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The Police Gamesmanship Dilemma

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The Police Gamesmanship Dilemma in Criminal Procedure

Mary D. Fan*

Police gamesmanship poses a recurring regulatory challenge for constitutional criminal procedure, leading to zigzags and murky zones in the law such as the recent rule shifts regarding searches incident to arrest and interrogation. Police gamesmanship in the “competitive enterprise of ferreting out crime” involves tactics that press on blind spots, blurry regions or gaps in rules and remedies, undermining the purpose of the protections. Currently, courts generally avoid peering into the Pandora’s Box of police stratagems unless the circumvention of a protection becomes too obvious to ignore and requires a stopgap rule-patch that further complicates the maze of criminal procedure. The doctrine leaves murky the line between fair and foul play and sends an implicit message to the police to game covertly. A clearer understanding of this opaque zone of

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intense pressures and the police gamesmanship dilemma is needed in order to better define and foster fair play and ameliorate rule strain. This Article takes up the task.

The Article offers a taxonomy of the three main forms of problematic police gaming. The Article also proposes anti-gaming standards and data-development remedial rules to help inculcate and enforce fair play values and address rule subversion and strain. The taxonomy distinguishes between desirable police innovation and problematic rule subversion and divides problematic police gaming into three variants: conduct rule gaming, remedial rule gaming, and framing rule gaming. Conduct rule gaming involves end-runs around the rules telling police how to behave to subvert the purpose of the rules, such as sending suspects abroad for violent interrogation or asking questions first, then administering a Miranda warning later. Remedial rule gaming takes advantage of gaps in rules telling officials how to remedy violations, such as the “standing” doctrine. Framing rule gaming exploits decision-framing doctrines telling courts how to address violations, such as averting judicial review by drawing on doctrines of deference and noninquiry.

The Article argues for two approaches that would facilitate fairer play, improved monitoring, and internalization of rule-abiding behavior and norms by the police. First, the Article argues for deploying anti-gaming standards to supplement bright-line rules on issues where the incentive to game is high because the potential evidentiary payoff is direct. Second, the Article argues for reorienting the predominant remedial approach to incorporate data-development remedies that surface problems sooner and give police incentive to cooperate in monitoring and reform.

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INTRODUCTION

Police gaming of the rules of constitutional criminal procedure presents a recurring regulatory challenge. Police gamesmanship in the “competitive enterprise of ferreting out crime”¹ involves tactics that undermine the purpose of rules implementing constitutional protections by pushing on blind spots, blurry zones, or gaps in rules and remedies.² Examples that have surfaced include such tactics as:

- interrogators asking suspects questions first, getting an incriminating statement and then turning on the tape recorder, administering *Miranda* rights, and getting the

¹ The oft-recurring metaphor of police investigation in constitutional criminal procedure is the “competitive enterprise of ferreting out crime.” See *infra* Part I.A and note 42.

² See MERRIAM-WEBSTER THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 933 (3d ed. 1993) (defining gamesmanship as (1) “the art or practice of winning a sports contest by expedients of doubtful propriety (as by distracting an opponent) without actual violation of the rules of the game” and (2) “the use of ethically or intellectually dubious methods to achieve an objective”).

suspect to self-incriminate again in a post-advisal statement;³

- detaining people using material witness warrants when there is insufficient evidence to charge any crime as an end-run around protections against detention without probable cause rather than part of any plan to have the person testify in a criminal case;⁴
- shipping suspects overseas for interrogation to avoid prohibitions on use of violence and other highly coercive interrogation methods, then relying on the state secrets privilege or “special factors” doctrine to avert judicial review of alleged constitutional violations;⁵ and
- ratcheting the power to arrest for minor traffic violations into an entitlement to search automobiles regardless of whether there is a reasonable basis to believe that there is evidence of the crime of arrest that the Supreme Court recently tried to address in *Arizona v. Gant*.⁶

The specter of police gamesmanship also haunts the terrain after rule changes. For example, *Gant* tried to curtail the practice that police had been treating as prerogative of arresting for even a minor traffic offense to get a free pass to search the car incident to arrest.⁷ Initial indications suggest that the response to *Gant*’s attempted block is a rise in asserted “inventory searches” after arrest and arguments that evidence invalidly seized would inevitably have been discovered in an inventory search.⁸ A year after the *Gant* shakeup, the Supreme Court

³ See *Missouri v. Seibert*, 542 U.S. 600, 616 n.6 (2004) (plurality opinion).

⁴ See *Ashcroft v. al-Kidd*, No. 10-98, 2011 WL 2119110, at *3 (May 31, 2011) (describing alleged government practice); *id.* at *9 (Kennedy, J., concurring) (noting the majority “leaves unresolved whether the Government’s use of the Material Witness Statute in this case was lawful”).

⁵ E.g., *Arar v. Ashcroft*, 585 F.3d 559, 563 (2d Cir. 2009) (en banc), *cert. denied*, 130 S. Ct. 3409 (2010) (affirming dismissal of *Bivens* suit regarding alleged extraordinary rendition because of “special factors”); *El-Masri v. United States*, 479 F.3d 296, 302-07, 312 (4th Cir. 2007) (affirming dismissal of suit seeking redress for extraordinary rendition based on state secrets privilege).

⁶ 129 S. Ct. 1710, 1722-23 (2009).

⁷ For an account of the twisted course of law leading to *Gant*, see *infra* Part III.B.2.

⁸ See, e.g., *United States v. Brunick*, No. 09-30107, 2010 WL 1041369, at *1-2 (9th Cir. Mar. 22, 2010) (holding search invalid under *Gant* as valid inventory search); *United States v. Stotler*, 591 F.3d 935, 940-41 (7th Cir. 2010) (holding that

granted certiorari in *Davis v. United States*, on the question of whether the good-faith exception to the exclusionary rule applies to reliance by the police on pre-*Gant* law for their automatic automobile searches incident to arrest.⁹ Another lurking question in *Davis*, however, is the inevitable discovery and inventory search rationale because even if the Court rules that the good-faith exception does not suspend the exclusionary remedy for the violation in the case, the denial of a remedy could at any rate be based on the government's alternate inventory search and inevitable discovery rationale unless this route-around *Gant*'s protection is narrowed or closed.¹⁰ Thus a stopgap protection may necessitate more patches as new fissures and cracks emerge under the pressure of rule-pushing and dodging.

Or, to take another recent example, the Supreme Court's decision in *Maryland v. Shatzer*, permitting police to reinitiate interrogation without counsel after a fourteen-day break in custody despite previous invocation of the right to an attorney, has roused concern that police will wait two weeks and then take further shots at reinterrogation in an effort to wear the suspect down.¹¹ Another recent shakeup in

notwithstanding *Gant*, police would have inevitably discovered evidence in inventory); *United States v. Ruckes*, 586 F.3d 713, 714 (9th Cir. 2009) (similar); *United States v. Sands*, 329 F. App'x. 794, 798 & n.1 (10th Cir. 2009) (similar); Cynthia Hujar Orr, *Fear, Favor and Fidelity*, CHAMPION, Aug. 2009, at 5 (noting that several months after *Gant*, trial lawyers have seen increase in auto inventory searches); Jack Ryan, *Arizona v. Gant and Inventory Searches of Motor Vehicles*, PUBLIC AGENCY TRAINING COUNCIL, http://www.patc.com/weeklyarticles/az_v_gant_inventory_searches.shtml (last visited July 1, 2010) (noting that one of most frequent post-*Gant* questions concerns inventory searches and noting that *Gant* has no impact on inventory searches).

⁹ *Davis v. United States*, 131 S. Ct. 502 (2010) (mem.) (granting certiorari); see also *United States v. Davis*, 598 F.3d 1259, 1264-66 (11th Cir. 2010) (finding Fourth Amendment violation, but declining to exclude because of good faith reliance on "clear and well-settled precedent" later overruled).

¹⁰ See *United States v. Davis*, No. 2:07-cr-0248-WKW, 2008 WL 1927377, at *1 (M.D. Ala. Apr. 28, 2008) (holding that evidence, gun in jacket on car seat, would have been inevitably discovered in inventory search, and there were standard operating procedures in place for such search); cf. *Davis*, 598 F.3d at 1262 n.1 (noting that district court also held evidence would have inevitably discovered in inventory search, but declining to consider this ground because of conclusion that refusal to exclude could be based on good faith exception).

¹¹ See, e.g., *Maryland v. Shatzer*, 130 S. Ct. 1213, 1223 (2010) (referring to Shatzer's argument that if Court allowed police to reinterrogate suspect who invoked after break in custody, then police will briefly release and then reinterrogate); Christopher D. Totten, Commentary, *New Federalism and Our Constitutional Rights in the Criminal Context*, 46 CRIM. L. BULL. NO. 3, ART. 3, at n.37 (2002) (expressing concern that "the *Shatzer* 'fourteen day rule' is susceptible to abuse by officers who know that they can attempt to re-interrogate a suspect at continuous, 14-day intervals despite the fact that the suspect requested an attorney at the previous custodial

interrogation law, *Berghuis v. Thompkins*, holding that police can persist in questioning though the suspect remains largely silent for more than two hours,¹² has prompted concern that police will take advantage of the taciturn, meek, and ignorant who do not know that they must defiantly and with precision invoke their right to silence.¹³ To take another example, opponents of Arizona's controversial Senate Bill 1070, which creates the crime of not carrying immigration documents and orders state authorities to stop those reasonably suspected to be an "alien who is unlawfully present in the United States,"¹⁴ fear that the law will serve as a cover for targeting Latino people to create an atmosphere of intimidation and hostility regardless of immigration status.¹⁵

Part of the complexity of the issue is that the doctrine and polity send mixed and ambivalent messages about police gaming. The law and doctrine oscillate between on the one hand desiring vigorous policing and giving police plenty of discretion to play hard and shrewdly around the rules and on the other hand, sometimes chastising the police for playing too hard, fast, and efficiently and intervening in strong ways to impede the power to investigate to safeguard space for civil liberties. The tense balance between police power and citizen liberty is maintained through efficiency-impeding rules that rein in police by raising the costs of more intrusive tactics to dampen their frequency.¹⁶ The regulatory approach of efficiency-impeding has the side effect, however, of heightening the incentive to engage in gamesmanship pushing against the rules.

interrogation").

¹² *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2257-59 (2010).

¹³ See, e.g., *id.* at 2266, 2276, 2278 (Sotomayor, J., dissenting) (writing that Court "turns *Miranda* upside down" by imposing clear statement rule on defendants and observing "the *Miranda* warnings give no hint that a suspect should use those magic words, and there is little reason to believe police — who have ample incentives to avoid invocation — will provide such guidance").

¹⁴ Support Our Law Enforcement and Safe Neighborhoods Act, S.B. 1070, 49th Leg., 2d Sess. (Ariz. 2010) (signed into law on Apr. 23, 2010), *preliminarily enjoined*, *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010).

¹⁵ Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 23, 2010, at A1; see also Mary D. Fan, *Post-Racial Proxies: Resurgent State and Local Anti-'Alien' Laws and Unity-Rebuilding Frames for Antidiscrimination Values*, 32 CARDOZO L. REV. 101, 126-28 (2011) (analyzing how Arizona's law conscripts police to be ominous embodiment of unwelcome for Latinos, whose ethnicity has been deemed relevant to alienage under *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975)).

¹⁶ See *infra* Part II.

The Court also seems to follow a sliding scale of concern, taking the most hands-off stance around the beginning of an investigation, when the Fourth Amendment is the main regulator, and deploying more searching scrutiny and protective standards after suspicion has attached to a particular person and the investigation has progressed further along, when the Fifth and Sixth Amendments become the prime regulators.¹⁷ The line between fair and foul play is left murky, with courts generally declining to peer into the Pandora's Box of potentially problematic practices so long as jurists can posit "objective" bases justifying exercises of police power, even post hoc.¹⁸ A potentially problematic practice generally does not get scrutiny except in the rare cases where circumvention of a protection is openly admitted or becomes too blatant to ignore, leading to fractured piecemeal patches.¹⁹ This don't ask, don't tell approach gives police incentive to play aggressively and covertly.

A different approach is needed. The first step is to define what constitutes problematic gaming of the rules. Innovation is not the same as subversion. For example, police substitution away from prohibited physically coercive tactics and towards psychological methods such as building rapport or even using deception might be viewed as innovation rather than subversion.²⁰

This Article draws a baseline rule of thumb for when police conduct crosses the line into unfair rather than creative play from the cases where the Supreme Court has intervened albeit in fractured fashion. Gaming to get around the rules becomes problematic when it subverts the substance or purpose behind a rule. Using this yardstick, the Article argues that the diverse ways police game criminal procedure rules can be understood as variants of three main forms: conduct rule gaming, remedial rule gaming, and framing rule gaming. The framework draws on the distinction between conduct and decision rules adapted by Professors Meir Dan-Cohen and Carol Steiker from Jeremy Bentham's work.²¹ Conduct rules in criminal law tell the public

¹⁷ See *infra* Part II.A.

¹⁸ *Brendlin v. California*, 551 U.S. 249, 260 (2007); *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004); *Arkansas v. Sullivan*, 532 U.S. 769, 771-72 (2001) (per curiam); *Whren v. United States*, 517 U.S. 806, 813-14 (1996).

¹⁹ See, e.g., *Missouri v. Seibert*, 542 U.S. 600, 616 n.6 (2004) (plurality opinion) (noting that "the intent of the officer will rarely be as candidly admitted as it was here").

²⁰ Cf. William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2147 (2002) (explaining that shift in interrogation practices after *Miranda* from coercion to deception can be viewed as innovation that "both improved the quality of interrogation and reduced the level of police coercion").

²¹ Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in*

how to behave.²² In criminal procedure — “criminal law for cops” — conduct rules tell police how to behave.²³ Decision rules tell officials what to do when a conduct rule is violated.²⁴ The Article expands the notion of decision rules to embrace not only remedial rules telling officials how to address violations of conduct rules by the police but also what the Article terms “decision-framing” doctrines influencing whether courts grant review or how courts frame rules or remedies.

Conduct rule gaming involves police conduct that subverts the purpose of rules constraining police behavior, even if the technical letter of the rules is not clearly violated. Recent examples that have surfaced include such conduct as sending suspects abroad for physically coercive interrogation or asking questions first, then administering a *Miranda* warning and questioning again to get a “Mirandized” confession.²⁵

Decision rule gaming branches into two variants. The first, remedial rule gaming, exploits remedial gaps in rules telling officials how to respond to alleged violations, such as illegally searching a third party and using the evidence against the target who lacks standing to seek suppression.²⁶ In remedial rule gaming, the police can engage in conduct rule transgressions secure in the knowledge that a remedial gap or exception means that there will be no remedy for the transgression. Thus, remedial rule gaming often facilitates a successful conduct rule gaming play.

The second, framing rule gaming, ducks judicial review of violations by drawing on doctrines of deference and noninquiry, influencing what review, rules, or remedies, if any, courts offer. Framing rule

Criminal Law, 97 HARV. L. REV. 625, 626-29 (1984); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2469 (1996).

²² See JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 430 (1948) (contrasting rule that tells public how to conduct themselves — for example, do not steal — with rule that tells courts how to address violation — for example, sentencing to hanging whoever is convicted of stealing).

²³ Steiker, *supra* note 21, at 2469-70.

²⁴ *Id.*; see Dan-Cohen, *supra* note 21, at 628-29.

²⁵ See, e.g., *Arar v. Ashcroft*, 585 F.3d 559, 566 (2d Cir. 2009) (en banc), *cert. denied*, 130 S. Ct. 3409 (2010) (describing alleged seizure in United States and shipping overseas to Syria for interrogation and beatings); *Missouri v. Seibert*, 542 U.S. 600, 605, 612-15 (2004) (plurality opinion) (questions-first tactic).

²⁶ E.g., *United States v. Payner*, 447 U.S. 727, 734 (1980) (refusing to exclude evidence in case where police illegally took briefcase from hotel room of suspect’s banker to gain documents to be used against suspect because break-in was violation of banker’s rights, not suspect’s rights).

gaming is the most subtle, potent, and potentially intractable of the three variants of gaming because it draws directly on judicial doctrines of noninquiry and deference to forestall review of potential conduct rule violations. An example is the use of the state secrets privilege and “special factors” analysis to avert judicial review of claims that authorities used foreign proxies or jurisdictional gradients in protections to evade constitutional conduct rules for police prohibiting use of violence and degradation in interrogation.²⁷ These three variants can interact and be stacked for a successful play around the rules defining citizen rights.

After laying a foundation for understanding the police gamesmanship dilemma, the Article advances two ideas for ameliorating the adverse consequences. The Article advocates incorporation of what it terms “anti-gaming standards” and “data-development remedial rules.” The Article first argues that the current bright-line rule fetishism²⁸ in framing constitutional criminal procedure’s mandates should be tempered by deploying anti-gaming standards to supplement or supplant “gameable rules” in high-risk zones where the incentive to game is highest because the potential evidentiary payoff is direct. Gameable rules are bright-line rules that enable end-runs around constitutional safeguards such as *Belton*’s rule of automatic power to search vehicles incident to arrest²⁹ or the Supreme Court’s recent fourteen-day rule for re-initiation of questioning after invocation of *Miranda* rights in *Maryland v. Shatzer*.³⁰ While such bright-line rules are meant to provide easily administrable rules, the course of criminal procedure has illustrated that gameable rules tend not to serve their aim of simplicity nor keep their bright-line shape — instead evolving offshoots and arms to accommodate or block rule-pushing.³¹ Bright-line rule fetishism also sends the wrong

²⁷ See, e.g., *Arar*, 585 F.3d at 563 (affirming dismissal of *Bivens* suit regarding alleged extraordinary rendition because of “special factors”); *El-Masri v. United States*, 479 F.3d 296, 302-07, 312 (4th Cir. 2007) (affirming dismissal of suit seeking redress for extraordinary rendition based on state secrets privilege). For an analysis, see *infra* Part II.B.2.a.

²⁸ A play off Albert W. Alschuler’s apt term “bright-line fever” to signify the ossification into a fetish. Cf. Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 229 (1984).

²⁹ *New York v. Belton*, 453 U.S. 454, 460 (1981).

³⁰ *Maryland v. Shatzer*, 130 S. Ct. 1213, 1223 (2010).

³¹ See *infra* Parts III.B.2, IV.A; see e.g., Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 71 (1991) (observing that “even seemingly ‘bright-line’ rules usually become blurred as the police and the adversarial process test their outer limits” and concluding “[t]he grail of ‘rule-oriented’ jurisprudence is as mythical as King Arthur’s”).

message and is perversely patronizing to police; it treats them as dim jocks who are not expected to understand or internalize the reasons behind the rules and conduct themselves according to these principles.³²

In contrast, because anti-gaming standards incorporate the reasons behind exceptions to the default rules of citizen protections, they educate and inform police judgment, trigger deliberation, and facilitate the internalization and implementation of the values served by constitutional criminal procedure.³³ Moreover, when standards are pushed, judicial attempts to block gaming take the form of educating officers about the meaning of the standard, rather than a new twist or additions to the rulebook. Standards are flexible and capacious enough to absorb further elaboration without the need for complicated new structures of rules enunciating exceptions and qualifications.

The second proposed reform is a reorientation of the predominant remedial approach when a violation is identified. The Article advocates data-development remedies to supplement the increasingly eroded exclusionary rule to surface potentially problematic practices and enable better-informed deliberation. The data-development remedial approach would give police a choice: voluntarily produce data on problematic practices and propose institutional reforms if needed to address practices that contribute to recurring violations or be subject to a penalty default designed to give police incentive to choose the voluntary information-generation and self-reform option. The penalty default approach sets default terms in a manner to incentivize the knowledgeable actor, here the police, to reveal information.³⁴ An array of potential penalty defaults can be conceived. This Article opens the conversation by proposing three potential approaches which could be used singly or in combination: (1) discretionary court-ordered remedial data generation and reforms, or (2) referral to the Department of

³² See *supra* Part IV.A.

³³ The virtues of standards are increasingly being heralded, particularly in the contexts of contracts and citizen, jury and judicial decisionmaking. See, e.g., Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214, 1224-27 (2010) (explaining virtues of hazy norms in inducing and developing moral deliberation and agency among citizens and promoting democratic virtues such as participatory interpretation through practice and citizen education); William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2037-39 (2008) (explaining virtues of open-textured standards in substantive criminal law in empowering juries to exercise their discretion towards mercy where context warrants without stigmatizing label of jury nullification).

³⁴ Ian Ayres, *Ya-Huh, There Are and Should Be Penalty Defaults*, 33 FLA. ST. U. L. REV. 589, 597 (2006); Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 90, 97-101 (1989).

Justice for inclusion on a watch list, or (3) for investigation under 42 U.S.C. § 14141.³⁵ This strategy takes a penalty default approach in the sense that it sets the default rule in the absence of voluntary cooperation at what the parties would rather not have — court-ordered data collection and institutional reform remedies.

The data-development approach could supplement the increasingly eroded and embattled exclusionary rule. The exclusionary rule is under strain in part because of the fierce and sustained criticism that society is made to suffer for the constable's blunder, depriving jurors of important evidence.³⁶ In contrast, the data-development remedial approach enriches the store of knowledge for the blunder as well as gives incentives not to overstep to avoid information-production and oversight requirements. The data-development remedial approach would also be a stronger deterrent because the impact of the remedy is directly internalized by the police organization whereas the exclusionary rule's main impact is to make the job of prosecutors in securing a conviction harder.

The Article proceeds in five parts. Part I analyzes the problematic message constitutional criminal procedure sends to police about playing fast, hard, and aggressively and the difficulty with doctrinal ambiguity and ambivalence about the line between fair and foul play. Part II analyzes how constitutional criminal procedure tries to calibrate a balance between police power and liberty through rules impeding police efficiency, leading to further pressure to game the rules. Part III lays the foundation for confronting and addressing problematic police gaming by defining the line between fair and foul play and offering a taxonomy of the three main modes of problematic police gaming. Parts IV and V argue that the time is right for reorienting constitutional criminal procedure in this period of foment to address the police gamesmanship problem through anti-gaming standards and data-development remedial rules.

³⁵ See *infra* Part V.

³⁶ See, e.g., *Herring v. United States*, 129 S. Ct. 695, 704 (2009) (quoting *People v. Defore*, 150 N.E. 585, 587 (1926)) (extending good-faith exception in cases of negligent police error because “criminal should not go free because the constable has blundered”); see also, e.g., *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (internal quotation marks omitted) (holding that suppression of evidence is “last resort, not the first impulse” because exclusionary rule exacts “substantial social costs” in undermining truth-seeking and “setting the guilty free and the dangerous at large”).

I. THE INCENTIVE TO PLAY AGGRESSIVELY AND COVERTLY

Police officers are no ordinary audience for the law — they are at once a prime and a cautionary example for those who wish to believe law matters and can steer behavior. Officers are versed in the law from training, experience, and close interaction with prosecutors.³⁷ They are capable of very smart, strategic ploys and plays with the law, such as using complex lures to sidestep jurisdictional roadblocks to getting suspects,³⁸ or playing upon the tangle of exceptions in criminal procedure rules to arrest someone for a misdemeanor traffic offense to trigger the power to search incident to arrest and discover evidence of a larger offense.³⁹ They are sensitive to shifts in the law — even subtle and less publicized decision rule shifts that limit remedies for constitutional violations — and can adjust behavior accordingly.⁴⁰ Clearly, the police are smart enough to think in complex ways about criminal procedure doctrine. Yet, as the Supreme Court has remarked with some dismay, “[t]he point” of key constitutional norms like the Fourth Amendment — the deeper value and spirit embedded in constitutional norms regulating the police — “often is not grasped by zealous officers.”⁴¹ While this is to be deplored, police are not wholly to blame. The doctrine and the polity send police mixed messages because of a fundamental ambivalence about how we want our police to behave.

A. *The Competitive Enterprise of Ferreting Out Crime*

The recurring imagery of the police officer in constitutional criminal procedure cases is a zealous, aggressive actor engaged in the

³⁷ See, e.g., Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 754, 778-86 (2003) (describing close interactions between prosecutors and agents); Steiker, *supra* note 21, at 2535 (explaining that police are educated actors about both conduct and decision rules from experience getting training, evidence suppressed, and interaction with prosecutors); *Training Materials*, POLICE LAW INST. <http://www.policelaw.org/products/monthly-legal-review.html> (last visited Aug. 9, 2010) (giving police monthly legal updates and online lessons).

³⁸ E.g., *United States v. Yunis*, 681 F. Supp. 909, 912 (D.D.C.), *rev'd on other grounds*, 859 F.2d 953 (D.C. Cir. 1988).

³⁹ E.g., *Virginia v. Moore*, 128 S. Ct. 1598, 1601-02 (2008); *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001) (per curiam).

⁴⁰ Steiker, *supra* note 21, at 2469, 2533-34, 2543.

⁴¹ *Johnson v. United States*, 333 U.S. 10, 13-14 (1948); see *Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971); *Chapman v. United States*, 365 U.S. 610, 614 (1961).

“competitive enterprise of ferreting out crime.”⁴² The imagery of police as bent on securing convictions and sparring with the criminal is often offered as a contrast to other criminal justice actors, such as the detached neutral judicial officer,⁴³ parole officer,⁴⁴ and even legislator — despite the strong self-interest politicians have in looking tough on crime.⁴⁵ Professor David Sklansky has noted wryly that the conception of officers as engaged in the “competitive enterprise of ferreting out crime” is so recurrent in criminal procedure doctrine that “one begins to suspect it was, at least at times, a diplomatic way to address worries beyond an excess of zeal.”⁴⁶ The imagery may express caution and concern for overzealous trampling — and indeed it is often marshaled as an explanation for the default constitutional preference for a warrant issued by a detached, neutral magistrate judge to double-check police judgment.⁴⁷ The imagery also conveys a particular social vision of the role of the police.

Criminal procedure doctrine envisions police playing the angles fast and hard and pushing the rules.⁴⁸ Indeed arguments over which rule to adopt are often influenced by background debates over how police will game the rules — for example, by using entry into the home to effect an arrest as a pretext to search the home without a warrant and seize items in plain view⁴⁹ or arrest suspects for minor traffic offenses and leave them unsecured to be able to conduct a search without probable cause or warrant.⁵⁰

There is a sense in our polity and in our constitutional doctrine that to fight criminals who play dirty, police may have to respond with

⁴² E.g., *Arizona v. Evans*, 514 U.S. 1, 15 (1995); *Illinois v. Krull*, 480 U.S. 340, 351 (1987); *Johnson*, 333 U.S. at 14.

⁴³ *United States v. Karo*, 468 U.S. 705, 717 (1984).

⁴⁴ *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 368 (1998).

⁴⁵ *Krull*, 480 U.S. at 351.

⁴⁶ David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1734 (2005).

⁴⁷ E.g., *Karo*, 468 U.S. at 717; *Johnson*, 333 U.S. at 14.

⁴⁸ See, e.g., *Moran v. Burbine*, 475 U.S. 412, 423 (1986) (ruling that even “highly inappropriate” deliberate deception of attorney trying to reach her client during interrogation does not vitiate validity of waiver of *Miranda* rights); *Payton v. New York*, 445 U.S. 573, 589 (1980) (pointing out that difference in scope of search between officers executing arrest warrant versus search warrant “may be more theoretical than real, however,” in part because police sometimes “ignore the restrictions on searches incident to arrest”).

⁴⁹ See, e.g., *Payton*, 445 U.S. at 618 (White, J., dissenting) (arguing, contra the majority, that “[a] rule permitting warrantless arrest entries would not pose a danger that officers would use their entry power as a pretext to justify an otherwise invalid warrantless search”).

⁵⁰ *Arizona v. Gant*, 129 S. Ct. 1710, 1724-25 (2009) (Scalia, J., concurring).

similar willingness to get muddy.⁵¹ For example, because organized crime suspects cover their tracks and insulate themselves from detection using those lower in the criminal hierarchy to do the risky, dirty work, police regularly “flip” criminal informants — threaten criminal associates into cooperating in an investigation — to unearth evidence.⁵² Writing for the Court, Justice Robert Jackson has called the “use of informers, accessories, accomplices, false friends” and similar betrayals a “dirty business,”⁵³ but it is regular business for the police, and the Court has recognized the need for police to play dirty in this way to ferret out crime.⁵⁴ To take another example, if criminals hide out in jurisdictions where extradition is difficult, impossible, or just plain too slow for law enforcement, U.S. authorities have engaged in elaborate ruses to lure defendants to international waters or a friendly third country — or occasionally engaged in outright kidnapping — sometimes to the ire of other nations.⁵⁵ Criminal procedure doctrine thus envisions the cop as a cunning, aggressive player who “will push to the limit.”⁵⁶

While the doctrine contemplates that police will play dirty in some very sophisticated ways that require substantial thought, the doctrine repeatedly declines to ask officers to think too much about the point of the rules. The repeated refrain is that police must be shielded from the burden of too much thinking in the rough-and-tumble field.⁵⁷

⁵¹ See, e.g., *Massiah v. United States*, 377 U.S. 201, 212 (1964) (White J., dissenting) (critiquing unreality of reading Constitution to guarantee “sporting treatment for sporting peddlers of narcotics”).

⁵² See, e.g., Philip B. Heyman, *Understanding Criminal Investigations*, 22 HARV. J. ON LEGIS. 315, 323-27 (1985) (explaining challenges of investigating organized crime situations where witnesses are unwilling and organizational loyalty insulates higher-level criminals and need to resort to informants).

⁵³ *On Lee v. United States*, 343 U.S. 747, 757 (1952).

⁵⁴ See, e.g., *Crawford v. United States*, 212 U.S. 183, 203-04 (1909) (cautioning that testimony of felon and confessed accomplice should be viewed with great caution, but “[n]o reflection is intended or intimated with regard to this action [stooping to use an accomplice]” because without such evidence, “it would have been difficult, if not impossible, to convict the defendant”).

⁵⁵ See, e.g., *United States v. Alvarez-Machain*, 504 U.S. 655, 659 (1992); *United States v. Yunis*, 681 F. Supp. 909, 912 (D.D.C.), *rev’d on other grounds*, 859 F.2d 953 (D.C. Cir. 1988); Susan W. Brenner & Joseph J. Schwerha IV, *Cybercrime Havens*, 17 BUS. LAW TODAY, 49 (2007) (describing FBI sting luring Russian hackers to United States with offer of interview with made-up computer security company “Invita”).

⁵⁶ *Brinegar v. United States*, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting).

⁵⁷ See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 346-47 (2001) (declining to provide remedy because “the Fourth Amendment has to be applied on the spur (and in the heat) of the moment” and “clear and simple” rules were required); see also, *New York v. Quarles*, 467 U.S. 649, 656 (1984) (“In a kaleidoscopic situation such as

Professor Albert Alschuler has humorously depicted the imagery of the officer that emerges from the doctrine as a dim-witted Incredible Hulk.⁵⁸ Unlike the burnished image of the prosecutor entrusted to “do justice”⁵⁹ — and figure out what it means to “do justice” — the police officer is treated as a dumb jock of sorts, to deploy another colloquial image in wide circulation. The imagery matters because it is the conceptual framework on which the law is draped and shaped, structuring how we approach problems.⁶⁰

B. *The Murky Line Between Fair and Foul Play*

The line between fair and foul play when police push and play with the rules is indistinct. Is it clever strategy or unfair gaming when police play on the doctrinal element of “standing” — which permits a remedy only for the individual whose rights were violated — and illegally search one person to get evidence against a suspect knowing the suspect lacks standing to exclude the evidence?⁶¹ Is it creative, commendable police work or improper gaming when police lure a criminal hiding abroad to open waters or a third country that will extradite?⁶² We have a deep ambivalence when it comes to

the one confronting these officers . . . spontaneity rather than adherence to a police manual is necessarily the order of the day” and in such situation officers “act out of a host of different, instinctive, and largely unverifiable motives”).

⁵⁸ Alschuler, *supra* note 28, at 286.

⁵⁹ *E.g.*, United States v. Bendolph, 409 F.3d 155, 166 n.16 (3d Cir. 2005) (en banc); Hayes v. Brown, 399 F.3d 972, 978 (9th Cir. 2005) (en banc); *see also* Berger v. United States, 295 U.S. 78, 88 (1935) (explaining that prosecutor represents impartial sovereignty whose interest “is not that it shall win a case, but that justice shall be done”).

⁶⁰ The rich literature on the power of metaphors in law is instructive. *See, e.g.*, JACK M. BALKIN, CULTURAL SOFTWARE: A THEORY OF IDEOLOGY 247 (1998) (“[M]etaphoric models selectively describe a situation, and in so doing help to suppress alternative conceptions.”); GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 145-46 (1980) (explaining that metaphors are conceptual structures that help shape how we understand and process reality); ROBERT L. TSAI, ELOQUENCE AND REASON 25 (2008) (explaining import of metaphors in propagating constitutional norms); Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1398 (2001) (explaining that metaphors are “are part of our conceptual systems and affect the way we interpret our experiences”).

⁶¹ *See, e.g.*, United States v. Payner, 447 U.S. 727 (1980) (involving such tactic).

⁶² *See, e.g.*, United States v. Yunis, 681 F. Supp. 909, 912 (D.D.C.) *rev’d on other grounds*, 859 F.2d 953 (D.C. Cir. 1988) (offering account of how U.S. authorities concocted elaborate scheme to lure suspected hijacker in Cyprus to international waters, where he could be arrested); Brenner & Schwerha IV, *supra* note 55, at 49 (describing sting luring Russian hackers to United States with offer of interview with

conceptualizing which strategies are deemed “fair” and what “fair” should mean for police because of a sense that criminals should be brought to justice, not given a “sporting chance.”⁶³ We fear what Judge Learned Hand termed “the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.”⁶⁴

The competing view that police should play fair and not just play to win — and that we should have a robust conception of what it means to “play fair” — is founded on the belief that much more is at stake in ensuring adherence to fair rules of play than a sporting chance for criminals. The deeper value served by ensuring fair play is a safeguard against the police asserting a power that overrides the norms and values of a free society under the mistaken logic that the ends justify any means.⁶⁵ Taken individually, each rule may not appear to be the

“Invita” made-up computer security company). Norms on this practice are contested within and among countries but the United States treats luring as an acceptable and sometimes necessary law enforcement tool. U.S. ATTORNEY’S MANUAL § 9-15.630 (1997) (regularizing procedures for luring suspects); Ethan A. Nadelmann, *The Evolution of United States Involvement in the International Rendition of Fugitive Criminals*, 25 N.Y.U. J. INT’L L. & POL. 813, 870-76 (1993) (offering accounts of diplomatic protest when U.S. officials bypassed extradition procedures); David P. Warner, *Challenges to International Law Enforcement Cooperation for the United States in the Middle East and North Africa: Extradition and Its Alternatives*, 50 VILL. L. REV. 479, 501 (2005) (contrasting legitimacy in United States with potential for objections by other nations).

⁶³ See, e.g., Jeremy Bentham, *Rationale of Judicial Evidence*, in BENTHAMIANA OR SELECT EXTRACTS FROM THE WORKS OF JEREMY BENTHAM 286 (John Hill Burton ed., 2007) (1843) (mocking notion of “the idea of fairness, in the sense in which the word is used by sportsmen” such as fox hunters who give fox fair chance to escape); Rollin M. Perkins, *The Great American Game: Our Sporting Theory of Criminal Justice*, HARPER’S MAG., Nov. 1927, at 750, 755-56 (deploring letting criminals go free because of overemphasis on technical rules of game rather than substance of guilt or innocence); A.T.H. Smith, *The Right to Silence in Cases of Serious Fraud*, in CRIMINAL JUSTICE & HUMAN RIGHTS VOL. 1, at 86 (Peter Birks. ed., 1995) (deploring notion); see also *Brewer v. Williams*, 430 U.S. 387, 416-17 (1977) (Burger, C.J., dissenting) (criticizing Court for punishing “the public for the mistakes and misdeeds of law enforcement officers” and “regress[ing] to playing a grisly game of ‘hide and seek’” under “sporting theory of criminal justice”); *Massiah v. United States*, 377 U.S. 201, 213 (1964) (“Law enforcement may have the elements of a contest about it, but it is not a game.”); *McGuire v. United States*, 273 U.S. 95, 99 (1927) (White, J., dissenting) (“A criminal prosecution is more than a game in which the government may be checkmated and the game lost merely because its officers have not played according to rule.”).

⁶⁴ *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923).

⁶⁵ See, e.g., *Brewer*, 430 U.S. at 409 (Marshall, J., concurring) (warning against dangers of “declar[ing] that in the administration of the criminal law the end justifies the means [. . . and] that the Government may commit crimes in order to secure the conviction of a private criminal”).

indispensable line against a slip into abuse, but collectively, the system of rules derived from constitutional norms form a phalanx of protection to avert a slide into an ends-overcome-all society in which the core of liberty is eroded away.⁶⁶ Sometimes this may mean a setback for police in a particular case, but protecting constitutional norms serves a larger collective interest in fairness and fair play.⁶⁷

Constitutional criminal procedure has been torn between the competing visions and worldviews. A casualty of the conflict is clarity about what constitutes fair and unfair play. Clearly constitutional protections against police power contemplate that police will not have free rein to pursue criminals with utmost vigor and efficiency.⁶⁸ But constitutional criminal procedure doctrine must also accommodate the sense that routes should be left open for police to investigate effectively. Indeed, criminal procedure doctrine takes great pains to read the Constitution to leave strategic routes open for the police to investigate crime effectively. In the Fourth Amendment context, for example, the Court has framed a consent rule that gives police space to take advantage of the ignorance of everyday people about their right to say no, in the interest of “encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime.”⁶⁹ The Court also recently invalidated the approach of lower courts considering failure to obtain a warrant before attempting to secure entry into a home despite ample probable cause as a factor suggesting deliberate manufacture of an exigency to evade the warrant requirement as an “unjustifiabl[e] interfere[nce] with legitimate law enforcement strategies.”⁷⁰

Constitutional criminal procedure doctrine also leaves routes open in more subtle ways. For example, by concluding that police use of informants and undercover agents wearing a wire does not implicate

⁶⁶ Cf. William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, WASH. U. L.Q. 279, 280 (1963) (deploring public impatience with procedures that seem to hamper task of law enforcement explaining their greater import).

⁶⁷ See James J. Tomkovicz, *An Adversary System Defense of the Right to Counsel Against Informants: Truth, Fair Play, and the Messiah Doctrine*, 22 UC DAVIS L. REV. 1, 48-49 (1988).

⁶⁸ See James J. Tomkovicz, *California v. Acevedo: The Walls Close in on the Warrant Requirement*, 29 AM. CRIM. L. REV. 1103, 1160 (1992).

⁶⁹ *Florida v. Jimeno*, 500 U.S. 248, 256 (1991); *Schneekloth v. Bustamonte*, 412 U.S. 218, 243 (1973); see also *Jimeno*, 500 U.S. at 252 (Marshall, J., dissenting) (critiquing Court for trying to enable “the police to capitalize on the ignorance of citizens so as to accomplish by subterfuge what they could not achieve by relying only on the knowing relinquishment of constitutional rights”).

⁷⁰ *Kentucky v. King*, 131 S. Ct. 1849, 1860 (May 16, 2011).

the Fourth Amendment,⁷¹ the Court permits the police to do with undercover agents and informants what they cannot with a wiretap alone, absent the heightened showing of probable cause and need under the Wiretap Act.⁷² While the Court has held that the Fourth Amendment protects against wiretapping without probable cause,⁷³ and Congress has applied strong protections that exceed the constitutional floor against wiretapping, the Court has held that information revealed to a third party wearing a wire is not protected by the Fourth Amendment because there is no reasonable expectation of privacy in information revealed to a third party.⁷⁴ This doctrinal accommodation permits the police to tackle the kinds of organizational crimes and corruption cases that are difficult to penetrate because prime actors are often well insulated.⁷⁵

Indeed, the police may go so far as to plant a jailhouse informant to elicit information from a suspect and avoid the obligation to administer *Miranda* warnings so long as formal proceedings on the offense of inquiry have not been initiated.⁷⁶ If formal proceedings have commenced, triggering applicability of the Sixth Amendment right to counsel, the Court has struck the balance differently.⁷⁷ A police-planted jailhouse informant or undercover agent may not deliberately elicit information from the suspect without an adequate waiver of the Sixth Amendment right to counsel once formal adversarial proceedings have commenced.⁷⁸ Police may, however, plant a jailhouse informant or undercover agent to serve as a “listening post” in hopes of hearing incriminating statements so long as the jailhouse plant does not take action beyond merely listening to incriminating remarks.⁷⁹

⁷¹ *United States v. White*, 401 U.S. 745, 749 (1971) (plurality opinion); *Hoffa v. United States*, 385 U.S. 293, 302 (1966).

⁷² Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968). For informative histories, see, for example JAMES G. CARR, *THE LAW OF ELECTRONIC SURVEILLANCE* (1986); Herman Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of “Law and Order,”* 67 MICH. L. REV. 455 (1969).

⁷³ *Berger v. New York*, 388 U.S. 41, 55 (1967).

⁷⁴ *White*, 401 U.S. at 749.

⁷⁵ *Cf. Heyman*, *supra* note 51, at 323-27 (explaining challenges of investigating organized crime situations and need to resort to informants in context where witnesses are unwilling and organizational loyalty insulates higher-level criminals).

⁷⁶ *Illinois v. Perkins*, 496 U.S. 292, 300 (1990).

⁷⁷ *See Moran v. Burbine*, 475 U.S. 412, 428 (1986) (explaining that Sixth Amendment right to counsel initially attaches after first formal charging proceeding).

⁷⁸ *United States v. Henry*, 447 U.S. 264, 270-75 (1980).

⁷⁹ *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986).

So police can slide around the rules — sometimes and sometimes not. There are few guideposts about the line between fair and foul play or even how to conceptualize what it is. Some routes around rules are meant to exist — and others are bushwhacked by police unhappy with a controversial rule, such as the *Miranda* requirement. When the Court formulates a rule to bind police, aiming with best intentions for clarity and concision, rule-pushing by officers can lead to a tangle of exceptions that try to accommodate law enforcement practices while drawing new lines in the sand.⁸⁰ As a result, while the steady spate of constitutional criminal procedure cases since the 1960s has evolved a code of conduct for police, the code has been critiqued as offering little comprehensible guidance.⁸¹

Moreover, the Supreme Court has adopted decision-framing rules that tend to have courts bowing out of the business of articulating what constitutes fair and foul play. One of the most prominent of such decision-framing doctrines is the general rule of judicial noninquiry into the reasons behind and prevalence of a practice so long as an officer can point to an “objective” basis at the time for an exertion of power against an individual — even if offered as a post hoc rationalization.⁸² The current stance of criminal procedure doctrine, controversially reiterated in the racial profiling case *Whren v. United States*, is that so long as an objective basis can be conceived for a particular police action, courts should not inquire or explain the bounds of propriety of police conduct further.⁸³

In the qualified immunity context, moreover, the Supreme Court’s recent decision in *Pearson v. Callahan* further takes the courts out of the job of calling fair or foul where police push the rules and game

⁸⁰ Thus, as Welsh White has explained, “in many cases, the police precipitate the uncertainty” of constitutional criminal procedure “by pushing for exceptions to a rule that seems clear” — and if an exception is granted, further police rule-pushing may lead to further exceptions and a lack of clarity. Welsh White, *Improving Constitutional Criminal Procedure*, 93 MICH. L. REV. 1667, 1670 (1995).

⁸¹ E.g., CRAIG M. BRADLEY, *THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION* 37-44 (1993).

⁸² E.g., *Brendlin v. California*, 551 U.S. 249, 260 (2007) (explaining that Court repeatedly rejected attempts to introduce subjectivity into Fourth Amendment analysis); *Devenpeck v. Alford*, 543 U.S. 146, 153-54 (2004) (holding that objective circumstances, rather than subjective police motives or knowledge control analysis of reasonableness of arrest); *Whren v. United States*, 517 U.S. 806, 806 (1996) (“Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”); see also *United States v. Robinson*, 414 U.S. 218, 221 & n.1, 235 (1973) (holding that traffic violation arrest is not invalid even if was “a mere pretext for a narcotics search”).

⁸³ See *Whren*, 517 U.S. at 810.

blind spots, gaps, and ambiguities.⁸⁴ *Pearson* suspended the requirement of *Saucier v. Katz*⁸⁵ that courts considering whether to dismiss suits against officers for violations of constitutional rights first determine whether the facts as pled make out a constitutional violation.⁸⁶ *Saucier* required courts to decide if the facts alleged amount to a constitutional violation even if not of “clearly established law” because law would otherwise stagnate and wrongs persist unremedied since without clarification a violation cannot amount to a transgression of clearly established law.⁸⁷ *Pearson* departed from *Saucier*’s requisite, however, ruling that courts may dismiss suits alleging constitutional violations by police on the grounds the conduct did not violate clearly established pre-existing law without ever explaining whether the conduct was fair or foul — thus leaving both police and the public in the dark about what the Constitution has to say about such conduct.⁸⁸

C. *The Implicit Message To Be Covert*

The main message sent by the murky jurisprudence surrounding fair and foul rule-pushing is not to be obvious — that is, to game covertly. Otherwise the general stance of constitutional criminal procedure is not to inquire into police motives so long as an objective basis for an exertion of power can be hypothesized. In the criminal procedure arena, particularly in Fourth Amendment cases involving police regulation, the Supreme Court is particularly unwilling to have judicial inquiry into the subjective motivations of officers.⁸⁹ Our attitude towards policing is akin to the common joke regarding sausage — we want it, but we do not want to know too much about the gritty stuff that goes into it.

The noninquiry stance is frequently justified based on the administrative difficulties and inefficiencies of case-by-case inquiry into the mystery of police motives and the need for officers on the

⁸⁴ *Pearson v. Callahan*, 129 S. Ct. 808 (2009).

⁸⁵ 533 U.S. 194, 200 (2001).

⁸⁶ *Pearson*, 129 S. Ct. at 816-20.

⁸⁷ *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

⁸⁸ *Pearson*, 129 S. Ct. at 816-20.

⁸⁹ This stance is oft-reiterated. *E.g.*, *Ashcroft v. al-Kidd*, No. 10-98, 2011 WL 2119110, at *6-7 (May 31, 2011); *Kentucky v. King*, 131 S. Ct. 1849, 1859 (May 16, 2011); *Brendlin v. California*, 551 U.S. 249, 260 (2007); *Devenpeck v. Alford*, 543 U.S. 146, 153-54 (2004); *Whren v. United States*, 517 U.S. 806, 813 (1996); *see also* *Scott v. United States*, 436 U.S. 128, 136 (1978) (“Subjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional.”).

street to make quick ad hoc judgments that courts should not subject to second-guessing.⁹⁰ This noninquiry stance means that potential gaming may flourish unaddressed for years so long as post hoc, objective bases can be identified for exercises of power and incursions into constitutional protections. When the Court does pronounce a practice unfair gaming around the rules, the pronouncement typically comes ex post and sometimes years after a practice has crystallized.

In general, the Court appears to be more willing to depart from the usual stance of noninquiry into subjective law enforcement intent and delve into police motivation further along the investigation timeline when suspicion has attached to a particular person.⁹¹ We thus have the odd result of stronger protections for the more-probably guilty. The effect is to have more searching scrutiny into law enforcement stratagems under the Fifth and Sixth Amendment, which regulate further down the investigation and prosecution timeline, than the Fourth Amendment, which protects closer to the outset of the investigation.⁹²

Two further things are striking when the Court moves to close off unfair gaming: (1) the motive of the officer, which is typically irrelevant in criminal procedure, becomes an issue; and (2) the Court tends to react in the rare cases where strategic motive to get around a constitutional rule is made transparent by an unusually frank law enforcement officer. Indeed, in *Missouri v. Seibert*, which invalidated the question-first, *Miranda*-warnings-later tactic of police interrogation, the Court noted “the intent of the officer will rarely be as candidly admitted as it was here.”⁹³ Interrogating officer Richard Hanrahan frankly revealed that he instructed the arresting officer to refrain from giving *Miranda* warnings to a woman suspected of instructing her son to burn down their trailer, killing a mentally

⁹⁰ E.g., *Rakas v. Illinois*, 439 U.S. 128, 136-37 (1978); *United States v. Robinson*, 414 U.S. 218, 235 (1973).

⁹¹ E.g., *Missouri v. Seibert*, 542 U.S. 600, 618-19 (2004) (Kennedy, J., concurring); *Brewer v. Williams*, 430 U.S. 387, 399 (1977); see also *Rhode Island v. Innis*, 446 U.S. 291, 301 n.7 (1980) (noting relevance of subjective intent in informing standard couched in objective terms).

⁹² See U.S. CONST. amend. IV (protecting against “unreasonable searches and seizures” and construed today to be primary regulator of police investigation); U.S. CONST. amend. V (providing, *inter alia*, “nor shall [any person] be compelled in any criminal case to be a witness against himself” and, thus, governing after the commencement of a “criminal case”); U.S. CONST. amend. VI (prescribing rights that apply in “all criminal prosecutions” and, thus, governing after the launch of “criminal prosecutions”).

⁹³ *Seibert*, 542 U.S. at 616 n.6.

disabled youth who lived with the family.⁹⁴ He testified that he had been trained in the tactic to elicit confessions and the strategy was promoted by his department and other departments at which he had worked in the past.⁹⁵ Some police manuals went so far as to instruct, “[t]here is no need to give a *Miranda* warning before asking questions if . . . the answers given . . . will not be required by the prosecutor during the prosecution’s case-in-chief.”⁹⁶ The *Seibert* plurality underscored that the facts revealed “a police strategy adapted to undermine the *Miranda* warnings.”⁹⁷

The Court fractured as to how to define and address the problem. A four-person plurality opinion authored by Justice David Souter adopted an objective approach aimed at assessing whether a midstream *Miranda* warning would function as effectively as *Miranda* required.⁹⁸ The pivotal fifth vote for the result was supplied by Justice Anthony Kennedy, however, who focused on the subjective bad faith of the officers, terming the forbidden conduct the “deliberate,” “calculated,” and “intentional” strategy “to undermine the *Miranda* warning.”⁹⁹ Such transparent subversion requiring the Court to intervene would be infrequent, Justice Kennedy believed.¹⁰⁰

Seibert has been a puzzle for police and lower courts.¹⁰¹ While there were five votes for the position that the two-step interrogation approach in *Seibert*’s case was invalid, the test for gauging whether the line between the fair and forbidden is transgressed was unclear. Both Justice Stephen Breyer, who joined the four-person plurality, and Justice Kennedy, who concurred in the result, wrote separate opinions.¹⁰² Typically the view of the Justice or Justices concurring in the judgment on the narrowest grounds controls,¹⁰³ but which ground is the narrowest basis is contestable.

Justice Kennedy wrote that his approach would apply in the infrequent case, suggesting his was the narrowest basis for invalidation. But his focus on subjective law enforcement intent

⁹⁴ *Id.* at 616.

⁹⁵ *Id.* at 609-10.

⁹⁶ ILL. POLICE LAW INST., POLICE LAW MANUAL 83 (Jan. 2001–Dec. 2003), cited in *Seibert*, 542 U.S. at 610 n.2 [hereinafter POLICE LAW MANUAL].

⁹⁷ *Seibert*, 542 U.S. at 616.

⁹⁸ *Id.* at 611-12.

⁹⁹ *Id.*

¹⁰⁰ *See id.*

¹⁰¹ Charles D. Weisselberg, *Mourning Miranda*, 96 CALIF. L. REV. 1519, 1551 (2008).

¹⁰² *Seibert*, 542 U.S. at 617 (Breyer, J., concurring); *id.* at 622 (Kennedy, J., concurring).

¹⁰³ *Marks v. United States*, 430 U.S. 188, 193 (1977).

represents the wider shift because it inverts the usual noninquiry rule in constitutional criminal procedure and was not accepted by at least seven Justices.¹⁰⁴ At least six circuits follow Justice Kennedy's inquiry into whether the violation was deliberate, while five circuits use both tests, combine parts of both approaches, or decline to decide which approach controls.¹⁰⁵ The states are also fractured about which touchstone of invalidity to use.¹⁰⁶

To take a second example, in *Watts v. Indiana*, the Court thanked the state prosecutor for being forthright in describing the relay-team interrogation of a murder suspect.¹⁰⁷ For five days the suspect was kept in a cell called the "hole" when not being questioned and then re-questioned by a prosecutor when his first incriminating statements were not deemed satisfactory.¹⁰⁸ The Court described the procedure as "a calculated endeavor to secure a confession through the pressure of unrelenting interrogation" and ruled that this "suction process" of "[p]rotracted, systematic and uncontrolled subjection of an accused to interrogation by the police for the purpose of eliciting" a confession violated the defendant's due process rights.¹⁰⁹

In a third example, *Brewer v. Williams* — the paradigmatic case for those who worry that fair play rules hinder police in addressing serious harms — an Iowan police detective admitted with plainspoken candor that he spoke to a defendant without his counsel because he wanted to find a little girl that the suspect had kidnapped on Christmas Eve.¹¹⁰ The defendant, escaped mental patient Robert Anthony Williams, had been spotted carrying a child bundled prone in a blanket from the Des Moines YMCA where the girl went missing on Christmas Eve.¹¹¹ Williams surrendered to police on December 26 in Davenport, Iowa, 160 miles east of Des Moines.¹¹² Detective Cleatus Leaming transported Williams to Des Moines where his lawyer waited

¹⁰⁴ The seven Justices who eschewed a subjective inquiry are the dissenters O'Connor, Rehnquist, Scalia, and Thomas along with the plurality of Souter, Stevens, Ginsburg, and potentially Justice Breyer, though his concurrence indicating he agreed with Justice Kennedy "insofar as it is consistent . . . and makes clear that a good-faith exception applies" has been read as ambiguous by *Miranda* law expert Charles D. Weisselberg. Weisselberg, *supra* note 101, at 1551 & n.169.

¹⁰⁵ *Id.* at 1551 & nn.172, 173.

¹⁰⁶ *Id.* at 1551-52 & nn.174, 175.

¹⁰⁷ *Watts v. Indiana*, 338 U.S. 49, 53 (1949).

¹⁰⁸ *Id.* at 53.

¹⁰⁹ *Id.* at 53-55.

¹¹⁰ *Brewer v. Williams*, 430 U.S. 387, 399 (1977).

¹¹¹ *Id.* at 390.

¹¹² *Id.* at 390-91.

and did not allow Williams's provisional counsel in Davenport to go on the long drive.¹¹³

During the drive, Detective Leaming played on the psychological susceptibilities of Williams, who was very religious, by giving what was later dubbed the "Christian burial speech."¹¹⁴ Detective Leaming addressed Williams as "Reverend" and talked about the import of giving a little girl snatched away from her parents on Christmas Eve a Christian burial.¹¹⁵ Swayed during the drive, Williams ultimately identified the place where he had left the little girl's body.¹¹⁶

Over a vivid dissent by Chief Justice Burger, the Court affirmed the reversal of Williams's conviction. The subjective purpose of Detective Leaming was important to the Court's decision invalidating the end-run — however well-meaning — around the Sixth Amendment. The majority reasoned: "Detective Leaming deliberately and designedly set out to elicit information from Williams" and "purposely sought during Williams' isolation from his lawyers to obtain as much incriminating information as possible."¹¹⁷ *Brewer* thus represents another departure from the Court's generally strong default reluctance to inquire into the subjective purpose of law enforcement officers. The Court concluded: "[d]isinterested zeal for the public good does not assure either wisdom or right in the methods it pursues. . . . so clear a violation of the Sixth and Fourteenth Amendment as here occurred cannot be condoned."¹¹⁸

What are police to glean from the cases in which the Court has called a foul? The main message may be not to be too obvious and open.¹¹⁹ If police frankly reveal their subjective purpose to sidestep or subvert a constitutional protection, then their practice might be shut down. This is a troubling message for constitutional criminal procedure to send. The perverse incentive is to play fast and hard with the rules covertly. More is needed to define and foster police conduct that treats the rules as the constitutional norms they are, rather than game rules to get around.

¹¹³ *Id.* at 392-93.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 399.

¹¹⁸ *Id.* at 406.

¹¹⁹ Even Chief Justice Burger, one of the most passionate deriders of what he termed a "sporting theory of . . . justice" — penalizing the public for police foul play — believed the exclusionary should be applied to "egregious" police conduct. *Id.* at 417, 422 (Burger, C.J., dissenting). His standard of egregiousness was demanding indeed, however, with the paradigm case of extortion of confessions by brutality or threats. *Id.* at 423.

II. EFFICIENCY-IMPEDING RULES AND REGULATORY PRESSURES

The regulatory structure of constitutional criminal procedure further adds pressure for police to game the rules. Though constitutional criminal procedure is about prescribing conduct rules for police,¹²⁰ often constitutional criminal procedure resembles a patchwork of pronouncements on the propriety of various police methods. For example, we have the law of trash searches,¹²¹ the law of dog sniffs,¹²² the law of aerial surveillance,¹²³ and the law of misplaced confidence in criminal confidantes¹²⁴ — which vary depending on whether formal proceedings have commenced and the Sixth Amendment has attached¹²⁵ — just to name a few. Jurists and scholars frequently critique the lack of consistency in rationales behind the patchwork.¹²⁶ Behind the apparent inconsistency and complexity is an overarching regulatory logic that balances police power and civil liberties by impeding investigative efficiency.

¹²⁰ Steiker, *supra* note 21, at 2469-70.

¹²¹ *California v. Greenwood*, 486 U.S. 35, 40-41 (1988).

¹²² *Illinois v. Caballes*, 543 U.S. 405, 408-09 (2005); *United States v. Place*, 462 U.S. 696, 707 (1983).

¹²³ *Florida v. Riley*, 488 U.S. 445, 451-52 (1989) (plurality opinion); *California v. Ciraolo*, 476 U.S. 207, 212-13 (1986).

¹²⁴ *United States v. White*, 401 U.S. 745, 752 (1971) (plurality opinion).

¹²⁵ Compare, e.g., *Illinois v. Perkins*, 496 U.S. 292, 297-98 (1990) (holding that police may plant informant and undercover agent to elicit information from suspect in custody before the commencement of formal proceedings by indictment or other procedural mechanism triggering Sixth Amendment protections), with *United States v. Henry*, 447 U.S. 264, 271-73 (1980) (holding that once Sixth Amendment rights attach, police may not use informant to deliberately elicit information from suspect in custody).

¹²⁶ See, e.g., Akhil Reed Amar, *The Future of Constitutional Criminal Procedure*, 33 AM. CRIM. L. REV. 1123, 1125-26 (1996) (describing constitutional criminal procedure doctrine as “a mess” and observing that “*United States Reports* now swells with language bulging this way and that, at virtually every level of generality and specificity”); Michael Mello, *Is a Puzzlement!: An Overview of the Fourth Amendment*, 44 CRIM. L. BULL. 153 (2008) (“The fifty-four words which comprise the Fourth Amendment have generated a jurisprudence which is rich, contradictory, and maddening.”); George C. Thomas III, *Remapping the Criminal Procedure Universe*, 83 VA. L. REV. 1819, 1819 (1997) (book review) (“[T]he law of criminal procedure had become encrusted with doctrinal complexities that seemed to bear little or no relationship to the underlying constitutional rights.”); see also *Minnesota v. Carter*, 525 U.S. 83, 91, 97 (1998) (Scalia, J., concurring) (“In my view, the only thing the past three decades have established about the *Katz* test . . . is that, unsurprisingly, those “actual (subjective) expectation[s] of privacy” “that society is prepared to recognize as ‘reasonable,’” . . . bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable.”).

Part of constitutional criminal procedure's unwritten overarching logic is use of the costs of pursuing an investigatory method as a constraint on the frequency and ubiquity of use. The confusing patchwork of pronouncements on whether and how the Fourth Amendment regulates particular methods must be seen in light of this logic. A prime example where the Court has deployed the logic of efficiency-impeding rules and regulation by cost calibration is in the context of restraints on electronic surveillance.

Criminal procedure rules seem to exert a puzzlingly perverse incentive for police to use informants or undercover agents as an entryway into an investigation despite the high dangers and costs of planting an agent or informant. This seemingly perverse incentive, however, fits within the logic of regulation through costs-calibration and efficiency-impeding. Today, the use of electronic wiretapping is subject to both extensive constitutional restrictions as well as statutory restrictions under *Berger v. United States*¹²⁷ and Title III of the Wiretap Act and state-law analogues.¹²⁸ *Berger* indicates that before police may wiretap, the Fourth Amendment requires particularization of the conversations to be seized as well as the particular offense police are investigating; limits on length of surveillance; a showing of "present probable cause" to continue surveillance; and notice and return listing the conversations seized.¹²⁹ Wiretap law goes further and requires, among other things, that police show that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous."¹³⁰ This necessity requirement reserves electronic surveillance as a last resort. In addition, even where police succeed in gaining wiretap authorization, they have a duty to man the wire to minimize interception of conversations that are not pertinent to the offense being investigated under the warrant.¹³¹ This imposes additional substantial costs on the use of electronic surveillance as an investigative method because the minimization requirement means that police on a wiretap must man the wire around the clock.

¹²⁷ *Berger v. United States*, 388 U.S. 41 (1967).

¹²⁸ Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968).

¹²⁹ *Berger*, 388 U.S. at 58-59.

¹³⁰ 18 U.S.C. § 2518(3)(c) (2006).

¹³¹ 18 U.S.C. § 2518(5) ("Every order and extension thereof shall contain a provision that the . . . [electronic surveillance] shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter.").

The rationale for these additional strictures is the grave threat posed to liberty by electronic surveillance methods such as wiretapping, which is swifter and less expensive to police than other methods and has the potential to be pervasive if unregulated. The *Berger* Court reasoned, for example, that “[f]ew threats to liberty exist which are greater than that posed by the use of eavesdropping devices” and noted that electronic eavesdropping is “quicker, easier, and more certain” than other methods.¹³² Before the landmark decision of *Katz v. United States* in 1967,¹³³ wiretaps and similar methods of surveillance accomplished without physical penetration of a protected space were deemed outside the scope of Fourth Amendment regulation, which was construed to prohibit trespass into protected areas.¹³⁴ In *Katz*, the Supreme Court brought wiretapping into the sphere of Fourth Amendment regulation through a paradigm shift in the definition of what the Fourth Amendment protects from physical trespass to the reasonable expectation of privacy test familiar today.¹³⁵ Summarizing the evolution of standards, Justice William Douglas explained in a dissent that “[t]he threads of thought running through our recent decisions are that these extensive intrusions into privacy made by electronic surveillance make self-restraint by law enforcement officials an inadequate protection, that the requirement of warrants under the Fourth Amendment is essential to a free society.”¹³⁶

In contrast, the Constitution leaves unregulated the use of informants and undercover agents because the Supreme Court has held that there is no reasonable expectation of privacy in information confided to a third party, particularly a criminal confederate.¹³⁷ To gain entryway into an investigation and probable cause for subsequent searches or wiretap authorizations, therefore, police resort to

¹³² *Berger*, 388 U.S. at 63.

¹³³ *Katz v. United States*, 389 U.S. 347 (1967).

¹³⁴ See, e.g., *Goldman v. United States*, 316 U.S. 129, 135-36 (1942) (holding that Fourth Amendment does not apply to use of detectaphone to eavesdrop on conversation because there was no physical trespass); *Olmstead v. United States*, 277 U.S. 438, 457, 464-66 (1928) (applying trespass rationale and holding Fourth Amendment does not apply to wiretap on phone line without physical intrusion into protected area).

¹³⁵ See *Katz*, 389 U.S. at 353 (turning away from trespass rationale); see also *id.* at 360, 361 (Harlan, J., concurring) (“My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”).

¹³⁶ *United States v. White*, 401 U.S. 745, 762 (1971) (Douglas, J., dissenting).

¹³⁷ See, e.g., *United States v. White*, 401 U.S. 745, 752 (1971) (plurality opinion); *Hoffa v. United States*, 385 U.S. 293, 302 (1966).

cultivating informants or planting undercover agents, particularly in proactive investigations where higher-ups in a criminal organization or activity are well shielded from sight.¹³⁸ Being an informant or undercover agent is very dangerous, and tragic stories of undercover investigations gone wrong and informants or agents killed are all too frequent.¹³⁹ The method takes substantial investment in human capital with greater risks and lower probability of success. Sometimes it may take years to cultivate sufficient trust to infiltrate a criminal organization, and the attempt may founder. The very costs of the enterprise impose a check on the frequency and pervasiveness of use of the tactic. Hence, while it may seem perverse indeed to channel police toward a method that is dangerous and expensive, the very high costs, risks, and uncertainty of success have a calibrating effect in curtailing the frequency of use, reserving the method for situations where the benefits are worth the costs.

To take a second example, the unwritten logic of regulation by efficiency-impeding also helps explain the puzzling contrast between the Court's holdings in *City of Indianapolis v. Edmond*¹⁴⁰ and *Illinois v. Lidster*.¹⁴¹ In *Edmond*, the Supreme Court invalidated a drug interdiction checkpoint, which subjected people to brief investigative seizures without reasonable articulable suspicion.¹⁴² *Edmond* distinguished *Michigan Department of State Police v. Sitz*, which permitted brief suspicionless stops at sobriety checkpoints,¹⁴³ because the programmatic purpose of the drug interdiction checkpoint was ordinary criminal law enforcement that requires individualized suspicion rather than special needs such as traffic safety.¹⁴⁴ *Lidster* involved suspicionless stops at a checkpoint in the service of criminal law enforcement — the investigation of a hit and run killing.¹⁴⁵ Because *Lidster* involved criminal law enforcement rather than a special needs search, the checkpoint seemed destined for invalidation

¹³⁸ See, e.g., Heyman, *supra* note 51, at 323-27 (discussing need for informants and undercover agents).

¹³⁹ See, e.g., Sosa v. Alvarez-Machain, 542 U.S. 692, 697 (2004) (describing torture and murder of undercover DEA agent Enrique “Kiki” Camarena); Andrea L. Dennis, *Collateral Damage? Juvenile Snitches as Collateral Damage in America’s “War” on Drugs, Crime and Gangs*, 46 AM. CRIM. L. REV. 1145, 1152-53 (2009) (collecting accounts of youthful informants who were murdered).

¹⁴⁰ *City of Indianapolis v. Edmond*, 531 U.S. 32, 41-42 (2000).

¹⁴¹ *Illinois v. Lidster*, 540 U.S. 419, 428 (2004).

¹⁴² *Edmond*, 531 U.S. at 42.

¹⁴³ *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 453 (1990).

¹⁴⁴ *Edmond*, 531 U.S. at 41.

¹⁴⁵ *Lidster*, 540 U.S. at 422.

under *Edmond*. But the Court in *Lidster* upheld the suspicionless stops. The Court attempted to explain the puzzle pragmatically, noting that the concept of reasonable suspicion did not fit the context of information-gathering investigative stops.¹⁴⁶ This does not explain the collapse of the Court's prior distinction between special needs searches and suspicionless stops for ordinary criminal law enforcement, however. More revealing is the Court's observation, "we do not believe that an *Edmond*-type rule is needed to prevent an unreasonable proliferation of police checkpoints" because "limited police resources and community hostility to related traffic tie-ups seem likely to inhibit any such proliferation."¹⁴⁷ Because there were cost constraints on the tactic external to criminal procedure rules, courts need not intervene to heighten the costs or prohibit the practice to preserve the balance of police power and liberty.

The logic of regulation by raising the costs of a tactic is also generally evident in more quotidian criminal procedure contexts and baseline rules, such as the default requirement of a warrant issued in advance of action by a magistrate judge before a search. In a reality where police can forum-shop magistrate judges and where assembly-line criminal justice precludes searching review of affidavits, commentators have wondered why criminal procedure is so insistent on the warrant requirement.¹⁴⁸ Part of the answer is that the requirement that police go through the paperwork hassle of producing an affidavit and getting a magistrate judge to sign off on a warrant imposes costs before a search. Raising the costs by impeding efficiency gives police incentive against indiscriminate intrusion because the anticipated benefits need to be worth the costs.

A similar logic also helps explain the Court's decision in *Knowles v. Iowa* that police must actually arrest before they engage in a search

¹⁴⁶ See *id.* at 425.

¹⁴⁷ *Id.* at 426.

¹⁴⁸ See, e.g., William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 888-89 (1991) (critiquing "slapdash" nature of warrant review process, debunking common rationales supporting warrant regime, and noting warrants "must be a far worse way of adjudicating the legality of police conduct than after-the-fact adversary litigation"); Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 33-35 (1988) (critiquing default warrant requirement as procedural check noting that rule is "so riddled with exceptions, complexities, and contradictions that it has become a trap for the unwary"). But see Cynthia Lee, *Package Bombs, Footlockers, and Laptops: What the Disappearing Container Doctrine Can Tell Us About the Fourth Amendment*, 100 J. CRIM. & CRIMINOLOGY 1403, 1464-79 (2010) (noting deleterious consequences of shift away from warrant requirement toward ex post reasonableness review).

incident to arrest of an automobile.¹⁴⁹ *Knowles* held that police cannot just issue a citation in lieu of arrest and then claim the power to search incident to arrest.¹⁵⁰ The requirement that the police go through the trouble of an arrest raises the costs of an intrusive search, forcing deliberation and restraint to focus on cases where potential benefits are worth the costs.

Regulation by impeding efficiency has pragmatic appeal, but it also leads to great strain on the superstructure of the rules. Cost-raising protections such as the requirement of a warrant seem like pesky “formalities” or inefficient roadblocks that impede investigation, heightening temptation to circumvent or sidestep the requisites. For example, police who track suspected drug traffickers to a warehouse may be tempted to take a peek into the warehouse after the traffickers have left to see if there are drugs inside before going to the bother of writing an affidavit and getting a search warrant.¹⁵¹ Prohibitions on searching the automobile of a suspect arrested for a minor traffic offense and secured may lead to roadside searches recharacterized as “inventory searches.”¹⁵² It is little wonder that constitutional criminal procedure doctrine resembles the complex cracks and fissures in a series of dams under immense pressure because it is channeling police power up the hill of costs, away from the most expedient routes. Unless standards of fair play steer police judgment, redefining natural patterns of decisionmaking beyond the most expedient routes, the continued pressure will further aggravate and proliferate the complexity of constitutional criminal procedure and its web of stopgap plugs and new fissures.

III. A TAXONOMY OF POLICE GAMESMANSHIP MANEUVERS

A necessary step toward ameliorating the police gamesmanship dilemma is understanding the line between fair and foul play and the structure of problematic police gamesmanship. We cannot expect police to play fair if we do not define the meaning of playing fair. This Part delineates a rule of thumb to discern problematic gaming and then offers a taxonomy of problematic police gaming.

¹⁴⁹ *Knowles v. Iowa*, 525 U.S. 113, 117-19 (1998).

¹⁵⁰ *Id.* at 118-19.

¹⁵¹ *Cf. Murray v. United States*, 487 U.S. 533, 539-40 (1988) (involving case where agents first entered suspected drop house to confirm there were drugs inside before then getting warrant).

¹⁵² *Colorado v. Bertine*, 479 U.S. 367, 368-69, 374 (1987) (affirming roadside search of automobile before tow truck arrived to impound vehicle as inventory search following arrest for driving under influence).

A. Discerning Problematic Gaming

While the question of the line between fair and forbidden gaming is murky, we can get bearings from *Missouri v. Seibert*.¹⁵³ The plurality invalidated the questions-first police tactic because “by any objective measure” the conduct revealed “a police strategy adapted to undermine the *Miranda* warnings.”¹⁵⁴ Justice Kennedy, who supplied the fifth vote, also found strategic subversion to be the problem — albeit defined based on subjective intent rather than objective assessment of conduct.¹⁵⁵ In short, subversion of the purpose of a constitutional protection should be deemed foul play.

The harder question is whether such subversion is defined in terms of subjective intent. The answer appears to be no. A comfortable majority of Justices appeared to reject inquiry into subjective intent. The plurality opinion, authored by Justice Souter and joined by Justices John Paul Stevens, Ruth Bader Ginsburg, and Breyer, noted that “[b]ecause the intent of the officer will rarely be as candidly admitted as it was” in *Seibert*, the focus should be “on facts apart from intent that show the question-first tactic at work.”¹⁵⁶ The dissent of Justice Sandra Day O’Connor, joined by then-Chief Justice William Rehnquist, Antonin Scalia, and Clarence Thomas, agreed with the plurality insofar as it “declines to focus its analysis on the subjective intent of the interrogating officer.”¹⁵⁷ Justice O’Connor reasoned that officer intent, unknown to the suspect, can have no bearing on whether she knowingly or voluntarily waived her rights and would send courts on a fruitless, inefficient expedition into the minds of police officers that constitutional criminal procedure “all but uniformly” avoids.¹⁵⁸ While *Seibert* involved “the uncommonly straightforward circumstance of an officer openly admitting that the violation was intentional,” in most cases, intent is opaque.¹⁵⁹

The reluctance of the majority of Justices to hinge analysis on subjective intent is salutary. An intent-based definition of problematic police gaming would aggravate the perverse message to game covertly because only in the infrequent case where officers openly reveal intent to undermine protections would an intent-based definition discern

¹⁵³ *Missouri v. Seibert*, 542 U.S. 600 (2004).

¹⁵⁴ *Id.* at 614-17 (2004).

¹⁵⁵ *Id.* at 621 (Kennedy, J., dissenting) (considering tactic invalid because it was calculated to undermine *Miranda* warning).

¹⁵⁶ *Id.* at 617 n.6.

¹⁵⁷ *Id.* at 622-23 (O’Connor, J., dissenting).

¹⁵⁸ *Id.* at 625-26.

¹⁵⁹ *Id.* at 626.

problematic gaming. The plurality position of relying on objective indicia of conduct that undermines the purpose and effect of protections apart from subjective intent is the better way to discern problematic police gaming.

Of course, where intent to undermine a protection is admitted, then we have a slam-dunk case of problematic gaming and such evidence, if available, is potent. The more frequent situation, however, calls for examining the police conduct to determine if it subverts the substance of a protection. This will avoid costly and often fruitless inquiry into subjective intent and mitigate the perverse incentive to shade the truth in police testimony about intent.¹⁶⁰

How does this yardstick discern problematic gamesmanship? To illustrate, it is helpful to begin with an example of what does *not* fall within the subversion-of-purpose-definition. *Illinois v. Perkins*¹⁶¹ offers an example. In *Perkins*, police put an informant and undercover agent in a cell with defendant Perkins to elicit incriminating statements about an unsolved murder with which Perkins had not been charged.¹⁶² Perkins was in jail on unrelated charges of aggravated assault.¹⁶³ The question was whether *Miranda*'s Fifth Amendment protections in the context of custodial interrogation were violated by the elicitation of information.¹⁶⁴

The Court held that *Miranda*'s protections were not implicated because the purpose of *Miranda* was to mitigate the coerciveness and compulsion produced by a "police-dominated atmosphere" that are "not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate."¹⁶⁵ Coerciveness is considered from the suspect's perspective. When a suspect thinks he is boasting among fellow prisoners, the concern about coerciveness is not present.¹⁶⁶ The police maneuvering did not subvert *Miranda*'s purpose because "*Miranda* forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to

¹⁶⁰ For an informative exploration of the phenomenon of "testilying," see generally Christopher Slobogin, *Testilying: Police Perjury and What To Do About It*, 67 U. COLO. L. REV. 1037, 1040 (1996) (exploring phenomenon and reasons).

¹⁶¹ *Illinois v. Perkins*, 496 U.S. 292, 294-95 (1990).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Because charges had not been filed against him on the murder, no Sixth Amendment right to counsel had attached with regard to questioning about the murder. *Id.* at 296, 299.

¹⁶⁵ *Id.* at 295-96; see also *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (detailing reasons for its procedural safeguards).

¹⁶⁶ *Perkins*, 496 U.S. at 296-97.

be a fellow prisoner.”¹⁶⁷ The strategy was within fair bounds because it did not undermine the purpose of the *Miranda* protections.¹⁶⁸

If we take subversion of the spirit or purpose of a rule as the yardstick for problematic police gaming, we can build a framework to understand the kinds of games police play that should concern us. The next sections present a taxonomy of problematic police gaming organized around an expanded notion of the distinction between conduct and decision rules developed by Professors Carol Steiker and Meir Dan-Cohen from Jeremy Bentham’s work.¹⁶⁹ There are three main forms of problematic police gamesmanship: conduct rule gaming, remedial rule gaming, and framing rule gaming. For each of the three forms, three illustrative examples are examined to render the theory concrete.

B. Conduct Rule Gaming

While in the criminal law context, conduct rules tell the public how to behave, in the context of criminal procedure — “criminal law for cops” — conduct rules tell the police how to behave.¹⁷⁰ Using subversion of the purpose of a conduct rule as the touchstone, this section looks at three examples of conduct rule gaming: (1) going through the motions while subverting the substance of a conduct rule, (2) stacking disparate exceptions to default constitutional protections to exceed the purpose of the exceptions, and (3) the use of proxy actors or jurisdictional gradients in the scope of protections to sidestep constitutional conduct rules for police.

1. Going through the Motions, Subverting the Purpose

The two-step interrogation tactic at issue in *Missouri v. Seibert* exemplifies gaming by observing a rule while undermining its purpose. Like many true-life crime stories, the facts of *Seibert* read like a gritty contemporary tragedy. After her twelve-year-old son Jonathan, who had cerebral palsy, died in his sleep, Patrice Seibert feared neglect charges because of bedsores on his body.¹⁷¹ Apparently to hide the body, Seibert’s surviving son Darian and his friends, in her presence, concocted a sorely misguided plan to burn the body in her trailer together with a mentally ill teenager named Donald so that it would

¹⁶⁷ *Id.* at 297.

¹⁶⁸ See *Miranda*, 384 U.S. at 444, 465.

¹⁶⁹ Steiker, *supra* note 21, at 2469; Dan-Cohen, *supra* note 21, at 626-29.

¹⁷⁰ Steiker, *supra* note 21, at 2469-70.

¹⁷¹ *Missouri v. Seibert*, 542 U.S. 600, 604 (2004) (plurality opinion).

not appear Jonathan died unattended.¹⁷² In the blaze, Donald burned to death, while Darian sustained burn injuries.¹⁷³

Interrogating Officer Richard Hanrahan directed the arresting officer not to administer *Miranda* rights to Seibert.¹⁷⁴ He then elicited incriminating statements from Seibert, getting her to admit she knew that Donald was to die in the trailer fire.¹⁷⁵ Only after obtaining incriminating statements did Officer Hanrahan turn on the tape recorder and administer a *Miranda* advisal.¹⁷⁶ After Seibert waived her *Miranda* rights, Officer Hanrahan led her through the incriminating statements again, prodding her with her prior statements when she was reluctant to admit her knowledge regarding the killing.¹⁷⁷

While police strategy is often opaque, and the stance of the courts is generally not to pry, the two-step tactic surfaced more clearly than usual in part because *Seibert* was a rare case of openly revealed strategic intent.¹⁷⁸ As the *Seibert* plurality opinion underscored, however, even if one simply examines objective conduct and puts aside the information on subjective police intent, it was plain from the conduct that the officer was just going through the motions of *Miranda*'s conduct rule through a strategy "dedicated to draining the substance out of *Miranda*."¹⁷⁹

Patently, the practice was aimed at breaking down and boxing in the unwarned defendant, subverting the purpose of *Miranda*. Once the suspect admits the crime, he "would hardly think he had a genuine right to remain silent" — particularly when led over the same ground again — and would probably just be perplexed and bewildered as to why the officer was going through the motions of incanting about rights at that point.¹⁸⁰ The Court shut down the practice, with the plurality concluding:

Strategists dedicated to draining the substance out of *Miranda* cannot accomplish by training instructions what *Dickerson* held Congress could not do by statute. Because the question-first tactic effectively threatens to thwart *Miranda*'s purpose of reducing the risk that a coerced confession would be admitted,

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 604.

¹⁷⁵ *Id.* at 604-05.

¹⁷⁶ *Id.* at 605.

¹⁷⁷ *See id.* at 605.

¹⁷⁸ *See id.* at 616 n.6 (noting officer candidly admitted his intent to court).

¹⁷⁹ *See id.* at 617.

¹⁸⁰ *Id.* at 613.

and because the facts here do not reasonably support a conclusion that the warnings given could have served their purpose, Seibert's postwarning statements are inadmissible.¹⁸¹

The touchstone of problematic gamesmanship was thus a strategy that thwarted the purpose of a constitutional protection. Going through the motions of observing a conduct rule, in this case, an advisal before eliciting statements to be used against the defendant, was not enough. Gamesmanship goes out of bounds where a police stratagem disables the efficacy of the protection.

2. Exception-Stacking and Rationale-Overriding

While *Seibert's* questions-first tactic offers a patent case of conduct rule gaming, identifying unfair conduct rule gaming in other contexts can be more complicated. Because criminal procedure is riddled with exceptions that offer various routes around default protections, such as the myriad exceptions to the default Fourth Amendment rule that a warrant and probable cause are required for a search,¹⁸² it may be hard to discern whether police stacking of exceptions to reach a certain goal is fair or foul gaming. The main touchstone should be whether officers arrogate to themselves a power that exceeds the scope of the rationale for exceptions to the default constitutional protection, thereby disfiguring the exceptions beyond their purpose.

In distinguishing between fair and foul play, it is helpful to begin with an example of acceptable exception-stacking. An example of acceptable "laddering up" of exceptions to the default Fourth Amendment requirement of probable cause and a warrant for a search is a familiar daily practice: police officers pull someone over based on reasonable suspicion of a traffic violation, and based on observations of what is in plain view, build probable cause for an automobile search under the automobile exception.¹⁸³ In these cases, each step of the way, the officers stayed within the scope of the rationales of the exceptions.

¹⁸¹ *Id.* at 617.

¹⁸² See *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) ("[W]e usually require that a search be undertaken only pursuant to a warrant (and thus supported by probable cause, as the Constitution says warrants must be."); *New York v. Belton*, 453 U.S. 454, 457 (1981) ("It is a first principle of Fourth Amendment jurisprudence that the police may not conduct a search unless they first convince a neutral magistrate that there is probable cause to do so.").

¹⁸³ See, e.g., *Texas v. Brown*, 460 U.S. 730, 734-35 (1983) (plurality opinion) (considering case of plain-view seizure of balloons of illegal narcotics).

Consider a harder case using the following tactic: Officers tail an individual in traffic until the individual slips up — perhaps out of nervousness — and commits a traffic infraction. Officers then stop the individual for the traffic infraction and smell a heavy odor of marijuana that gives them probable cause to arrest the individual and search the car. In this case, we are still not in the zone of problematic gaming. Officers have stacked the exceptions. They may even have had the subjective intent to tail someone until she slipped up in hopes of seeing something in plain view or smelling something in plain sniff. Each step of the way, however, officers have not overstepped their power and transgressed the purpose of any constitutional protection. Officers are free to follow anyone in public so long as they do not stop and seize them. There is no constitutional protection against having police follow you when you are out and about in public. Officers have the power to detain you temporarily when you commit a traffic infraction. And officers may use what is in plain view or sniff as a basis to seize illegal contraband and arrest. The rationale of the plain view or plain smell exception was not exceeded by the tactic. The plain view rule is predicated simply on the notion that police have not invaded a reasonable expectation of privacy where they perceive contraband in the open, from a lawful vantage point.¹⁸⁴ The Court has explained that the plain view exception applies even when an officer went to a suspect's home with the admitted intent and hope of seeing items outside the scope of a search warrant in plain view.¹⁸⁵ There has not been a transgression of the logic of the exceptions to default protections by such conduct.

So what would be exception-stacking that exceeds the rationale for exceptions and crosses the line into problematic gaming of criminal procedure's complex of rules? *Arizona v. Gant*¹⁸⁶ offers two potential examples and an illustration of how the Court has struggled to deal with the problem of police gaming. The two forms of potential conduct rule gaming that *Gant* addressed are: (1) searches incident to arrest that exceed the rationale and purpose of the exception and (2) leveraging the power to arrest for minor traffic offenses to ratchet up the power to search vehicle compartments and containers within incident to arrest.

First some background. The oft-reiterated baseline default rule of constitutional criminal procedure is that police need a warrant and probable cause to search. There are many exceptions to this rule —

¹⁸⁴ *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993).

¹⁸⁵ *See Horton v. California*, 496 U.S. 128, 130 (1990).

¹⁸⁶ *Arizona v. Gant*, 129 S. Ct. 1710, 1722-23 (2009).

including the power to search items within a suspect's grab area incident to arrest to avert destruction of evidence or danger to officers.¹⁸⁷ The standard regulating searches incident to arrest was famously framed in *Chimel v. California*, after much doctrinal instability.¹⁸⁸ The key case extending *Chimel* to searches of vehicles after arrests of recent occupants was *New York v. Belton* in 1981.¹⁸⁹ Observing that the lower courts had split and foundered in defining what constituted the "immediate grab area" of an arrestee in the vehicle context, the *Belton* Court attempted to fashion a guideline. The *Belton* Court founded its rule of police power on an assumption — "the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary [item].'"¹⁹⁰ Based on this generalization, *Belton* held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile" as well as containers inside the vehicle.¹⁹¹

Belton was ambiguous in its grant of police power. Some lower courts — and belatedly, the Supreme Court — would explain that *Belton* merely held that "when the passenger compartment was within an arrestee's reaching distance, *Belton* supplies the generalization that the entire compartment and any containers therein may be reached."¹⁹² In other words, the exception was still moored to its rationale of averting destruction of evidence or danger to the police.

In the face of the ambiguity, however, police pushed the rule. Police began regarding the exception as an automatic power even when the rationales justifying the exception were not present. In numerous cases, officers searched incident to arrest though a suspect was cuffed in the back of a patrol vehicle — or even after the suspect had been transported from the scene.¹⁹³ The majority of lower courts, weighing

¹⁸⁷ See *Chimel v. California*, 395 U.S. 752, 762-63 (1969).

¹⁸⁸ For a history of the doctrinal vacillation before *Chimel*, see, for example James J. Tomkovicz, *Divining and Designing the Future of the Search Incident to Arrest Doctrine: Avoiding Instability, Irrationality, and Infidelity*, 2007 U. ILL. L. REV. 1417, 1421-26.

¹⁸⁹ 453 U.S. 454 (1981).

¹⁹⁰ See *id.* at 460 (quoting *Chimel*, 395 U.S. at 763).

¹⁹¹ *Id.*

¹⁹² See *Arizona v. Gant*, 129 S. Ct. 1710, 1717-19 (2009) (offering this reading of *Belton* and history).

¹⁹³ See *Thornton v. United States*, 541 U.S. 615, 618, 628 (2004) (Scalia, J., concurring) (citing cases).

in after evidence was found, began reading *Belton* broadly to permit a vehicle search incident to arrest of a recent occupant even if there was no possibility that the arrestee could gain access to the vehicle and items inside at time of the search.¹⁹⁴ The practice was so widespread that Justice O'Connor observed that "lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel*," that is, limited to averting danger to officers or risk of destruction of evidence.¹⁹⁵

Police and the lower courts had reason for confusion. Doctrinal ambivalence about police rule-pushing manifested in *Thornton v. United States*, which seemed amenable to aggressive play outside of *Chimel*'s rationales.¹⁹⁶ In *Thornton*, the Court approved a search incident to arrest of a vehicle compartment where a suspect was no longer in the car when stopped and was handcuffed in the back of a patrol car, posing no risk of harm to officers or destruction of evidence.¹⁹⁷

While *Thornton* seemed to accept police rule-pushing, its regime would be relatively short-lived. The seeds were planted even in the *Thornton* concurrences, most notably in the concurrence of Justice Scalia, joined by Justice Ginsburg. Justice Scalia pointed out the obvious falsity of the empirical assumption that undergirded *Belton*'s rule of automatic power to search:

If it was ever true that the passenger compartment is "in fact generally, even if not inevitably," within the arrestee's immediate control at the time of the search, it certainly is not true today. As one judge has put it: "[I]n our search for clarity, we have now abandoned our constitutional moorings and floated to a place where the law approves of purely exploratory searches of vehicles during which officers with no definite objective or reason for the search are allowed to rummage around in a car to see what they might find."¹⁹⁸

Just when it seemed that the power to search automobiles incident to arrest was mushrooming away from the twin *Chimel* rationales for the exception, the Court decided *Arizona v. Gant* in 2009.¹⁹⁹ In *Gant*, the

¹⁹⁴ See *Gant*, 129 S. Ct. at 1718 (offering history).

¹⁹⁵ *Thornton*, 541 U.S. at 624.

¹⁹⁶ See *id.*

¹⁹⁷ See *id.* at 617-18, 624.

¹⁹⁸ *Id.* at 628 (Scalia, J., concurring) (internal citations omitted).

¹⁹⁹ *Gant*, 129 S. Ct. at 1710.

Court partially blocked police conduct exceeding the twin rationales of *Chimel*, noting that *Belton* had underscored that its ruling “in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests.”²⁰⁰ *Gant* ruled that police may “search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.”²⁰¹ A form of problematic police gamesmanship exceeding the purpose of the search-incident-to-arrest rationale was thus shut down.

Gant also had a second component that partially accommodated the rule-pushing practice that had crystallized in the twenty-eight years between *Belton* and *Gant*. Even where the suspect is secured, *Gant* permitted searches of an automobile and containers within the general interest of evidence-gathering “when it is reasonable to believe evidence relevant to the *crime of arrest* might be found in the vehicle.”²⁰² The Court thus preserved and recharacterized *Thornton* — because *Thornton*, a recent occupant of a vehicle, was arrested for illegal narcotics possession after officers found narcotics on his person, it was reasonable to believe he might have stashed narcotics in the car he had recently exited and therefore the search was valid.²⁰³

What bears underscoring about the second part of *Gant*’s standard is the limitation of the power to search incident to arrest to the crime of arrest. The second part of the *Gant* rule illustrates how the Court also adopted an anti-gaming component in its standard to avert another form of problematic police gamesmanship that arises at the confluence of the power to arrest for even minor traffic offenses and the power to search incident to arrest. To understand the other potential form of problematic police gamesmanship *Gant* tried to block, we must consider *Atwater v. City of Lago Vista*,²⁰⁴ which had roused the Court’s concern.

Atwater involved a mother named Gail Atwater, who was driving her three-year-old son and five-year-old daughter in her pickup truck in Texas and her encounter with an officer named Bart Turek.²⁰⁵ Turek had previously stopped Atwater on the mistaken belief he had spotted

²⁰⁰ *Id.* at 1719 (quoting *New York v. Belton*, 453 U.S. 454, 460 n.3 (1981)).

²⁰¹ *Id.*

²⁰² *Id.* (emphasis added) (citing *Thornton*, 541 U.S. at 632 (Scalia, J., concurring)).

²⁰³ See *Thornton*, 541 U.S. at 618 (giving facts); see also *Gant*, 129 S. Ct. at 1719 (preserving *Thornton* because the offense of arrest give officers reason to search the vehicle compartment and containers inside).

²⁰⁴ *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

²⁰⁵ *Id.* at 323-24.

her son riding without a seatbelt in violation of Texas traffic law.²⁰⁶ On the prior occasion, it turned out Atwater's son was actually wearing a seatbelt.²⁰⁷ When Turek spotted Atwater driving with her children in the front seat — this time without seatbelts — he acted in apparent vindication and vindictiveness.²⁰⁸ According to Atwater, Turek yelled something to the effect that “we’ve met before” and “you’re going to jail.”²⁰⁹

He asked to see Atwater's driver's license and insurance documentation, which she did not have with her because her purse had been stolen the day before.²¹⁰ Atwater asked to take her scared and crying children to a nearby friend's house, but Turek told her, “you're not going anywhere.”²¹¹ Though it was uncontested that Atwater “was a known and established resident of Lago Vista with no place to hide and no incentive to flee, and common sense says she would almost certainly have buckled up,” Turek arrested her.²¹² Atwater's friend found out what was happening and came to take charge of the children while Turek cuffed Atwater and hauled her to the police station.²¹³ Her mug shot was taken and she was left alone in jail for about an hour.²¹⁴ Ultimately Atwater paid \$50 after pleading no contest to the misdemeanor seatbelt offenses.²¹⁵ The other charges stemming from the fact her purse had been stolen, rendering her unable to produce her license, were dismissed.²¹⁶

After this humiliating experience, Atwater sued, arguing that Turek had acted unreasonably in arresting her for a minor traffic misdemeanor as her children cried.²¹⁷ The Court — over a vigorous dissent by Justice O'Connor, joined by Justices Stevens, Ginsburg, and Breyer — affirmed the dismissal of Atwater's lawsuit, with obvious misgivings about letting Turek enjoy impunity. The majority termed Turek's decision to arrest “merely gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor

²⁰⁶ *Id.* at 323 n.1.

²⁰⁷ *Id.*

²⁰⁸ *See id.* at 323.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 324.

²¹¹ *Id.*

²¹² *Id.* at 324, 347.

²¹³ *Id.* at 324.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *See id.* at 323-25.

judgment.”²¹⁸ Empathizing with *Atwater*, the Court noted that if it were to fashion a standard for the uncontested facts of the case, *Atwater* might well prevail.²¹⁹ To accommodate the general need for officers to make judgment calls “on the spur (and in the heat) of the moment” and the preference for simple rules, however, the majority categorically ruled that officers may arrest for even minor misdemeanors committed in the officer’s presence.²²⁰ This bright-line power to arrest for even minor offenses eliminated case-by-case consideration of potential abuses of the power.²²¹

In dissent, Justice O’Connor underscored *Atwater*’s “potentially serious consequences for the everyday lives of Americans.”²²² After *Atwater*, an officer can arrest for a minor violation and then search incident to arrest the driver and the entire vehicle passenger compartment, including any purse or other container within, Justice O’Connor warned.²²³ Justice O’Connor foresaw that police might stack together the power to make a warrantless arrest for a minor traffic offense and the power to search a car and containers, such as purses or backpacks, inside — and worried about such tactics within the power of someone like Officer Turek. The “unbounded discretion carries with it grave potential for abuse,” Justice O’Connor wrote.²²⁴ In a decision issued the same term as *Atwater*, affirming the power of officers to arrest a motorist for a minor offense and search incident to arrest, Justice Ginsburg, joined by Justices Stevens, O’Connor, and Breyer, also expressed caution, writing “if experience demonstrates ‘anything like an epidemic of unnecessary minor-offense arrests,’ I hope the Court will reconsider its recent precedent.”²²⁵

The looming concern is that police will leverage the ability to arrest for minor offenses into the power to conduct a roving or even harassing search. *Gant*’s modest anti-gaming device is the limitation of the ability to search the vehicle incident to arrest to cases where there is a reason to believe there is evidence of the crime of arrest in the vehicle. This protects against the stacking together of the *Atwater* power to make arrests for minor misdemeanors and the search incident to arrest power to go on a further roving search. Such

²¹⁸ *Id.* at 346.

²¹⁹ *Id.*

²²⁰ *Id.* at 347, 354.

²²¹ *Id.*

²²² *Id.* at 347, 371-72 (O’Connor, J., dissenting).

²²³ *Id.*

²²⁴ *Id.* at 371-72.

²²⁵ *Arkansas v. Sullivan*, 532 U.S. 769, 772-73 (2001) (Ginsburg, J., concurring).

stacking is unfair gaming because it is not a logical progression of police power expanding concomitantly as the signs of potential criminality increase. Rather, a roving search predicated on an arrest for a minor misdemeanor is outside the purpose of either exception. As the Court explained in *Gant*, if a motorist is stopped for a minor traffic offense, such as speeding or failure to signal before a turn, the interest in gathering evidence related to the offense does not justify the further intrusion of an automobile search because there will be no reason to believe the vehicle has evidence of the traffic offense.²²⁶ In its explication, the *Gant* Court cited *Atwater* and *Knowles* — a subtle “tell” about the potentially problematic gaming that had troubled the Court and was now being blocked by the anti-gaming device in the second prong of the *Gant* rule.

3. Playing Through Proxies or Jurisdictional Gradients

A third example of problematic conduct rule gaming is the use of proxy actors or jurisdictional shifts to avoid conduct rules, thereby subverting the purpose and protection of the rules. This is a tactic that has surfaced at various junctures both in domestic and cross-border police investigations²²⁷ and is currently very salient because of the continuing controversy over extraordinary rendition.

A prime historical example of gaming jurisdictional gradients in protections comes from the period when the exclusionary rule applied only to federal agents, not state agents.²²⁸ The exclusionary rule is the Fourth Amendment’s prime remedy to deter police misconduct by excluding wrongfully obtained evidence against the defendant. Without the central remedy that put force into the otherwise largely toothless Fourth Amendment, it was as if the state police were not subject to the Fourth Amendment’s conduct rules.²²⁹ State officers would blatantly disregard Fourth Amendment protections, illegally seizing evidence and then handing it over to federal authorities on a silver platter for prosecution.²³⁰ The Supreme Court at first tried

²²⁶ *Arizona v. Gant*, 129 S. Ct. 1710, 1719 (2009) (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring)).

²²⁷ See, e.g., *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) (involving kidnapping by DEA-paid Mexican nationals of doctor suspected to be involved in the torture and murder of DEA agent Enrique Camarena).

²²⁸ *Wolf v. Colorado*, 338 U.S. 25, 28, 32-33 (1949).

²²⁹ See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 652 (1961) (recounting “the obvious futility of relegating the Fourth Amendment” to toothless remedies in states before extension of exclusionary rule).

²³⁰ For articles regarding the rampant violations, see, for example James A.C.

incremental stopgap rulings, for example, ruling in a Prohibition-era case that the exclusionary sanction applied where state agents seized liquor though no federal agents were present and there was no evidence of state-federal cooperation because the state troopers were plainly conducting the search to enable federal prosecution since the state had no Prohibition law.²³¹ The Court ultimately eliminated the jurisdictional gradient in protections by extending the exclusionary remedy to the states in *Mapp v. Ohio* to give force to the Fourth Amendment across the jurisdictions.²³²

Extraordinary rendition is an example of both playing through proxies and gaming of jurisdictional gradients. Extraordinary rendition is the transportation of suspects in U.S. custody to third-party nations where foreign agents, sometimes with U.S. agent involvement, and sometimes not, engage in interrogation techniques forbidden by the U.S. Constitution.²³³ Essentially U.S. agents enlist foreign agents to do what is forbidden by the Constitution's conduct rules or engage in conduct abroad that is patently forbidden at home. The gamesmanship plays on the blurriness of constitutional protections abroad.²³⁴ When U.S. police play through proxies or jurisdictional gradients, the same concerns that animate the prohibition are implicated — and certainly concern has been greatly roused.²³⁵ As discussed below, however, such conduct rule gaming can

Grant, *The Tarnished Silver Platter: Federalism and Admissibility of Illegally Seized Evidence*, 8 UCLA L. REV. 1, 4-13 (1962) (similar); Yale Kamisar, *Wolf and Lustig Ten Years Later: Illegal State Evidence in State and Federal Courts*, 43 MINN. L. REV. 1083, 1101-08 (1959) (similar); Roger J. Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 DUKE L.J. 319, 321-22 (discussing searches in violation of constitutional protections without remedy).

²³¹ See, e.g., *Gambino v. United States*, 275 U.S. 310, 314-15 (1927).

²³² *Mapp*, 367 U.S. at 659.

²³³ See, e.g., *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (defining extraordinary rendition and adjudicating claim by individual alleged to have been subjected to the program); DAVID COLE & JULES LOBEL, *LESS SAFE LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR* 26-27 (2007) (giving history and analysis of extraordinary rendition).

²³⁴ For work tackling the question of criminal procedure protections abroad, see, for example M.K.B. Darmer, *Beyond Bin Laden and Lindh: Confessions Law in an Age of Terrorism*, 12 CORNELL J.L. & PUB. POL'Y 319, 345-72 (2003) [hereinafter *Confessions Law in an Age of Terrorism*] (analyzing constraints on interrogation practices abroad); Charles Doyle, *Extraterritorial Application of American Criminal Law*, CONG. RESEARCH SERV., Mar. 26, 2010, at 23-25 (analyzing extraterritorial applications).

²³⁵ See, e.g., *Rendition to Torture: The Case of Maher Arar: Joint Hearing Before the Subcomm. on Int'l Orgs., Human Rights, & Oversight & the Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the H. Comm. on Foreign Affairs*, 110th Cong. (2007) (inquiring into potential abuses in Arar case); Jules Lobel, *The Preventive Paradigm and the Perils of Ad Hoc Balancing*, 91 MINN. L. REV. 1407, 1430-36 (2007) (discussing Arar case).

be combined with decision rule gaming to evade consequences — and even review — of alleged foul play.

C. Decision Rule Gaming

Decision rule gaming involves playing upon the doctrines addressed to courts about how to apply the law. As classically conceived by Bentham, a decision rule is an instruction about how to punish for a conduct rule violation.²³⁶ The Article expands on the idea of decision rules to include doctrines steering courts in deciding what review, rules and remedies — if any — to frame. Decision rule gaming thus involves two variants: remedial rule gaming and framing rule gaming. Examples of each variant are analyzed below.

1. Remedial Rule Gaming

Remedial rule gaming plays upon gaps and soft spots in remedial regimes for conduct rule violations. A particularly blatant historical example is the peculiar period from 1949 to 1961 when the Supreme Court ruled that the Fourth Amendment's prohibition against unreasonable search and seizures applied to the states via the Due Process Clause of the Fourteenth Amendment — but the key remedy that gave the Amendment teeth, the exclusionary rule, did not apply to the states.²³⁷ As previously detailed, police infamously gamed the remedial gap.²³⁸ The preceding section explained how we can conceive of taking advantage of jurisdictional gradients in protections — in this period, the de facto suspension of the Fourth Amendment's conduct rules for police for lack of a remedy in the states — as conduct rule gaming. What police were also doing was remedial rule gaming in the sense that they were taking advantage of a remedial gap, the lack of an effective remedy for Fourth Amendment violations in the states. By 1961, the Court was sufficiently troubled by the blatant police gaming of the remedial gap to close it and halt the gaming.²³⁹

²³⁶ BENTHAM, *supra* note 21, at 430 (contrasting rule that tells public how to conduct themselves — for example, do not steal — with rule that tells courts how to address violation — for example, sentencing to hanging whoever is convicted of stealing).

²³⁷ See, e.g., *Wolf v. Colorado*, 338 U.S. 25, 28, 32-33 (1949).

²³⁸ See, e.g., *Grant*, *supra* note 228, at 4-13 (examining history and abuse of silver platter doctrine); *Kamisar*, *supra* note 228, at 1101-08 (detailing rampant violations); *Traynor*, *supra* note 228, at 321-22 (describing how illegally obtained evidence was “time after time . . . being offered and admitted as a routine procedure”).

²³⁹ See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 657 (1961).

A second example of gaming of remedial rules is presented by *United States v. Payner*,²⁴⁰ involving a patently illegal search that played on the “standing” doctrine. The “standing” doctrine provides that a defendant is not entitled to exclusion of evidence from an illegal search unless the search violates his personal rights.²⁴¹ Because Fourth Amendment rights are personal and may not be vicariously asserted,²⁴² the violation must have invalidly transgressed the defendant’s legitimate expectation of privacy, not that of a third party.²⁴³ In *Payner*, the Internal Revenue Service was investigating the potentially illegal financial activities of Americans banking in the Bahamas.²⁴⁴ At the behest of federal investigators, private investigator and occasional informant Norman Casper cultivated a relationship with a bank president.²⁴⁵ Casper cooperated with federal agents in arranging for another person to take the banker to dinner while he entered the banker’s apartment and stole a briefcase, photographed the contents, then slipped it back into the apartment.²⁴⁶ Among the items thus illegally pilfered and photographed was a loan guarantee agreement establishing that defendant Jack Payner had a secret foreign bank account.²⁴⁷ The Supreme Court observed that while “[n]o court should condone the unconstitutional and possibly criminal behavior of those who planned and executed this ‘briefcase caper,’” exclusion of evidence should be limited because of the costs it exacts on the truth-finding process.²⁴⁸ The Court took a hands-off approach, noting that while “decisions of this Court are replete with denunciations of willfully lawless activities undertaken in the name of law enforcement,” the exclusionary remedy would not be granted in every case of illegality.²⁴⁹

In the Fifth Amendment context, however, the Court has been less hands-off and shy about intervening. The third example is the two-step midstream *Miranda* interrogation strategy in *Seibert*. The preceding section analyzed the tactic as conduct rule gaming accomplished by going through the motions of the required rights

²⁴⁰ *United States v. Payner*, 447 U.S. 727, 734 (1980).

²⁴¹ *Rakas v. Illinois*, 439 U.S. 128, 137-38 (1978).

²⁴² *Alderman v. United States*, 394 U.S. 165, 174 (1969).

²⁴³ *Combs v. United States*, 408 U.S. 224, 227 (1972).

²⁴⁴ *Payner*, 447 U.S. at 729-30.

²⁴⁵ *Id.* at 730.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 733.

²⁴⁹ *Id.*

advisal while playing with timing to drain the advisal of substance and effect. In pursuing the two-step strategy, investigators were combining the conduct rule gaming with a form of remedial rule gaming that played upon the rule of *Oregon v. Elstad*, holding that fruits of confessions taken in violation of *Miranda* are admissible.²⁵⁰

Indeed police training manuals played on the remedial gap posed by the *Elstad* fruits rule. For example, a publication of the Police Law Institute advised: “At any point during the pre-*Miranda* interrogation, usually after arrestees have confessed, officers may then read the *Miranda* warnings and ask for a waiver. If the arrestees waive their *Miranda* rights, officers will be able to repeat any subsequent incriminating statements later in court.”²⁵¹ In *Seibert*, counsel for Missouri similarly argued that the second confession was admissible because, under *Elstad*, the fruits of un-*Mirandized* confessions are admissible.²⁵²

The *Seibert* plurality refused to allow the government to game the rule of *Elstad*, holding this would “disfigure[.]” *Elstad*.²⁵³ The plurality distinguished *Elstad* as involving “innocent neglect” of *Miranda* and an “oversight.”²⁵⁴ Thus, at least for the midstream two-step *Miranda* strategy, the Court interposed an anti-gaming protection, albeit a limited rule patch when it comes to the two-step strategy.

2. Framing Rule Gaming

The third variant in the tripartite taxonomy, framing rule gaming, is the most subtle, mysterious, and potentially potent and intractable. Framing rule gaming involves playing upon the Court’s decisionmaking doctrines, particularly those that call for deference to considerations such as police experience and needs in the field,²⁵⁵ or

²⁵⁰ *Oregon v. Elstad*, 470 U.S. 298, 306 (1985).

²⁵¹ POLICE LAW MANUAL, *supra* note 96.

²⁵² *Missouri v. Seibert*, 542 U.S. 600, 614 (2004) (plurality opinion).

²⁵³ *Id.* at 614-15.

²⁵⁴ *Id.*

²⁵⁵ See, e.g., *Illinois v. Gates*, 462 U.S. 213, 230, 237-38 (1983) (adopting more flexible totality of circumstances standard for review of adequate probable cause out of deference to needs of police); *United States v. Cortez*, 449 U.S. 411, 418 (1981) (noting that “a trained officer draws inferences and makes deductions-inferences and deductions that might well elude an untrained person”); see also *Ornelas v. United States*, 517 U.S. 690, 699 (1996) (“A trial judge views the facts of a particular case in light of the distinctive features and events of the community; likewise, a police officer views the facts through the lens of his police experience and expertise. The background facts provide a context for the historical facts, and when seen together yield inferences that deserve deference.”); Douglas H. Ginsburg, *Of Hunches and Mere*

the Executive Branch,²⁵⁶ or noninquiry into matters such as a law enforcement officer's subjective intent,²⁵⁷ the manner in which an accused comes before the Court,²⁵⁸ or state secrets.²⁵⁹ The strategy is potent and potentially intractable because noninquiry and deference mean potential conduct rule subversion or outright violations simply do not come to light, and the questions remains murky and unresolved. Moreover, deference to law enforcement experience and interests mean power may proliferate to new contexts without a requirement of proof of assumptions undergirding the shift.

a. Gaming Rules of Noninquiry and Deference to the Executive

The first of three examples in this subsection takes up where subsection III.B.3 left off — the combining of conduct rule gaming using foreign proxies or U.S. operatives abroad to do what U.S. agents

Hunches: Two Cheers for Terry, 4 J.L. ECON. & POL'Y 79, 86 (2007) (analyzing cases with borderline and questionable reasonable articulable suspicion for *Terry* stop as illustrating how “the totality of the circumstances approach, in combination with deference to police officers’ experience, enables a court to avoid disturbing the officer’s judgment in any case that is close to the line drawn in *Terry*”); Wayne R. LaFave, “Case-by-Case Adjudication” Versus “Standardized Procedures”: *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 142-58 (arguing that Court shows solicitude for deferring to police judgment and police protection); Erik Luna, *Hydraulic Pressures and Slight Deviations*, 2008–2009 CATO SUP. CT. REV. 133, 146 (arguing that while Fourth Amendment’s consent doctrine “claims to evaluate voluntariness under the totality of the circumstances . . . in practice means that utter deference to law enforcement”).

²⁵⁶ See *Arar v. Ashcroft*, 585 F.3d 559, 565, 574-75 (2d Cir. 2009) (en banc) (declining to provide *Bivens* remedy because of “special factors” that it is for Executive to decide how to implement extraordinary rendition and Congress to decide whether and how to provide remedy), *cert. denied*, 130 S. Ct. 3409 (2010).

²⁵⁷ See, e.g., *Brendlin v. California*, 551 U.S. 249, 260 (2007) (noting Court has repeatedly refused to inquire into officers’ subjective intent in Fourth Amendment analysis); *Whren v. United States*, 517 U.S. 806, 813-14 (1996) (“Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”); *New York v. Quarles*, 467 U.S. 649, 656 (1984) (rejecting inquiry into subjective intent because “[i]n a kaleidoscopic situation such as the one confronting these officers . . . spontaneity rather than adherence to a police manual is necessarily the order of the day” and in such situation officers “act out of a host of different, instinctive, and largely unverifiable motives”).

²⁵⁸ See, e.g., *United States v. Alvarez-Machain*, 504 U.S. 655, 657, 662-70 (1992) (ruling Court need not inquire into how defendant came before Court and allegations of DEA paying off Mexican nationals to forcibly abduct him); see also *Ker v. Illinois*, 119 U.S. 436, 444 (1886) (ruling that forcible seizure in Peru and violent transfer into this country does not defeat jurisdiction over criminal case).

²⁵⁹ See *El-Masri v. United States*, 479 F.3d 296, 302-07, 312 (4th Cir. 2007) (dismissing suit because of successful assertion of state secrets privilege).

may not with framing rule gaming of doctrines of noninquiry and deference. The potency of this approach to deflect review is illustrated by the fact the federal courts have thus far declined to recognize a remedy for individuals subjected to harsh and degrading treatment under the Bush Administration's extraordinary rendition program.²⁶⁰ Cases have foundered on either the state secrets privilege²⁶¹ or the judiciary declining to allow a cause of action for money damages to remedy constitutional violations under *Bivens v. Six Unknown Named Agents* on the ground that the "special factors" of deference to the Executive and to Congress mean that the judiciary should bow out of policing constitutional protections.²⁶²

A common law evidentiary privilege with potentially strong force and teeth in the War on Terror era, the state secrets privilege is founded on deference to the President's authority over national security. The Supreme Court has indicated that the state secrets privilege has "constitutional overtones" stemming from the Executive's Article II authority to conduct foreign affairs and provide for the national defense.²⁶³ The privilege permits the government to prevent disclosure of information in a judicial proceeding if "there is a reasonable danger" that such disclosure "will expose military matters which, in the interest of national security, should not be divulged."²⁶⁴ Not only might the privilege deny plaintiffs key evidence to their suit and potentially result in dismissal on summary judgment, the privilege can be a basis for dismissal of a suit altogether where "the circumstances make clear that sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters."²⁶⁵

²⁶⁰ *E.g.*, *Arar*, 585 F.3d at 574-80; *El-Masri*, 479 F.3d at 302-07, 312; *see, e.g.*, *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85, 103-07, 119 (D.D.C. 2007); *see also* *Rasul v. Myers*, 512 F.3d 644, 663-65 (D.C. Cir. 2008) (holding that Guantánamo Bay detainees do not enjoy Fifth Amendment rights and, therefore, could not bring *Bivens* action), *vacated and remanded*, 129 S. Ct. 763 (2008) (ordering reconsideration in light of *Boumediene v. Bush*, 553 U.S. 723, 732 (2008) (holding that aliens held at Guantánamo Bay have constitutional right to habeas corpus)), *judgment reinstated*, 563 F.3d 527 (D.C. Cir. 2009).

²⁶¹ *El-Masri*, 479 F.3d at 302-07, 312.

²⁶² *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 395-96 (1971) (holding there is implied right of private cause of action for damages against federal officers); *Arar*, 585 F.3d at 574-80; *In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d at 103-07.

²⁶³ *United States v. Reynolds*, 345 U.S. 1, 6-7 (1953).

²⁶⁴ *Id.* at 10.

²⁶⁵ *El-Masri*, 479 F.3d at 302-07 (citing *Sterling v. Tenet*, 416 F.3d 338, 348 (4th Cir. 2005)); *see also* *Totten v. United States*, 92 U.S. 105, 107 (1875) (dismissing suit for compensation for death stemming from alleged contract for espionage).

The privilege was first recognized by the Supreme Court in *United States v. Reynolds*,²⁶⁶ a 1953 case involving a damages suit by widows of civilians killed in the crash of a B-29 aircraft. The widows sought the U.S. Air Force's official accident investigation reports and the three surviving crew members' statements about the incident.²⁶⁷ The Air Force Judge Advocate General filed an affidavit invoking the state secrets privilege, asserting the plane was on "a highly secret" Air Force mission and materials could not be released "without seriously hampering national security, flying safety and the development of highly technical and secret military equipment."²⁶⁸ The Court ruled that the Air Force need not disclose the documents — not even in camera and in chambers to the judge alone — due to the "privilege against revealing military secrets."²⁶⁹

In contemporary times, the state secrets privilege has played a role in averting review of the Bush Administration's extraordinary rendition program. In a decision affirmed by the Fourth Circuit, the Eastern District of Virginia relied on the state secrets privilege to dismiss a suit by German citizen Khaled El-Masri, alleging extraordinary rendition for physically violent and degrading interrogation. El-Masri alleged that he was kidnapped in Macedonia, beaten, stripped of his clothing, and sodomized, then drugged, degraded, and transported to Kabul, Afghanistan where he was beaten and detained for four months with the participation of a CIA "black renditions" team and two other Americans as well as Afghani authorities.²⁷⁰ The Director of the CIA submitted an ex parte classified declaration for the judge and an unclassified declaration for the public record.²⁷¹ The public-record declaration stated generally that damage to national security would result if the government were asked to admit or deny El-Masri's declarations.²⁷² The declaration to the judge argues that any admissions or denials of allegations concerning a clandestine intelligence program and the means and methods of implementing it would gravely endanger national security.²⁷³

²⁶⁶ 345 U.S. 1 (1953). For an in-depth history of the litigation, see, for example, LOUIS FISHER, *IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE* (2006).

²⁶⁷ *Reynolds*, 345 U.S. at 5.

²⁶⁸ *Id.* at 4-5.

²⁶⁹ *Id.* at 6-7, 10.

²⁷⁰ *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 532-34 (E.D. Va. 2006).

²⁷¹ *Id.* at 537.

²⁷² *Id.*

²⁷³ *Id.*

Accepting the Government's invocation of the privilege, District Judge T.S. Ellis dismissed El-Masri's suit on the ground that resolution of the suit would risk disclosure of state secrets, and no amount of effort and care would safeguard the privileged material.²⁷⁴ Judge Ellis concluded that "while dismissal of the complaint deprives El-Masri of an American judicial forum for vindicating his claims . . . El-Masri's private interests must give way to the national interest in preserving state secrets."²⁷⁵

Affirming the judgment, the Fourth Circuit agreed that the privilege was properly invoked even though some details of the government's extraordinary rendition program were public.²⁷⁶ Litigating the case would expose sensitive details about "how the CIA organizes, staffs, and supervises its most sensitive intelligence operations" and require witnesses whose very identities are state secrets.²⁷⁷ Moreover, the government could not mount a defense without privileged evidence, the Fourth Circuit concluded. For example, disputing El-Masri's claims about how he was interrogated would require disclosure of interrogation tactics, and disputing claims of CIA personnel involvement would reveal staffing information.²⁷⁸ The Fourth Circuit rejected El-Masri's argument for protective procedures that would still enable him to pursue his case, reading *Reynolds* as foreclosing even review by the judge alone of such state secrets.²⁷⁹

In short, the judiciary would close its eyes to El-Masri's allegations because of the state secrets privilege, with no requirement that there be alternative avenues of review or remedy through the coordinate branches. The Fourth Circuit was cognizant of "the gravity of [its] conclusion that El-Masri must be denied a judicial forum for his Complaint."²⁸⁰ Whether and if U.S. agents had transgressed constitutional conduct rules would remain shrouded in mystery.

Two other cases seeking redress for extraordinary rendition have foundered on the "special factors" doctrine of deference to the coordinate branches.²⁸¹ Most recently, on November 2, 2009, the

²⁷⁴ *Id.* at 539.

²⁷⁵ *Id.*

²⁷⁶ See, e.g., TREVOR PAGLEN & A.C. THOMPSON, TORTURE TAXI: ON THE TRAIL OF THE CIA'S RENDITION FLIGHTS (2006); Jane Mayer, *Outsourcing Torture: The Secret History of America's "Extraordinary Rendition" Program*, NEW YORKER, Feb. 14, 2005, at 106, available at http://www.newyorker.com/archive/2005/02/14/050214fa_fact6.

²⁷⁷ *El-Masri v. United States*, 479 F.3d 296, 308-09 (4th Cir. 2007).

²⁷⁸ *Id.* at 309.

²⁷⁹ *Id.* at 311.

²⁸⁰ *Id.* at 313.

²⁸¹ *Arar v. Ashcroft*, 585 F.3d 559, 563, 565, 572 (2d Cir. 2009) (en banc); *In re*

Second Circuit en banc in *Arar v. Ashcroft* affirmed dismissal of a *Bivens* action by a plaintiff seeking redress for alleged extraordinary rendition to Syria, where he was tortured.²⁸² The plaintiff, Maher Arar, alleged that he was seized and detained while changing planes at John F. Kennedy International Airport in New York, based on a warning by Canadian authorities that he was an Al Qaeda member. Arar was rendered to Syria via Jordan, where he was subjected to physical violence for twelve days, including beatings on his palms, hips, and lower back with an electric cable.²⁸³

The main issue that the Second Circuit sitting en banc considered was whether Arar could assert claims for detention and torture in Syria under the venerable vehicle for tort suits against federal officers for constitutional violations, *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*.²⁸⁴ In *Bivens*, the Supreme Court recognized an implied private right of action for damages against federal officers alleged to have violated a citizen's Fourth Amendment rights for the purpose of deterring officers from committing constitutional violations.²⁸⁵ While central to policing constitutional protections, *Bivens* is criticized as usurping the legislative role of creating rights of action.²⁸⁶ The Supreme Court has, therefore, been cautious in extending the judicially fashioned *Bivens* remedy to "new contexts"²⁸⁷ outside of its Fourth Amendment-protecting origins, recognizing only two more nonstatutory damages remedies, for employment discrimination in violation of the Due Process Clause²⁸⁸ and Eighth Amendment violations by prison officials.²⁸⁹ Since 1980, the Court has recognized no "new contexts" and has rejected a host of possible

Iraq & Afg. Detainees Litig., 479 F. Supp. 2d 85, 104-07 (D.D.C. 2007).

²⁸² *Arar*, 585 F.3d at 563, 574-80.

²⁸³ *Id.* at 563, 566.

²⁸⁴ 403 U.S. 388, 395-96 (1971).

²⁸⁵ *Id.* at 397; *see also* *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66, 70 (2001) (describing *Bivens* as "the first time" Court "recognized . . . an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights").

²⁸⁶ *E.g.*, *Wilkie v. Robbins*, 551 U.S. 537, 568 (2007) (Thomas, J., concurring); *Malesko*, 534 U.S. at 75 (Scalia, J., concurring); *Bivens*, 403 U.S. at 411, 418 (Burger, C.J., dissenting); *id.* at 427-28 (Black, J., dissenting); James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 *GEO. L.J.* 117, 118, 125-31 (2009); *cf.* ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* § 9.1.2, at 593-94 (4th ed. 2003).

²⁸⁷ *Malesko*, 534 U.S. at 68-69.

²⁸⁸ *Davis v. Passman*, 442 U.S. 228, 229-31 (1979).

²⁸⁹ *Carlson v. Green*, 446 U.S. 14, 16-18 (1980).

extensions.²⁹⁰ The Court has explained that the decision whether to recognize a *Bivens* remedy requires two considerations: (1) whether any “alternative existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages,” and (2) “even in the absence of an alternative,” whether “any special factors counsel[] hesitation before authorizing a new kind of federal litigation.”²⁹¹

The Second Circuit has held that extraordinary rendition is a new context for a *Bivens* claim.²⁹² The question then became whether to recognize a cause of action for the new context.²⁹³ The Second Circuit declined to consider whether any alternative remedial scheme was available because it found that “special factors” of impact on the Executive’s conduct of diplomacy, foreign policy, and national security in the extraordinary rendition context “sternly counsel hesitation.”²⁹⁴ The Second Circuit underscored the Supreme Court’s counsel that “matters touching upon foreign policy and national security fall within an area of executive action ‘in which courts have long been *hesitant* to intrude’ absent congressional authorization.”²⁹⁵ Moreover, adjudicating Arar’s claim would call for considering the classified material of three nations, the Second Circuit reasoned, a task ill-suited for courts, which are typically open-access and might lead to a “graymail” problem where the government will pay up rather than give up sensitive information.²⁹⁶

Thus, the decision-steering rules of the state secrets privilege and the “special factors” analysis about whether to extend *Bivens* actions effectively leave potential constitutional conduct rule violations shrouded in mystery and devoid of judicial deliberation. The potency of framing rule gaming is that police can transgress or push hard against constitutional norms with the security of knowing that the doctrines of nonadjudication will forestall consequences for the conduct. Even more problematically, courts eschewing scrutiny out of deference for the coordinate branches have also refrained from requiring data about whether the coordinate branches offer effective review or a remedy.

²⁹⁰ See *Arar v. Ashcroft*, 585 F.3d 559, 571-72 (2d Cir. 2009) (en banc) (citing cases).

²⁹¹ *Wilkie*, 551 U.S. at 550.

²⁹² *Arar*, 585 F.3d at 572.

²⁹³ *Id.*

²⁹⁴ *Id.* at 573.

²⁹⁵ *Id.* at 575 (quoting *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993)).

²⁹⁶ *Id.* at 578-79.

b. *Gaming Deference to Law Enforcement*

The second example is not from the more exotic and mysterious cross-border context, but from the criminal procedure of the everyday. In framing rules of constitutional criminal procedure, the Supreme Court shows deference to the needs of law enforcement officers in the field.²⁹⁷ Some of the most important cases of criminal procedure shaping the everyday experiences and liberties of every person who drives or walks down the street are founded on these rules of deference.

An example involves one of the most controversial everyday powers of police — the ability to initiate a *Terry* stop and frisk. The police power to stop and frisk was a flashpoint in communities of color in the 1960s even before the Supreme Court blessed the tactic in *Terry v. Ohio*. Though it noted that stop and frisk tactics “are a major source of friction between police and minority groups,” *Terry* held that stops and frisks are permissible based on the lower standard of reasonable articulable suspicion.²⁹⁸ More than four decades later, the power to stop and frisk remains a flashpoint today, as the number of police stops soar even as crime rates decrease — and the brunt of the tactic is borne by Blacks and Latinos.²⁹⁹ The available data in New York, for example, collected under the terms of a settlement of a racial profiling suit,³⁰⁰ indicates that eighty-three percent of people stopped by the New York Police Department in 2008 were African-American or Latino.³⁰¹

²⁹⁷ See, e.g., *Maryland v. Wilson*, 519 U.S. 408, 412-13 (1997) (automatic power to order passenger out of stopped car without requirement of reasonable suspicion passenger poses danger); *Maryland v. Buie*, 494 U.S. 325, 334 (1990) (automatic precautionary power to search closets and other spaces immediately adjoining place of arrest from which attack could be immediately launched, regardless of whether officers have probable cause or reasonable suspicion); *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) (automatic power to order driver out of car in routine traffic stop regardless of whether officers have reason to suspect foul play from motorist); *United States v. Robinson*, 414 U.S. 218, 233-39 (1973) (automatic power to search person of suspect incident to arrest regardless of lack of reasonable basis to believe suspect poses risk of danger to officers or destruction of evidence).

²⁹⁸ *Terry v. Ohio*, 392 U.S. 1, 14 n.11, 30, 35 (1968).

²⁹⁹ In 2008, for example, New York Police Department data on *Terry* stops indicate that of 531,159 people stopped, eighty-three percent of those stopped were Black or Latino. Colleen Long, *People Stop More than 1 Million People on Street*, SEATTLE TIMES, Oct. 8, 2009, http://seattletimes.nwsourc.com/html/nationworld/2010026963_apusstopandfrisk.html; see ELIOT SPITZER, THE NEW YORK CITY POLICE DEPARTMENT’S ‘STOP AND FRISK’ PRACTICES: A REPORT TO THE PEOPLE OF THE STATE OF NEW YORK FROM THE OFFICE OF THE ATTORNEY GENERAL 94-95 (1999).

³⁰⁰ *Daniels v. New York*, 99 Civ. 1695, 198 F.R.D. 409, 2001 WL 62893 (SAS), Stipulation of Settlement (S.D.N.Y. Jan. 31, 2000).

³⁰¹ Long, *supra* note 299; see also Andrew Gelman, Jeffery Fagan & Alex Kiss, *An Analysis of the New York City Police Department’s “Stop-and-Frisk” Policy in the Context*

The difficulty in piercing the opacity surrounding the practice to stop and frisk stems from deference to the needs of law enforcement in the street. This is illustrated by the main case in which the Supreme Court addressed concerns about racial profiling, *Whren v. United States*.³⁰² In *Whren*, D.C. police officers became suspicious upon seeing young black men in a truck with temporary license plates in what they termed a “high drug area.”³⁰³ What was so suspicious about being young, Black, in a disadvantaged community and driving a truck with lawful temporary license plates? According to the officer, his suspicions were roused when the driver looked into the passenger’s lap and paused at an intersection for more than twenty seconds.³⁰⁴ These actions — that people lawfully in a truck frequently perform for myriad lawful reasons — led the officers to flip around in a U-turn to tail the truck.³⁰⁵ Followed by officers, the truck turned right without signaling and proceeded at what officers deemed an “unreasonable speed.”³⁰⁶ The officers thereupon stopped the car, walked up, and, according to their testimony, saw two large plastic bags of what looked like crack cocaine blatantly in plain view in defendant *Whren*’s hands.³⁰⁷

Appealing their narcotics-related conviction, the defendants argued that because driving is extensively regulated by myriad spongy provisions, such as the requirement that driving must be at a speed “reasonable and prudent under the conditions” or that the driver must give “full time and attention” to vehicle operation, police have ample cover to pursue a pretextual stop.³⁰⁸ As students introduced to *Whren* learn, police can always follow a car on public streets until they catch some traffic violation, such as a failure to signal on a turn by individuals nervous about being tailed. Police, therefore, have nearly unconstrained power to target individuals for little more than being young, Black, and male.³⁰⁹

The Supreme Court in *Whren* rejected the defendants’ request that the Court intervene to mitigate the risk of racial targeting. The Court first reiterated that constitutional criminal procedure — particularly

of *Claims of Racial Bias*, 15 J. AM. STAT. ASS’N 46, 821-22 (2007).

³⁰² *Whren v. United States*, 517 U.S. 806 (1996).

³⁰³ *Id.* at 808.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.* at 808-09.

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 809.

³⁰⁹ *See id.*

Fourth Amendment jurisprudence — generally eschews case-specific inquiry into the subjective motivations of officers.³¹⁰ One of the main explanations for this stance is that the necessarily quick ad hoc judgment calls that officers make on the street are not susceptible to a step-by-step analysis.³¹¹ The second oft-invoked reason is that the administrative difficulties, such as lengthy hearings, involved in assessing police motives is a substantial cost not worth the marginal increase in protection.³¹² The overarching concern is that the fluid and flexible police judgment calls made on the street should not be burdened by the probability of post hoc scrutiny and extensive examination and questioning of motives. In other words — the perceived need to defer to police outweighed concern for potential incursions on constitutional commitments.

In *Whren*, therefore, the defendants searched for a way around the general rule of noninquiry into subjective intent and tried to argue instead that the test should be whether a reasonable officer would have made the stop in light of customary police practices.³¹³ Writing for a unanimous Court, Justice Scalia dismissed the notion as even more unworkable than inquiry into officers' subjective intent, calling the exercise of "speculating about the hypothetical reaction of a hypothetical constable" akin to "virtual subjectivity."³¹⁴ Moreover, what a reasonable officer would do varies from place to place and time to time, and the Fourth Amendment could not be so variable.³¹⁵ *Whren* concluded that in "the run-of-the-mine case," there was "no realistic alternative" to the customary rule of deeming a search justified without further inquiry if officers could point to probable cause.³¹⁶ Case closed.

³¹⁰ E.g., *Brendlin v. California*, 551 U.S. 249, 260 (2007) (explaining that Court repeatedly rejected attempts to introduce subjectivity into Fourth Amendment analysis); *Devenpeck v. Alford*, 543 U.S. 146, 153-54 (2004) (holding that objective circumstances, rather than subjective police motives or knowledge, control analysis of reasonableness of arrest); *Whren*, 517 U.S. at 813 ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."); *Scott v. United States*, 436 U.S. 128, 136 (1978) ("Subjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional."); *United States v. Robinson*, 414 U.S. 218, 221 & n.1, 235 (1973) (holding that traffic-violation arrest is not invalid even if it was "a mere pretext for a narcotics search").

³¹¹ E.g., *Robinson*, 414 U.S. at 235.

³¹² See *Rakas v. Illinois*, 439 U.S. 128, 136-37 (1978) (explaining concern).

³¹³ *Whren*, 517 U.S. at 813-14.

³¹⁴ *Id.* at 814-15.

³¹⁵ *Id.* at 815.

³¹⁶ *Id.* at 819.

But the case is not closed, of course, for communities of color where racial profiling remains an open wound and where perceived incongruity can perpetuate continued segregation and other harms.³¹⁷ Many innocent people — often Black men across class lines — have been subjected to humiliating stops and seizures.³¹⁸ Some argue that disproportionate targeting may reflect an uneven distribution of criminal activity across communities, with impoverished communities where people of color are often concentrated suffering from higher amounts of crime and higher racial group representation in crime statistics.³¹⁹ A study based on Los Angeles data between July 2003 and June 2004 by Professor Ian Ayres found, however, that even controlling for a host of variables, including uneven distribution of crime statistics across communities, African Americans and Latinos are “over-stopped, over-frisked, over-searched, and over-arrested.”³²⁰ The report found that, per 10,000 residents:

- The Black stop rate is 3,400 stops higher and the Latino stop rate is nearly 360 stops higher than the White stop rate.³²¹
- Stopped Blacks are 127% more likely to be frisked and stopped than Whites; Latinos are 43 percent more likely to be frisked.³²²

³¹⁷ For compelling analyses, see, for example, DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE CRIMINAL JUSTICE SYSTEM* 27-41, 48-52 (1999); I. Bennett Capers, *Policing, Race and Place*, 44 *HARV. C.R.-C.L. L. REV.* 43, 56-72 (2009).

³¹⁸ See, e.g., Alison Bath, *Day 1: Racial Profiling? Traffic Citations Database Shows Blacks Cited More Often for Traffic Offenses*, *SHREVEPORT TIMES*, Mar. 9, 2010, <http://www.shreveporttimes.com/apps/pbcs.dll/article?AID=/99999999/NEWS01/801200301> (analyzing data); Richard A. Fausset & P.J. Huffstutter, *Black Males' Fear of Racial Profiling Very Real, Regardless of Class*, *L.A. TIMES*, July 25, 2009, <http://articles.latimes.com/2009/jul/25/nation/na-racial-profiling25> (detailing experiences); Transcript, *Is Racial Profiling Real?*, THINK TANK WITH BEN WATTENBERG (PBS broadcast July 19, 2001), available at http://www.pbs.org/thinktank/show_967.html (statements of Paul Butler) (discussing phenomenon).

³¹⁹ E.g., Heather MacDonald, *What Looks Like Profiling Might Just Be Good Policing*, *L.A. TIMES*, Jan. 19, 2003, available at http://www.manhattan-institute.org/html/_latimes-what_looks_like.htm; see also Kelly Welch, *Black Criminal Stereotypes and Racial Profiling*, 23 *J. CONTEMP. CRIM. JUST.* 276, 277 (2007) (examining such stereotypes).

³²⁰ Ian Ayres & Jonathan Borowsky, *A Study of the Racially Disparate Outcomes in the Los Angeles Police Department*, *ACLU* at 3, 33 (Oct. 2008), available at <http://www.aclu-sc.org/documents/view/47>.

³²¹ *Id.* at 33.

³²² *Id.*

In the decade since *Whren*, therefore, the problem of profiling has persisted while *Whren* stands as a controversial landmark of noninquiry and “a license to make racial distinctions.”³²³ *Whren* is a lightning rod for controversy because the Court took a don’t ask, don’t tell approach allowing police to do whatever it takes — without examining the accuracy of police beliefs about what it takes, basing deference on noninquiry rules rather than data. Only after extensive effort by impact litigation organizations like the ACLU and NAACP, and suits for structural reform brought by the United States under 42 U.S.C. § 14141, which authorizes injunctive relief to address a pattern or practice of deprivation of constitutional rights, have profiling data begun to emerge several decades after *Whren*.³²⁴ Hard-fought suits that lead to successful settlements can spur information cascades by making a problem politically salient, spurring legislative action, or giving impetus to departments voluntarily to adopt measures rather than face suit.³²⁵ The extensive time and effort poured into such data-forcing impact litigation illustrates, however, the high costs posed by opacity and judicial noninquiry.

IV. ANTI-GAMING STANDARDS

The dilemma of policing the police is that we yearn for aggressive tactics against the bad guys. Closing our eyes to police rule-pushing and ducking, however, means aggressive and transgressive tactics may be used against everyone. The challenge is to sort through the mixed messages sent to police and spell out minimum conceptions of what is fair versus foul play. The first step towards addressing problematic

³²³ Devon W. Carbado & Rachel F. Moran, *The Story of Law and American Racial Consciousness: Building a Canon One Case at a Time*, 76 U. MO. KAN. CITY L. REV. 851, 873-74 (2008).

³²⁴ See, e.g., Consent Decree, *United States v. City of Los Angeles*, Civil No. 00-11769-GAF (C.D. Cal. June 15, 2001) (example of consent decree); Memorandum of Understanding between the U.S. Dep’t. of Justice and the City of Cincinnati, Ohio and Cincinnati Police Dep’t, Case No. C-1-99-317 (S.D. Ohio Apr. 12, 2002) (example of settlement); *Daniels v. New York*, 99 Civ. 1695 (SAS), Stipulation of Settlement (S.D.N.Y. Jan. 31, 2000) (providing example of settlement).

³²⁵ Indeed, today, about half of the states have enacted some form of anti-racial profiling legislation. AMERICAN CIVIL LIBERTIES UNION, *THE PERSISTENCE OF RACIAL AND ETHNIC PROFILING IN THE UNITED STATES: A FOLLOW-UP REPORT TO THE U.N. COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION* 40 (2009) (survey of state legislation summarizing state legislative developments). Police Departments have also voluntarily begun collecting data to self-monitor in the wake of successful suits in other jurisdictions. See Michael E. Buerger & Amy Farrell, *The Evidence of Racial Profiling: Interpreting Documented and Unofficial Sources*, 5 POLICE Q. 272, 273-74 (2002) (summarizing reforms).

police gaming is this fundamental task of defining and understanding the problem. The preceding two parts of this Article were, therefore, focused on this foundational task. With the foundational understanding in place, we also have a basis to consider further approaches to shore up the zones most subject to problematic police gaming and remedying the problem. Anti-gaming approaches can operate at different junctures of the criminal justice process. Ideally, we need better steering in advance of action as well as an approach that enables more efficient self-monitoring by the police to ensure compliance and remedies during and after decisionmaking.

This section proposes deploying anti-gaming standards in particularly risk-prone zones for police to help better steer decisions in advance. The next section explores the possibility of incorporating data-development remedial rules to enable more efficient and effective self-policing by the police and remedies in the event of error during and after decisionmaking. Other creative strategies are certainly possible. This Article is, therefore, an invitation to a discussion, as well as a vehicle for forwarding remedial proposals. The proposals for redress offered below are among the ways we can think outside the current box of constitutional criminal procedure, with vantage enhanced by peering into and beginning to understand the opaque domain of police gaming. Moving beyond bright-line fetishism is a starting point.

A. *Beyond Bright-Line Fetishism*

Gaming of the rules in constitutional criminal procedure is facilitated by what Professor Albert Alschuler has memorably dubbed the Supreme Court's "bright-line fever"³²⁶ in choosing rules rather than standards to regulate the police. One of the framing approaches prevalent in constitutional criminal procedure is a preference for bright-line categorical rules that apply across cases rather than standards requiring police to consider whether the reasons justifying an incursion on liberty, privacy, and security are present.³²⁷ Rules generally have a simpler operation: if condition A exists, you may do B.³²⁸ For example, *Belton's* bright-line rule, as construed by the police

³²⁶ See Alschuler, *supra* note 28, at 229 (analyzing how Supreme Court opted for bright-line rules in formulating guidelines for police).

³²⁷ See, e.g., *Maryland v. Shatzer*, 130 S. Ct. 1213 (2010) (explaining preference).

³²⁸ Wayne R. LaFare, *The Fourth Amendment in an Imperfect World: On Drawing 'Bright Lines' and 'Good Faith'*, 43 U. PITT. L. REV. 307, 326-27 (1982).

and the majority of lower courts until *Gant*, was that if officers arrested someone in or near a car they could search it automatically.³²⁹

The assumption underlying the preference for bright-line rules is that they are more easily administrable by officers who have to make on-the-fly judgment calls. Experience has shown better, however. Police gaming, particularly in “high-risk” zones where the potential evidentiary gain is high, has been among the pressures behind the proliferation of rules making criminal procedure akin to the notoriously complex tax code.³³⁰ Just as tax law has become riddled with elaborations and exceptions in a struggle to differentiate between legitimate and illegitimate tax avoidance, so too has constitutional criminal procedure had to deal with gaming of the rules by highly sophisticated actors.

In the abstract, categorical rules have the seeming advantage of simplified administration, predictability, and the diminution of the need for on-the-spot judgment calls that may be colored by subjective differences between officers.³³¹ In reality, of course, as the trajectory of criminal procedure doctrine has amply demonstrated, rules can be complex, unpredictable, and difficult to administer when they become a tangle of cross-cutting exceptions that try at once to accommodate law enforcement rule-pushing and shut down the most egregious forms of gaming.³³² Even a seemingly bright-line rule in practice requires contextual judgment calls and refinements that muddy the imagined clarity of a rule. For example, as Justice Stevens writing for the Court in *Gant* observed, a host of questions have arisen despite the seeming bright-line *Belton* rule that a car can be searched incident to arrest such as how close in time the search must be to the arrest and how proximate the first contact with the arrestee must be to the vehicle.³³³

We can no longer claim the advantage of clarity or simplicity in the preference for categorical rules. Yet the preference for categorical rules persists as does the notion that they are better suited for steering law

³²⁹ See *New York v. Belton*, 453 U.S. 454, 460 (1981) (“[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.”).

³³⁰ See Steven A. Saltzburg, *The Fourth Amendment: Internal Revenue Code or Body of Principles?*, 74 GEO. WASH. L. REV. 956, 957 (2006).

³³¹ *Id.* at 227-28.

³³² Cf. White, *supra* note 78, at 1670 (explaining how lack of clarity and complexity of rules in constitutional criminal procedure stems in part from police rule-pushing).

³³³ See *Arizona v. Gant*, 129 S. Ct 1710, 1720 (2009).

enforcement officers. Part of the lingering preference is founded on the caricatured conception of the officer in the field. As Alschuler observed wryly, “[i]f the Supreme Court’s assertion of the need for bright line rules is taken at face value,” the officer is conceived of as a dimwitted, hulking Officer Gazenga:

Gazenga is a good officer. He has memorized all 437 Supreme Court bright line rules for search and seizure. For example, Gazenga has made a lawful arrest in a car. Gazenga rip that car apart! But Gazenga never touch trunk of car unless there is probable cause, for Gazenga has read footnote 4 of *Belton* opinion.

Now Gazenga has made a lawful arrest in a house. Different bright line rule apply to a house. Gazenga may search glove compartment of car when suspect far away, but may not search desk drawer in living room unless suspect right there. Why? Supreme Court say so. Gazenga just a cop.³³⁴

Of course officers are much smarter and more should be expected. The challenge is how we can reorient criminal procedure in practicable ways to communicate such expectations and better elicit such behavior.

B. *Anti-Gaming Standards*

As the primary code regulating police, constitutional criminal procedure needs to be attuned to approaches that foster the development and internalization of constitutional values and empower adjudicators to check police power without further complicating the maze of criminal procedure. Law enforcement cannot be entirely encased in rules because the nature of the work entails strategic planning and subjective judgment that cannot be monitored at every moment. Rather than spew a tangle of rules, constitutional criminal procedure must also deploy anti-gaming standards that better inform officer judgment based on the principles and purposes behind legal mandates and empower adjudicators to check officers without further complicating the labyrinthine maze of rules that comprise criminal procedure.

The argument is not about which legal form is superior — both rules and standards have their merits. The argument is that we have neglected the merits of standards in informing police judgment and

³³⁴ Alschuler, *supra* note 28, at 285-86.

empowering adjudicators to check transgressions. Better balancing of bright-line fetishism with anti-gaming standards can help cultivate principle-guided organizational culture and cut down on the need for a thicket of rules and exceptions and the resulting proliferation of complexity that defeats the goal of effective and efficient guidance. The approach also would help plug gaps and ambiguities in the law, and allow for more responsive and efficient guidance in high-risk zones where the incentive to game is greatest.

1. Cultivating a Principle-Guided Police Organizational Culture

Constitutional criminal procedure's framing approach can draw a lesson from the insights of scholars of organizational management. Police practices stem from organizational culture because police are shaped, socialized, trained, monitored, and evaluated by departments and vocational collectivities.³³⁵ Professional organizations cultivate what sociologist Pierre Bourdieu would term the *habitus* of police officers, that is, the ingrained habitual ways of thinking, perceiving, judging, and acting that are conditioned through the everyday experience of customs, norms, and education within the group.³³⁶

Many organizations have the goal of fostering ethical behavior in the sense of adherence to the spirit or purpose of the rules.³³⁷ Managers realize that rules can only do so much in constraining and steering behavior because the point of having people perform tasks is to have human judgment in the myriad situations that arise in the course of work. The goal is not to have rules disappear, but to ensure that principles guide police behavior to the point where the rules are automatically adhered to and variation in conduct around the target value is reduced.³³⁸ Defining the target principle and communicating the principle to police departments is a critical aspect of achieving the aim of conditioned adherence as a matter of orientation.³³⁹

³³⁵ For an examination of police regulation from the organizational management perspective, see, for example, R.R. ROBERG & J. KUYKENDALL, *POLICE ORGANIZATION AND MANAGEMENT: BEHAVIOR, THEORY AND PROCESSES* (1990).

³³⁶ The notion of *habitus* in Pierre Bourdieu's work takes different shapes. For articulations, see, for example, PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* 17, 78-86 (Richard Nice trans., 2002) (1977); PIERRE BOURDIEU, *PRACTICAL REASON: ON THE THEORY OF ACTION* 8-9 (1998); Richard Terdiman, *Translator's Introduction, to Pierre Bourdieu, The Force of Law: Toward a Sociology of the Legal Field*, 38 *HASTINGS L.J.* 805, 807, 811 (1987).

³³⁷ Val D. Hawks et al., *Establishing Ethics in an Organization by Using Principles*, 10 *SCI. & ENGINEERING ETHICS* 259, 262 (2004).

³³⁸ *Id.* at 264.

³³⁹ *Id.* at 262-65.

Standards serve the important role of communicating and educating regarding the underlying principles. A standard in lieu of a rule can educate in a more robust manner and change perception regarding entitlement to the exercise of power. For example, a standard that vehicle may be searched incident to arrest only if there is a reasonable basis to believe there is a need to avert destruction of evidence or danger to officers encapsulates the balance struck in the limited grant of power and the reasons for it. The standard also communicates that searches incident to arrest are not a prerogative if an officer finds a basis for an arrest. Rather, the standard communicates the underlying logic that the power is an exception to the default rule of protection against intrusive practices. In contrast, a bright-line rule that if you arrest near a car you can search it, sends a much different message of prerogative that the Court in *Gant* deplored.

Standards also reflect that we expect more out of officers than operating at an Incredible Hulk level of moral development. We expect actions to be guided by larger principles. Inducing functioning at a more advanced level of moral reasoning may also offer the collateral benefit of bias suppression by eliciting greater deliberation rather than rote application of a rule. Studies suggest that those operating at a higher stage of moral development suppress biases such as self-interest and pre-conceived notions, in making judgments.³⁴⁰ The potential of bias suppression is tantalizing in the domain of criminal law and procedure where too often, we see disparities that may result from unconsciously harbored implicit bias based on negative perceptions of people of color.³⁴¹

³⁴⁰ Liisa Myrsky & Klaus Helkama, *Moral Reasoning and the Use of Procedural Justice Rules in Hypothetical and Real-Life Dilemmas*, 15 SOC. JUST. RES. 373, 374, 384 (2002).

³⁴¹ For some of the rich literature on implicit bias, see, for example, Gary Blasi, *Advocacy Against the Stereotype: Lessons from Cognitive Social Psychology*, 49 UCLA L. REV. 1241 (2002); Joshua Correll et al., *The Police Officer's Dilemma: Using Ethnicity To Disambiguate Potentially Threatening Individuals*, 83 J. PERS. & SOC. PSYCH. 1314, 1325 (2002); Scott W. Howe, *The Futile Quest for Racial Neutrality in Capital Selection and the Eighth Amendment Argument for Abolition Based on Unconscious Racial Discrimination*, 45 WM. & MARY L. REV. 2083, 2094-06 (2004); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1506-14 (2005); Rory K. Little, *What Federal Prosecutors Really Think: The Puzzle of Statistical Race Disparity Versus Specific Guilt, and the Specter of Timothy McVeigh*, 53 DEPAUL L. REV. 1591 (2004); Jeffrey J. Pokorak, *Probing the Capital Prosecutor's Perspective: Race of the Discretionary Actors*, 83 CORNELL L. REV. 1811, 1819 (1998); 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 (2003).

The Supreme Court has recently pointed to the “increasing professionalism of police forces” as a basis for shifting constitutional criminal procedure’s remedial stance.³⁴² It is time to expect more in terms of behavior as well and to break from the doctrinal tendency to treat police as jocks who should not be asked to think too much on the fly and in the field.³⁴³

2. Reducing Rule Proliferation and Complexity and Plugging Gaps

Standards also diminish the need for a complicated host of rules. Albert Alschuler has influentially argued that Fourth Amendment law, the main code regulating police, is incomprehensible not because of the lack of categorical rules, but because there are too many.³⁴⁴ As organizational management scholars have noted, skewing too far toward preferring rules risks “fall[ing] victim to volumes of specific laws and rules that must undergo constant modification and addition” — even as “behavior worsens and many spend their time trying to find ways around the specifications at best, or even worse, gradually loosen specifications in an attempt to reduce violations.”³⁴⁵ Standards, in contrast, are elastic enough to capture an array of situations that may arise and steer judgment in advance by embodying the principles that we want to guide officers.

Elevating standards above rule-think can also help guide judgment in areas of legal ambiguity and plug “holes” in protections created by jurisdictional gradients or playing through proxies. A prime contemporary example is the ambiguity surrounding physically coercive interrogations abroad. As the Supreme Court began realizing the human costs of a hands-off approach to police regulation through early graphic and shocking cases such as *Brown v. Mississippi* involving interrogation by whipping and simulated hanging, the Court ruled that the use of confessions obtained through methods “revolting to the sense of justice” violated constitutional due process.³⁴⁶ The due process standard evolved over time to a less visceral gut-reaction formulation to the more familiar and law-like voluntariness standard based on whether the defendant’s “will was overborne.”³⁴⁷ This

³⁴² *Hudson v. Michigan*, 547 U.S. 586, 598 (2006).

³⁴³ See *supra* Part I.

³⁴⁴ Alschuler, *supra* note 28, at 287.

³⁴⁵ Hawks et al., *supra* note 337, at 266.

³⁴⁶ *Brown v. Mississippi*, 297 U.S. 278, 286 (1936).

³⁴⁷ See, e.g., *Lynumn v. Illinois*, 372 U.S. 528, 534 (1964) (cataloguing cases moving to voluntariness standard and inquiry as to whether defendant’s will was overborne).

standard has a historical antecedent in the Court's early decision in *Bram v. United States*, excluding involuntary statements made to Canadian officials by a ship officer suspected of murder under the Fifth Amendment privilege against self-incrimination.³⁴⁸ Voluntariness and protection against methods such as violent interrogation or sleep deprivation to overbear a suspect's will is a minimum constitutionally compelled baseline distinct from the infamously controversial "prophylactic" *Miranda* advisal requirement.³⁴⁹ The extent of constitutional regulation of incriminating statements extracted abroad through violence or other coercive methods calculated to overbear a suspect's will is unclear, however, particularly if the interrogators are foreign actors rather than U.S. law enforcement.³⁵⁰ The unstable and seesawing constitutional status of *Miranda* and potential distinctions in the level of protection for *Miranda*'s prophylactic protections compared to the clearly constitutionally compelled requirement of voluntariness further deepen the murk.

An overly rule-bound way of examining the issue leads to a proliferation of complexity and potential gaps for gaming. Does our tolerance for admitting statements obtained in ways that would violate the Constitution change if the statements are taken abroad?³⁵¹ If the

³⁴⁸ See *Bram v. United States*, 168 U.S. 532, 542-45 (1897) (excluding statements made to Canadian agents as involuntary and, therefore, inadmissible under Fifth Amendment privilege against self-incrimination).

³⁴⁹ The Supreme Court has seesawed over whether *Miranda* is constitutionally compelled. Compare, e.g., *Dickerson v. United States*, 530 U.S. 428, 438-41 (2000) (holding *Miranda* is constitutionally compelled and may not be overruled by Congress, despite prior language in opinions suggesting that *Miranda* is prophylactic and sweeps beyond Constitution's requisites), with *United States v. Patane*, 542 U.S. 630, 639 (2004) (plurality) (holding that *Miranda*'s "prophylactic" protections sweep more broadly than Constitution requires).

³⁵⁰ See, e.g., Jenny-Brooke Condon, *Extraterritorial Interrogation: The Porous Border Between Torture and U.S. Criminal Trials*, 60 RUTGERS L. REV. 647, 672 (2008) (noting lack of clarity); Darmer, *Confessions Law in an Age of Terrorism*, *supra* note 232; Robert Iraola, *A Primer on Issues Surrounding the Extraterritorial Apprehension of Criminals*, 29 AM. J. CRIM. L. 1, 19 (2001) (noting that "the extraterritorial effect" of protections surrounding interrogation "has yet to be fully addressed by the Supreme Court" and that in 2001, the start of the War on Terror era, when the question became pressing, the "few cases that have confronted these questions . . . suggest that a confession obtained by American law enforcement officials must be voluntary before it is admitted into evidence and that (at the minimum) modified *Miranda* warnings are applicable in the case of a confession given by a foreign national in a foreign country to American law enforcement officers").

³⁵¹ Cf. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (noting "not every constitutional provision applies to governmental activity [abroad] even where the United States has sovereign power").

statements are taken by foreign actors *and* while abroad?³⁵² If the statements are taken by foreign actors abroad but with some involvement by U.S. agents?³⁵³ If the statements are taken abroad by foreign actors with “substantial” involvement by U.S. agents making the interrogation a “joint venture” that would trigger even the controversial *Miranda* protections?³⁵⁴ What constitutes “substantial” involvement, and is shipping a suspect overseas for interrogation abroad by foreign agents substantial enough?³⁵⁵ And does protection differ depending on whether the person being interrogated is a U.S. national, a resident alien, or an alien who lacks “substantial connections” to the United States?³⁵⁶ Moreover, does *that* question in

³⁵² Compare, e.g., *United States v. Karake*, 443 F. Supp. 2d 8, 52-53 (D.D.C. 2006) (holding that involuntary statements extracted by foreign officials abroad must be excluded under Due Process Clause), with *Colorado v. Connelly*, 479 U.S. 157, 163-64 (1986) (holding that Due Process Clause regulates overreaching of state actors and absent conduct by state actor causally connected to extraction of statements, there is no due process violation), *United States v. Wolf*, 813 F.2d 970, 973 n.3 (1967) (noting that *Connelly* has cast “serious doubt” on continuing vitality of prior holding that due process requires exclusion of involuntary statements extracted by foreign agents), and *Condon*, *supra* note 350, at 672-73 (noting that *Connelly* has cast doubt on whether Due Process Clause applies to involuntary statements extracted by foreign actors); Darmer, *Confessions Law in an Age of Terrorism*, *supra* note 232, at 364-65 (noting that after *Connelly*, pressure imposed by foreign agents may arguably not implicate constitutional protections concerning involuntary statements).

³⁵³ Cf. M. Katherine B. Darmer, *Reliability, Waterboarded Confessions and Reclaiming the Lessons of Brown v. Mississippi in the Terrorism Cases*, 66 GUILD PRAC. 18, 29-30 (2009) [hereinafter *Waterboarded Confessions*] (arguing that involvement of U.S. officials in extraordinary rendition constitutes deterrable U.S. government actor behavior that should trigger constitutional regulation).

³⁵⁴ Cf. *United States v. Yousef*, 327 F.3d 56, 145-46 (2d Cir. 2003) (noting that statements taken by foreign agents abroad are admissible if voluntary regardless of whether *Miranda* warnings were administered unless “joint venture” exception applies based on “substantial” involvement by U.S. agents).

³⁵⁵ See *United States v. Abu Ali*, 528 F.3d 210, 229 (4th Cir. 2008) (noting that only few cases illuminate what might constitute “substantial” participation and “mere presence” at interrogation is insufficient).

³⁵⁶ Compare, e.g., *United States v. Balsys*, 524 U.S. 666, 671 (1998) (“Resident aliens . . . are considered ‘persons’ for purposes of the Fifth Amendment and are entitled to the same protections under the [Self-Incrimination] Clause as citizens.”), and *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (“The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons [i.e., non-citizens] from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.”), with *United States v. Verdugo-Urquidez*, 494 U.S. 259, 268-69, 271-72 (1990) (noting “we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States” and holding that Fourth Amendment does not protect against search abroad of home of foreign national lacking “substantial connections” to United States). *But see*, e.g., *In re*

turn depend on whether one is talking about “fundamental” Fifth and Fourteenth Amendment due process protections rather than the Fifth Amendment privilege against self-incrimination?³⁵⁷ And does the applicability of protections abroad also vary depending on whether at issue is the *Miranda* prophylactic protections for the Fifth Amendment privilege against self-incrimination rather than the *Bram* exclusion of statements involuntarily extracted in a particular case under the Fifth Amendment privilege?³⁵⁸

While courts have indicated that statements that do not satisfy the minimum baseline standard of voluntariness are inadmissible, even if extracted by foreign agents,³⁵⁹ the Supreme Court’s decision in *Colorado v. Connelly* has been construed to cast some doubt on this.³⁶⁰ *Connelly* had nothing to do with brutal or coercive methods by a foreign agent abroad at all, however. In *Connelly*, a mentally ill individual argued that his confession was involuntary because he was compelled by the voices in his head to speak.³⁶¹ The Court held there must be action by a state actor and police overreaching for admission of assertedly involuntary statements to implicate the Due Process Clause, and asserted voices in one’s head do not count.³⁶² The creative

Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 177, 201 (2d Cir. 2008) (holding that “foreign nationals interrogated overseas but tried in the civilian courts of the United States are protected by the Fifth Amendment’s self-incrimination clause”). For analyses of the revival of the notion of citizenship as a basis for constitutional rights and the blurry rights-citizenship linkage, see, for example, Linda Bosniak, *Constitutional Citizenship Through the Prism of Alienage*, 63 OHIO ST. L.J. 1285, 1308-11 (2002) (discussing implications of revival); Mary De Ming Fan, *Citizenship Perception Strain in Cases of Crime and War: On Law and Intuition*, 2010 MICH. ST. L. REV. 1, 16-33 (2010) (analyzing slippery significance of citizenship for protections in crime and war).

³⁵⁷ See *Verdugo-Urquidez*, 494 U.S. at 268-69 (noting applicability of constitutional protections in territories depending on whether right is “fundamental” or not). See also source cited *supra* note 356 (contrasting Court’s different pronouncements).

³⁵⁸ Cf. *Yousef*, 327 F.3d at 145 (noting settled law that statements taken by foreign police without *Miranda* warnings are admissible if voluntary).

³⁵⁹ E.g., *Brulay v. United States*, 383 F.2d 345, 348-49 & n.3 (9th Cir. 1967) (applying *Bram* Fifth Amendment protection against admission of involuntary statements to statements extracted by foreign agents).

³⁶⁰ See, e.g., *United States v. Wolf*, 813 F.2d 970, 973 n.3 (1967) (noting that *Connelly* has cast doubt on continuing vitality of *Brulay*’s exclusion of statements extracted by foreign agents on voluntariness grounds); Condon, *supra* note 350, at 672-73 (noting uncertainty after *Connelly*); Darmer, *Waterboarded Confessions*, *supra* note 351, at 364-65 (noting that after *Connelly*, due process voluntariness review may not apply to statements extracted by foreign agents).

³⁶¹ *Colorado v. Connelly*, 479 U.S. 157, 161, 163-64 (1986).

³⁶² *Id.* at 164.

stretch of a defense argument in *Connelly* is a far cry from the government attempting to build a case based on involuntary statements extracted by foreign actors through violence, threat of violence, or other infirm tactics. For *Connelly*'s inapposite situation to trump the general principle would be to allow hyperliteral and slavish rule-think to lead us to lose sight of the larger and longstanding principle.

A lot of the confusion, profusion of potential rules, and ambiguity stems from losing sight of the overarching baseline principle in focusing on how far the many offshoots and possible permutations of rules may extend. A simpler approach steered by overarching principle is to reaffirm that the government may not make its case based on involuntary statements extracted through methods that affront constitutional due process such as torture, violence, or the threat of violence. The idea was elegantly stated by the Court in an earlier epoch before the advent of rule fetishism: "A coerced confession is offensive to basic standards of justice, not because the victim has a legal grievance against the police, but because declarations procured by torture are not premises from which a civilized forum will infer guilt."³⁶³ This standard could guide and govern in a range of situations, obviating the need for a complex profusion of rules. In contrast, an approach that tries to regulate through a welter of rules — for example, if abroad + foreign agent + foreign national suspect + no U.S. agent involvement in interrogation, albeit involvement in deportation, then permissible; if abroad + foreign agent + U.S. national + no implicit or explicit U.S. agent involvement then permissible, and so on — adjusts distinctions with much less difference and import than the overarching principle that gets lost in the details.

3. The Virtues of Supple Standards in High-Risk Zones

One can see the benefits of bright-line rules in some instances while also appreciating the need for anti-gaming standards. The point is that we need a more nuanced approach as to when we prefer categorical rules and when we might prefer standards. We particularly are plagued with the proliferation of rule complexity and rule-pushing when the stakes, in terms of direct evidentiary pay-off, are high. In contrast, bright-line rules offer the anticipated benefits of clarity, simplicity, and predictability in domains where there is not as much at stake in circumvention of the rules. Thus, for example, bright-line rules regarding the ability to order suspects out during a stop are less

³⁶³ Lyons v. Oklahoma, 322 U.S. 596, 605 (1944).

prone to abuse because the anticipated evidentiary gain is slight and indirect. The pay-off of having bright-line rules in terms of clarity and administrative ease is thus realized in these situations. Indeed, we have not seen as pronounced a proliferation of complexity in the wake of *Pennsylvania v. Mimms*, giving police the automatic power to order motorists out of a car,³⁶⁴ or *Maryland v. Wilson*, giving police the automatic power to order passengers out of a car.³⁶⁵

In dealing with issues where the temptation to transgress is greatest, we should deploy anti-gaming standards to supplement bright-line rules. For example, the rule that police generally may not search someone's car or personal possessions without a warrant and probable cause would still apply. To constrain gaming around the rule, standards would supplement the rule. Examples of standards supplementing rules include the *Chimel* requisite that searches incident to arrest are justified if there is a threat to officer safety or risk of destruction of evidence. In contrast, where there is not much at stake in terms of evidentiary "gains" if rules are pushed, such as the ability to order passengers out of a car for officer safety, the benefits of bright-line rules without the cross-hatch of standards can be enjoyed.

Anti-gaming standards, therefore, call for judicial consideration of the prospect of police gaming. Where the risk is high, because at issue is the power to obtain evidence otherwise out of reach, we should supplement rules with anti-gaming standards. The elasticity of standards means that potential abuses of constitutional values can be shut down without necessitating a rule change or new rules. Anti-gaming standards, therefore, serve the interests of legal economy as well as officer education.

The two highest-risk zones occur at the threshold of the ability to search and thus gain evidence, or the ability to interrogate and thus secure the "queen of proofs"³⁶⁶ — the confession that is often critical to closing a case and getting a guilty plea in a reality where more than ninety percent of cases conclude by plea bargain.³⁶⁷ The very thicket of

³⁶⁴ *Pennsylvania v. Mimms*, 434 U.S. 106, 110-11 (1977).

³⁶⁵ *Maryland v. Wilson*, 519 U.S. 408, 413-15 (1997).

³⁶⁶ In Anglo-American law, the confession has long been regarded as "the queen of proofs." EDWARD PETERS, *TORTURE* 41 (1985).

³⁶⁷ See, e.g., Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 *CORNELL L. REV.* 697, 698 (2002) (noting more than ninety percent of cases end in plea bargain); Roger A. Fairfax, Jr., *Grand Jury Innovation: Toward a Functional Makeover of the Ancient Bulwark of Liberty*, 19 *WM. & MARY BILL RTS. J.* 339, 340 (2010) (noting more than ninety percent of cases end in plea bargain). For influential analyses of the heavy systemic reliance on plea bargains, see, for example, Stephanos Bibas, *Plea Bargaining Outside the Shadow of*

rules surrounding these powers reflects the Supreme Court's recognition that these are particular investigative junctures prone to abuse of power. The proliferation of rule complexity in these domains particularly demonstrates how bright-line rules do not give the promised benefit of simplicity and relative administrative ease and comes at the substantial cost of sacrificing the elasticity and educative value of standards.

To move from the abstract to the concrete: what would a choice of an anti-gaming standard to supplement a bright-line rule look like? An example arises from *Missouri v. Seibert*, involving the interrogate-first, *Miranda*-advisal-later procedure. The baseline bright-line rule is that police must administer a *Miranda* warning to suspects undergoing custodial interrogation. In *Seibert*, the problem was how to deal with gaming around this baseline rule. The Court turned to an anti-gaming standard as a limited patch. To circumvent the two-step tactic to disable the efficacy of *Miranda* advisals, the plurality of Justices Souter, Stevens, Ginsburg, and Breyer required that a subsequent advisal must function as effectively as *Miranda* requires in putting the suspect in an informed position, offering a real choice regarding whether to give a statement, and communicating that the suspect may stop speaking despite a prior statement.³⁶⁸ This is a good step forward in the particularly sensitive domain of extracting confessions, where stakes are high.

Justice Breyer's concurrence in *Seibert* offers an example of a more efficient and effective anti-gaming standard because it applies more widely, to forestall and simplify the law across a span of contexts rather than operating as a post hoc patch. Justice Breyer called for a good-faith standard in evaluating failures to offer *Miranda* warnings coupled with the requirement of an effective advisal once the mistake is realized.³⁶⁹ His rule was simple and administrable: exclude "the 'fruits' of initial unwarned questioning unless the failure to warn was in good faith."³⁷⁰

Trial, 117 HARV. L. REV. 2463, 2471-72 (2004) (analyzing systemic use of plea bargains); Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 622-24 (2005) (analyzing heavy reliance on plea bargains); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 30-40 (2002) (noting heavy reliance and debunking false dichotomy of plea bargains versus trials).

³⁶⁸ *Missouri v. Seibert*, 542 U.S. 600, 611-12 (2004).

³⁶⁹ Justice Breyer began by stating the "simple rule should apply to the two-stage interrogation technique." *Id.* at 617 (Breyer, J., concurring). As advocated above, however, the approach would be more efficient and less complicated as a general guide in the context of police questioning rather than limited to just one problematic tactic.

³⁷⁰ *Id.*

This approach underscores what we really want officers to be doing in the difficult task of policing — acting in good faith.

The guidance given to police through such a standard would be more than just how to proceed following an initial failure to administer *Miranda* warnings. The message sent is that it is illegitimate to try to sidestep *Miranda*'s requirements — police are answerable for a failure to advise and must articulate why a failure was a good-faith mistake and how they tried to cure it to realize *Miranda*'s purpose and protections. The good-faith standard is familiar in criminal law and procedure, though it is becoming increasingly more forgiving of police. In its most recent pronouncement on the scope of the good-faith exception to exclusion of evidence, the Supreme Court held that negligent mistakes by police still qualify for the good-faith exception to exclusion because conduct must be “sufficiently deliberate” to be deterrable and “sufficiently culpable that such deterrence is worth the price paid by the justice system.”³⁷¹

It may seem counterintuitive to deploy standards in high-risk zones where the temptation towards transgression is greatest. After all, are not rules understood to be discretion-constraining and standards prone to abuse of discretion?³⁷² The argument is not about sacrificing the constraining cross-hatch of rules or the power of rules in holding recalcitrant or conflicted actors to normative commitments. Rather, anti-gaming standards are supplements to trigger police internalization of the reasons behind the rules and empower adjudicators to call a foul through interpretation of an open-textured standard without the need to announce a new rule.

We live in reality and are trying to improve a system run by fallible hardened humans dealing with some of the unhappiest aspects of reality. Problematic police gaming will occur. Anti-gaming standards will make it harder, however, to game. Most importantly, the aim of anti-gaming standards is to cultivate an understanding and internalization of constitutional values as something more than an obstacle course of bright-line rules. Moreover, when police play overly aggressively, standards need not grow new limbs of exceptions in order to call a foul. Unlike categorical rules, which tend to require new offshoots to address alternate plays, rendering the hoped-for bright line more akin to a Ganesh in form, standards are elastic enough to foreclose conduct as an aspect of elaboration and education

³⁷¹ *Herring v. United States*, 129 S. Ct. 695, 698, 704 (2009).

³⁷² *Cf. Shiffrin*, *supra* note 33, at 1244-45 (suggesting that rules may be wise where standards may be subject to abuse, for example, by prosecutors, or “where the law plays a leadership role in establishing new standards and moral progress”).

about the meaning of a principle. In short, anti-gaming standards make it harder to game the rules of criminal procedure and easier and less costly to block problematic practices.

V. DATA-DEVELOPMENT REMEDIAL RULES

A second strategy to redress problematic police gaming operates at the level of remedies. In an era where the exclusionary rule's cutback has proceeded apace³⁷³ and its possible demise is debated,³⁷⁴ now is a particularly opportune time to consider how adjustments to the predominant remedial approach may address the police gamesmanship dilemma. This Article proposes the incorporation of what it terms "data-development remedial rules" to supplement the ever-receding and narrowing exclusionary rule, either operating in tandem, or alone when exclusion is not offered as a remedy.

A. *Supplementing the Embattled and Eroded Exclusionary Rule*

The oft-repeated criticism of the exclusionary rule is that society suffers when the constable blunders because the remedy is deprivation of information, distorting the truth-finding process.³⁷⁵ Because of the "substantial social costs exacted" by exclusion, the contemporary Supreme Court has held that exclusion — though often the only realistically available remedy³⁷⁶ — should be the "last resort."³⁷⁷

³⁷³ See, e.g., *Herring*, 129 S. Ct. at 698, 704 (holding that costs of exclusion are too high to offer remedy for negligent police error leading to wrongful arrest and search); *Hudson v. Michigan*, 547 U.S. 586, 591-94 (2006) (refusing to apply exclusionary remedy for knock-and-announce violation prior to entry into home). For recent commentary on the cutback, see, for example, David B. Owens, Comment, *Fourth Amendment Remedial Equilibrium: A Commentary on Herring v. United States and Pearson v. Callahan*, 62 STAN. L. REV. 563, 565-70 (2010).

³⁷⁴ See, e.g., Thomas K. Clancy, *The Irrelevancy of the Fourth Amendment in the Roberts Court*, 85 CHI.-KENT L. REV. 191 (2010) (predicting demise of, or at least substantial limits on, exclusionary rule); Donald Dripps, *The Fourth Amendment, the Exclusionary Rule, and the Roberts Court: Normative and Empirical Dimensions of the Over-Deterrence Hypothesis*, 85 CHI.-KENT L. REV. 209 (2010) (predicting retention of exclusionary rule or revival if discarded).

³⁷⁵ Justice Cardozo framed the iconic refrain in *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926). The concern has steered recent cases portending the cutback of the exclusionary remedy based on severe criticism of its costs. See also David A. Harris, *How Accountability-Based Policing Can Reinforce — or Replace — the Fourth Amendment Exclusionary Rule*, 7 OHIO ST. J. CRIM. L. 149, 190 (2009).

³⁷⁶ See *Herring*, 129 S. Ct. at 702 n.4, 707 (emphasizing that even today, exclusionary rule "is often the only remedy effective to redress a Fourth Amendment violation" because civil remedies are often precluded and criminal or administrative sanctions rarely pursued).

Indeed, distaste and reluctance concerning the remedy of exclusion have led increasingly to decisions to offer no remedy at all.³⁷⁸ For example, recently in *Herring v. United States*, the Supreme Court concluded that the costs of exclusion were too high to offer the remedy for negligent police error that lead to an unlawful arrest and search incident to the arrest.³⁷⁹

There is also an open empirical debate as to whether the exclusionary rule adequately deters violations. Study findings are mixed.³⁸⁰ What is clear is that police have plenty of incentive to transgress rules, even if they face exclusion. The fruits of unlawful searches and seizures can be used to impeach if a suspect goes to trial,³⁸¹ deterring defendants from taking the stand, or forcing defendants to limit their stories if they do testify. Fruits of unlawful searches and seizures are also admissible in grand jury proceedings,³⁸² parole revocation hearings,³⁸³ deportation hearings,³⁸⁴ and civil investigations by agencies like the Internal Revenue Service.³⁸⁵

Criminal procedure has been in search of an alternate remedial approach to replace the embattled exclusionary rule. One of the main contenders in the literature is damages of varying degrees of refinement.³⁸⁶ The Supreme Court has generally shown great concern, however, that damages will overdeter and chill vigorous policing because officers will ease up on the job rather than face individual

³⁷⁷ *Hudson*, 547 U.S. at 591.

³⁷⁸ *Herring*, 129 S. Ct. at 698, 704 (no remedy for wrongful arrest and search incident to arrest); *Hudson*, 547 U.S. at 594 (no remedy for knock-and-announce violation prior to entry into home).

³⁷⁹ *Herring*, 129 S. Ct. at 698, 704.

³⁸⁰ Surveys of police suggest that they do care about exclusion of evidence — particularly in bigger profile cases where embarrassment is greater — and pursue insulating behavior, such as trying to obtain warrants if possible, to avoid exclusion. E.g., L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 IOWA L. REV. 669, 709-11 (1998); Myron W. Orfield, Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1017-1018, 1039 (1987). Yet studies also suggest the exclusionary rule is not a significant influence on most officers in deciding whether to search or seize. Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 369 & nn.6, 8 (summarizing studies).

³⁸¹ *United States v. Havens*, 446 U.S. 620, 626-28 (1980).

³⁸² *United States v. Calandra*, 414 U.S. 338, 347-48 (1974).

³⁸³ *Penn. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 369 (1998).

³⁸⁴ *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1042-44 (1984).

³⁸⁵ *United States v. Janis*, 428 U.S. 433, 447-48 (1976).

³⁸⁶ See, e.g., Slobogin, *supra* note 380, at 364 (proposing monetary penalties approach as primary regulator).

liability. The recent decision in *Pearson v. Callahan*³⁸⁷ holding that litigants alleging violations of constitutional rights can have their suits dismissed without even a pronouncement as to whether the conduct alleged violates the Constitution so long as the violation is not “clearly established” does not portend a liberalization of the damages avenue any time soon. In practice, therefore, damages will probably remain a rarely viable remedy for defendants and thus insufficient as a supplement to the eroded exclusionary rule.

Data-development remedial rules can help tackle the problem of the opacity of problematic police gaming practices. The idea behind data-development remedial rules is to generate socially valuable information rather than controversially depriving the polity of information when the constable blunders. Data-development remedial rules can ameliorate the opacity that facilitates problematic police gamesmanship. The data-development approach draws insights from the notion of information-forcing rules more familiar in the realm of contracts. Information-forcing rules are a way to induce better informed and more sophisticated parties to reveal information that may otherwise be strategically withheld. One strategy of the information-inducing approach is to set default terms in a manner to incentivize the sophisticated actor to aim to modify the default terms and reveal information in the process.³⁸⁸

In the criminal procedure context law enforcement officers and agencies are sophisticated repeat players in the best position to collect, aggregate and report data and rationales. Though best situated to produce and share information, law enforcement officials have strategic incentives to withhold information that would better inform doctrine and judicial and public deliberation. The perverse incentive arises because the law enforcement “share of the pie” — power — increases with information withholding though the “size of the pie” — total collective benefit and enriched deliberation over the propriety of police practices — increases with more information revelation.³⁸⁹

One way to give police incentive to produce more information is to set a remedial penalty default that gives police departments incentive to engage in voluntary information production about the frequency of the violation identified and steps taken to avoid it in the future. An information-generating approach has potentially greater deterrent

³⁸⁷ 129 S. Ct. 808, 816-17 (2009).

³⁸⁸ See Ayres, *supra* note 34, at 597; Ayers & Gertner, *supra* note 34, at 90, 97-101.

³⁸⁹ See Ayres & Gertner, *supra* note 34, at 97-101 (arguing that penalty defaults should be set against parties who strategically withhold information that, if shared, would increase the size of pie because they want bigger slice of pie).

value than the eroded exclusionary rule. Even when it applies, the exclusionary rule does not as directly impact police interests because the investigation is still closed and off the books even if the job of the prosecutor in attaining conviction is harder. In contrast, an information-generating approach operates directly on departmental self-interest, which internalizes the full cost and deterrent force of the remedy because whether information-generation is court-ordered or voluntary, the department has to bear the full burden of the remedy.

While we can conceive of an array of penalty defaults that might give police incentive to produce information voluntarily to avoid the default, it is important to select a default that offers sufficient incentive to police to choose the preferable route of voluntary data-generation and one that courts are willing to deploy in appropriate cases. An array of potential penalty defaults are conceivable. I propose three to begin the conversation.

A strong but potentially controversial penalty default to condition cooperation is court-ordered production of information and potential institutional reforms upon identification of a violation. Courts have increasing experience with data-generating reforms and other structural reforms in overseeing consent decrees and memoranda of understanding arising from structural reform civil suits for constitutional violations by police departments.³⁹⁰ When faced with a choice between clumsy court-imposed data-gathering and remedial regimes or a self-designed approach, police and courts have an incentive to prefer voluntary data generation to design a plan that better fits organizational structure and needs.

The first option is likely to be controversial because the penalty default of court-ordered data-gathering and remedial regimes rouses and raises the longstanding debate about how courts are ill suited to intervene so directly in police practices.³⁹¹ This debate has led to

³⁹⁰ See, e.g., *United States v. City of Los Angeles*, 288 F.3d 391, 396-97 (9th Cir. 2002) (detailing entry into consent decree and adjudicating who may intervene); *Jackson v. City of Pittsburgh*, 688 F. Supp. 2d 379, 397 (W.D. Pa. 2010) (noting that consent decree “imposed federal oversight on the Pittsburgh Police”); *Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 12-13 (D.D.C. 2001) (referring to consent decrees in Pittsburgh, Steubenville, and New Jersey).

³⁹¹ See, e.g., Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 786-790 (1970) (exploring reasons why judiciary has difficulty assuming effective supervisory or disciplinary role over police); Richard E. Myers, II, *Detector Dogs and Probable Cause*, 14 GEO. MASON L. REV. 1, 29-31 (2006) (analyzing limitations of courts in supervising police practices and particular challenge posed by evolving techniques of investigation and collecting literature). Cf. Stephen J. Schulhofer, *The Constitution and the Police: Individual Rights and Law Enforcement*, 66 WASH. U.L.Q. 11, 19 (1988) (arguing “[i]n our constitutional

deference to the political branches to act in a number of controversial criminal contexts even though when it comes to protections that may be perceived to benefit criminals and impede the police, legislatures are hesitant to intervene.

A potentially more palatable alternative penalty default in the event of noncooperation is referral of the police department to the U.S. Department of Justice for investigation pursuant to 42 U.S.C. § 14141 into whether there is a pattern or practice of violations. If an investigation is launched, the penalty default is powerful because investigations can lead to not only data-gathering reforms but other structural reforms. Moreover, the Department of Justice has already been designated by Congress to pursue structural reform litigation under 42 U.S.C. § 14141 and is a better-suited actor to negotiate reforms.

An even milder and less costly potential penalty default would be to begin keeping score of findings of violative practices and reporting the record to the Department of Justice for possible inclusion on a watch list. A high score of accumulated identified violations would potentially put a department at risk of placement on a priority investigation list.³⁹² Here, the penalty default has less teeth in prodding police to choose voluntary data-generation, because unlike the first approach, the choice is not between clumsy court-ordered reform versus voluntary data-gathering and remedial plans, or investigation that could lead to even more costly structural reforms versus voluntary data-gathering. The penalty default force of this softer approach to induce voluntary data-collection depends on the likelihood of the Department of Justice ultimately launching an investigation. As the number of reports accumulate, there will be a tipping point where there will be a strong incentive to prefer voluntary data-generation and self-monitoring and remedial plans.

Pursuing a data-generating remedial approach would be at the judge's discretion as a supplemental remedy upon finding a violation in a particular criminal case. The discretion would be exercised based on the judge's experience on the front lines with cases involving the particular police agencies as to whether there is need for more information and monitoring. Judges in courts of first instance have

mythology, the job of courts, after all, is to find law, to ascertain the rights of the individual, not to balance costs and benefits like a legislature, or even a construction engineer").

³⁹² For an intriguing proposal to better leverage Department of Justice resources for investigations under 42 U.S.C. § 14141 by using a priority list of police departments to investigate, see Rachel Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 27-34 (2009).

ringside seats to the testimony and challenges of the litigants and daily exposure to the diet of criminal cases in the region and practices of the area's police. They are, therefore, well situated to spot whether there is a need to inquire as to a potential pattern or practice of violations.

Data-development remedial rules more delicately navigate the tensions between the need for a remedy that imposes sufficient costs to deter violations and the problem of overdetering vigorous law enforcement. The costs of data generation are borne by a department rather than an individual officer, avoiding the chilling effect that is produced by damages suits against individual officers. Moreover, data generation produces the social good of better information for the public and avoids the controversial critique of the exclusionary rule that the "criminal goes free when the constable blunders."³⁹³

B. Enriching Public Knowledge and Deliberation When the Constable Blunders

It is better, where possible, to have the police voluntarily cooperate in the production of data and, if needed, design of institutional reforms. It is cheaper to change a cooperating entity rather than imposing clumsy top-down measures from a distance on a recalcitrant organization. The penalty default strategy thus has the benefit of giving the police a push to cooperate in improved information-gathering to gain more rigorous data to guide decisionmaking and public deliberation. A push is needed to facilitate better judicial as well as public deliberation. Even as it has ratcheted back the availability of a remedy, members of the Supreme Court have suggested the possibility that the Court's stance on such matters as illegal arrests and searches due to police record-keeping errors or knock and announce rule violations might shift if data were supplied suggesting a pattern or rash of violations.³⁹⁴ Yet how are individual criminal defendants, who are often indigent and represented by overworked appointed counsel, to come by the data? A data-development remedial rule would help overcome the structural barriers to better-informed decisionmaking.

³⁹³ See, e.g., *United States v. Colbert*, 474 F.2d 174, 179 (1973) (Goldberg, J., dissenting) ("It may offend many people that under our system of criminal justice the criminal goes free when the constable blunders, but such is the law of the land.").

³⁹⁴ *Herring v. United States*, 129 S. Ct. 695, 698, 704 (2009) (suggesting that exclusionary rule might apply to illegal arrests and searches due to record-keeping errors "where systemic errors were demonstrated"); *Hudson v. Michigan*, 547 U.S. 586, 604 (2006) (Kennedy, J., concurring) ("If a widespread pattern of [knock and announce rule] violations were shown . . . there would be reason for grave concern.").

The benefits of better data for public deliberation over police tactics is demonstrated by the New York City Police Department's collection of data on *Terry* stops and frisks. Political momentum for data-gathering ignited after mass protests erupted in New York over the fatal shooting of Amadou Diallo, an unarmed West African immigrant in the Bronx by four police officers in 1999.³⁹⁵ The Center for Constitutional Rights sued the city for data after the Diallo killing.³⁹⁶ The resulting data-gathering measures adopted have documented the disparate impact of *Terry* stops, showing for example that Black and Latino people were nine times more likely to be stopped than Whites in 2009.³⁹⁷ Hard-fought lawsuits by impact litigation groups have begun an information cascade when it comes to the problem of racial profiling that has festered for decades. About half of the states have introduced racial profiling legislation, often requiring data collection, and some police departments have also begun voluntarily collecting data on the issue after successful suits in other jurisdictions.³⁹⁸

An unarmed man should not have to be shot to death before costly institutional reform impact litigation succeeds in bringing police practices to light. Decades should not have to pass before costly and slow civil suits begin to prevail in securing consent decrees for reform and data-gathering. Structural reform civil suits, whether brought by organizations like the ACLU and NAACP or by the Department of Justice under its 42 U.S.C. § 14141 authority are extremely costly, slow, and rare. Successful suits by individuals are even less likely because they depend on a victim having the access to resources and extraordinary determination to bring civil suit — which may falter on the police-protective qualified immunity doctrine.

Indeed, compared to the host of criminal cases in which the law has been clarified by defendants seeking exclusion of evidence, civil cases presenting criminal procedure questions are rare indeed. Professor Donald Dripps has observed that only four damage actions against police have lead to substantive Fourth Amendment decisions by the Court, laying aside a small cluster of cases on the execution of search warrants.³⁹⁹ A data-development remedial strategy would lower the

³⁹⁵ Al Baker, *New York Minorities More Likely To Be Frisked*, N.Y. TIMES, May 13, 2010, at A1; Jane Fritsch, *Four Officers in Diallo Shooting Are Acquitted of All Charges*, N.Y. TIMES, Feb. 26, 2000, at A1.

³⁹⁶ Baker, *supra* note 395.

³⁹⁷ *Id.*

³⁹⁸ Buerger & Farrell, *supra* note 325, at 273-74.

³⁹⁹ Dripps, *supra* note 374, at 209, 235.

obstacles to obtaining information to facilitate detection of problematic police gaming. Moreover, the prospect of monitoring through data generation exerts its own control function. The greater transparency produced by data generation is a strategy of police Panopticism⁴⁰⁰ in which police subject to the watchful gaze of courts, the public and self-surveillance behave in better conformity with expectations.

CONCLUSION

The specter of police gaming haunts constitutional criminal procedure, difficult to detect and something we have been afraid to fully confront. Police gamesmanship presents a dilemma because on the one hand, the law and polity want police to be aggressive and willing to get muddy in dealing with the bad guys. On the other hand, we are worried enough about overly aggressive policing to enshrine constitutional protections and a phalanx of rules against it because policing affects the lives of everyone, everyday, criminal or innocent. Because of this ambivalence, constitutional criminal procedure doctrine has been murky and reticent in defining the line between fair and foul play. But defining this line is crucial to conditioning better behavior and alleviating one of the pressures behind the ever-proliferating complex of piecemeal patches. This Article's exploration of the line between desirable police innovation and problematic rule subversion and taxonomy of the main forms of problematic police gaming are offered toward this goal.

With this foundation, we have a clearer vantage to conceive of ways to curtail undesirable gaming and imagine a remedial regime that can better inform deliberation and surface problems earlier as well as deter. Police gaming is not going to go away altogether. When it comes to such tough problems that are submerged and not wholly soluble, however, surfacing the problem and mitigating the harm are worthy goals.⁴⁰¹ In a time of foment, as the Court adjusts constitutional criminal procedure's rules and remedies, leading to numerous new criminal procedure cases decided in recent years, the time is right for creative approaches that supplement constitutional

⁴⁰⁰ See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 201 (1991) (developing as metaphor for control notion of Panoptic prison in which prisoners arrayed in transparent cells self-police).

⁴⁰¹ See Stuntz, *supra* note 20, at 2142 (“[W]ith unsolvable problems, mitigation of harm is a worthy goal.”).

criminal procedure's predominant decision-framing approaches and remedial strategies to better address the problem of police gaming.

Incorporating anti-gaming standards in high-risk zones where the temptation to game is highest and monitoring is hard can help trigger internalization and implementation of constitutional values and steer officer judgment. Standards are also more elastic than brittle bright line rules and can block gaming through interpretation without the need for fashioning new rules.

Data-development remedial rules can improve the aim of deterrence through an approach that leads to police rather than prosecutors internalizing the costs. Data-development remedial rules also allow society to gain in information and deliberation rather than lose when the constable undermines constitutional protections. Calibrating incentives to encourage voluntary police self-monitoring and data generation has the dual benefit of more efficient monitoring and the generation of information to surface problems earlier and permit better-informed deliberation and reform.