

10-2015

# Regulation or Resistance: A Counter-Narrative of Constitutional Criminal Procedure

Alice Ristroph

*Brooklyn Law School*, [alice.ristroph@brooklaw.edu](mailto:alice.ristroph@brooklaw.edu)

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/faculty>

 Part of the [Criminal Procedure Commons](#), [Fourth Amendment Commons](#), and the [Law Enforcement and Corrections Commons](#)

---

## Recommended Citation

95 B.U. L. Rev. 1555 (2015)

This Article is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of BrooklynWorks.

---

**REGULATION OR RESISTANCE?  
A COUNTER-NARRATIVE OF CONSTITUTIONAL  
CRIMINAL PROCEDURE**

ALICE RISTROPH\*

INTRODUCTION .....	1556
I. THE PROBLEM OF THE STATE .....	1565
A. <i>In the Beginning Were the Police</i> .....	1565
B. <i>Out From the Garden</i> .....	1574
C. <i>Turtles All the Way Down</i> .....	1580
II. "A STRUGGLE FROM START TO FINISH" .....	1581
A. <i>Conditions for Punishment</i> .....	1583
B. <i>Motions of Resistance</i> .....	1593
C. <i>Adjudication as Articulation</i> .....	1601
III. EXCLUSION AND OTHER DOCTRINAL IMPLICATIONS .....	1605
A. <i>Exclusion and Fourth Amendment Reasonableness</i> .....	1606
B. <i>Coercion, Consent, and Waiver</i> .....	1611
CONCLUSION.....	1616

*As soon as modern constitutional criminal procedure appeared, the police were at center stage. In judicial opinions and in academic commentary, the Fourth Amendment and some provisions of the Fifth and Sixth Amendments have been framed for decades as regulations of the police. The regulatory project is now widely viewed as a failure, and some judges and many commentators seem ready to abandon, or at least scale back dramatically, the whole field of constitutional criminal procedure. But the framing of that field as police regulation was always a mistake. The enterprise of constitutional criminal procedure is, by design, a vehicle for defendants to resist punishment rather than a mechanism to regulate police. The prototypical Fourth or Fifth Amendment claim alleges police misconduct, to be sure, but the immediate goal is not better policing. Instead, the prototypical claim is an individual's act of resistance against state coercion: it is an effort to avoid punishment by claiming that the state has overstepped its powers. Regulatory effects of such a claim are derivative of, and subsidiary to, the resistance. Importantly, the*

---

\* Professor of Law, Seton Hall University School of Law. For helpful feedback on earlier drafts of this project, I am grateful to Kip Cornwell, Eric Miller, Melissa Murray, David Pozen, John Rappaport, Jocelyn Simonson, Chris Slobogin, and Jim Whitman. Thanks also to participants at faculty workshops at Seton Hall and Columbia and at the 2014 CrimFest conference at Rutgers-Newark Law School.

*defendant's act of resistance is itself constitutionally sanctioned. The Bill of Rights sets conditions for legitimate punishment, including minimum standards for investigative procedures. Thus it is open to individual defendants to resist punishment by alleging an unreasonable search or seizure, or an unconstitutional interrogation. We should recognize and even celebrate this resistance as part of a truly adversarial system. Even when punishment is ultimately and appropriately imposed, the resistance itself pushes the state to articulate and defend the principles of coercion that underlie the operation and enforcement of the criminal law.*

#### INTRODUCTION

The Fourth, Fifth, and Sixth Amendments have been among the most jurisgenerative provisions of the Constitution: at least until recently, the Supreme Court has devoted more attention to the interpretation of the Fourth Amendment than to any other constitutional provision, and the Fifth and Sixth Amendments' implications for interrogations and confessions are also frequently adjudicated.<sup>1</sup> What occupies the Court occupies scholars, and constitutional criminal procedure has produced a vast secondary literature.

Most of this scholarship is critical. The "constitutionalization" of criminal procedure has drawn critics from the moment of its inception, first from those who saw the Warren Court as meddling unnecessarily in the affairs of law enforcement, then from those who complained about the subsequent limitations of Warren Court precedents, and most recently from those who see judicial efforts to constrain police conduct as at best ineffective, and at worst counterproductive. A chorus of scholars, though fully engaged in the effort to regulate the police, have urged that the effort be reoriented away from the Constitution.<sup>2</sup> At the same time, some members of the Court seem increasingly inclined to abandon, or at least scale back dramatically, the exclusionary rule,<sup>3</sup>

---

<sup>1</sup> For a helpful aggregation of statistics on Fourth Amendment cases from 1959 through 2009, see Thomas Y. Davies, *The Supreme Court Giveth and the Supreme Court Taketh Away: The Century of Fourth Amendment "Search and Seizure Doctrine"*, 100 J. CRIM. L. & CRIMINOLOGY 933, 1040-41 tbl.1 (2010); see also *Hudson v. Michigan*, 547 U.S. 586, 613 (2006) (Breyer, J., dissenting) (stating that the Court decided 332 Fourth Amendment cases between 1914 and 2002); TRACEY MACLIN, *THE SUPREME COURT AND THE FOURTH AMENDMENT'S EXCLUSIONARY RULE* xi (2013) (claiming that the Fourth Amendment is the most frequently litigated constitutional provision). As discussed below, the prevalence of Fourth Amendment litigation may decline substantially given the Court's most recent limitations on the exclusionary rule.

<sup>2</sup> See *infra* Section I.B.

<sup>3</sup> By "the" exclusionary rule, I mean the general principle that evidence obtained pursuant to a constitutional violation is not admissible in a criminal trial. As a doctrinal matter, the Supreme Court has in fact distinguished separate exclusionary rules, with different scopes, for the Fourth, Fifth, and Sixth Amendments. See, e.g., *United States v. Leon*, 468 U.S. 897, 906-08 (1984) (describing the scope of the exclusionary rule in Fourth Amendment cases). I discuss these separate doctrinal exclusionary rules in Part III.

even if (or perhaps because) this step would reduce significantly Fourth and Fifth Amendment litigation.<sup>4</sup> The Fourth, Fifth, and Sixth Amendments have been jurisgenerative, and commentary-generative, but is it time to say goodbye to all that?

We should first be sure that we understand just what it is that we would abandon. On the prevailing account, the enterprise of constitutional criminal procedure is the regulation of the police.<sup>5</sup> The Fourth Amendment, the Fifth Amendment privilege against compelled self-incrimination, and to a lesser extent, the Sixth Amendment right to counsel are understood to set minimal standards for police conduct. Notably, none of these provisions actually mention police or law enforcement—indeed, the professional police forces familiar to us today did not exist when the Bill of Rights was drafted.<sup>6</sup> In their own terms, the Fourth, Fifth, and Sixth Amendments are all framed as

---

<sup>4</sup> See *Davis v. United States*, 131 S. Ct. 2419, 2426-28, 2432-33 (2011) (narrowing justifications for the exclusionary rule, and dismissing the concern that limitations on exclusion will create disincentives to litigate Fourth Amendment claims); *Herring v. United States*, 555 U.S. 135, 140-42 (2009) (limiting application of exclusionary rule and listing its costs); *Hudson*, 547 U.S. at 591 (characterizing suppression of evidence as a “last resort” and listing “substantial social costs” of exclusionary rule); but see *id.* at 603 (Kennedy, J., concurring in part and concurring in the judgment) (“[T]he continued operation of the exclusionary rule . . . is not in doubt.”).

<sup>5</sup> See, e.g., Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 506 (2007) (characterizing Fourth Amendment jurisprudence as efforts to “distinguish police practices needing . . . regulation from those that do not”); Seth W. Stoughton, *The Incidental Regulation of Policing*, 98 MINN. L. REV. 2179, 2185 (2014) (listing Fourth Amendment doctrine as an example of “rules and restrictions that exist exclusively or primarily to regulate police conduct”); William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 433 (1995) (“The main point of [Fourth and Fifth Amendment law] is to regulate the police.”); but see Thomas Crocker, *The Political Fourth Amendment*, 88 WASH. U. L. REV. 303, 308 (2010) (critiquing the tendency to “view the Fourth Amendment primarily as a special provision of constitutional criminal procedure designed to regulate police practice”). Some scholars are careful to emphasize that constitutional litigation both vindicates rights and regulates state officials. See, e.g., Jennifer E. Laurin, *Rights Translation and Remedial Disequilibrium in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002, 1004 (2010) (describing the dual functions of the Fourth Amendment). An intriguing recent article raises important questions about the limits of the regulatory enterprise, but also illustrates the dominance of the regulatory account. See John Rappaport, *Second-Order Regulation of Law Enforcement*, 103 CALIF. L. REV. 205, 210-12 (2015) (arguing that the Supreme Court should sometimes engage in “second-order regulation” by creating incentives for policymakers, rather than undertaking “first-order regulation” by devising rules directly for police officers).

<sup>6</sup> See D. Michael Risinger & Leslie C. Risinger, *Innocence is Different: Taking Innocence into Account in Reforming Criminal Procedure*, 56 N.Y.L. SCH. L. REV. 869, 878 (2011-2012) (“Whichever way one cuts it, the Founding Fathers would barely recognize pretrial procedure in criminal cases as they exist today, and they would be profoundly shocked by some aspects of it.”); see also *infra* notes 31-32.

guarantees of individual rights. Moreover, it is taken for granted, even when not stated explicitly, that the individual rights protected by the Constitution are rights against the government; constitutional rights are restrictions on state action. But for decades now, courts have proceeded as though police officers are the only (or the most relevant) potential violators of Fourth, Fifth, and Sixth Amendment rights. In other words, the *state* against which persons or people assert these rights has been reduced to police officers. The conception of constitutional criminal procedure as regulation of the police has become increasingly dominant in court opinions, in legal scholarship, and in legal pedagogy.<sup>7</sup>

If regulating the police is the core function of constitutional criminal procedure, then it is difficult to assess this area of constitutional law as anything other than a failure. By most accounts, constitutional doctrine does not substantially restrict police conduct. The doctrinal rules are very permissive and seem continually to become more so, and the police are adept at evading those restrictions that do exist.<sup>8</sup> Especially in the Fourth Amendment context, but also in Fifth and Sixth Amendment jurisprudence, the primary mode of analysis is a balancing approach that almost always finds government interests to outweigh individual interests.<sup>9</sup> Constitutional criminal procedure could constrain the police, in theory, but in practice it does not. It is not surprising, then, that those who wish to see meaningful constraints on law enforcement have increasingly turned from constitutional criminal procedure to other regulatory mechanisms.<sup>10</sup>

Suppose, however, that police regulation were not the organizing principle of constitutional criminal procedure. Suppose instead that this area of law were the product of many individual acts of resistance to state coercion, especially resistance to coercive punishment. Consider the relevant constitutional provisions: the Fourth Amendment protects the right of the people to be free

---

<sup>7</sup> See *infra* Section I.A. The nomenclature of law school classes and casebooks reflects this emphasis on the police. The basic criminal procedure course is colloquially called “cops and robbers,” and it is usually framed as a study of the constitutional restraints on the police. Cf. Christopher Slobogin, *Transnational Law and the Regulation of the Police*, 56 J. LEG. EDUC. 451, 451 (2006) (describing “courses that focus on the regulation of the police”).

<sup>8</sup> See Mary D. Fan, *The Police Gamesmanship Dilemma in Criminal Procedure*, 44 U.C. DAVIS L. REV. 1407, 1409-17 (2011). Fan’s article, while helpful in its identification of the ways in which police evade constitutional rules, is among the many scholarly works that take for granted that the Fourth, Fifth, and Sixth Amendments function primarily as regulations for the police. See, e.g., *id.* at 1413 (characterizing the Fourth Amendment as “the main regulator” of the early stages of a police investigation and the Fifth and Sixth Amendments as “the prime regulators” of later stages).

<sup>9</sup> See Shima Baradaran, *Rebalancing the Fourth Amendment*, 102 GEO. L.J. 1, 15-16 (2013) (observing that when the Supreme Court balances government interests with individual interests to decide Fourth Amendment issues, the government wins about eighty percent of the time).

<sup>10</sup> See *infra* Section I.B.

from unreasonable searches and seizures; the Fifth Amendment protects persons from compelled self-incrimination; the Sixth Amendment promises the assistance of counsel to individuals facing criminal prosecution. Each of these provisions is concerned with coercive state conduct against people or persons, but none identifies any particular coercer. And indeed, state coercion is typically much more complex than the actions of a single government agent. This is especially true in the criminal justice system, where the various coercive elements of policing, prosecution, and punishment often depend upon and augment one another.<sup>11</sup> A police search, for example, is fundamentally different from and more coercive than an invasion of privacy by a private individual, because the police search is linked to the coercive penal authority of the state.

And indeed, most protests to police searches are not complaints exclusively about the conduct of the police officer in the moment of the search. The complaint is instead a complaint about the context and consequences of the search. A claim that a search is unreasonable is more likely to be made—and more likely to have merit—when the search is part and parcel of the state’s efforts to impose coercive punishment. Likewise, a claim that a seizure was unreasonable is typically a claim about the seizure’s place in a broader course of official conduct. The fact that most worries about unreasonable searches and seizures are worries about the consequent punishment is obvious to anyone who has raised or litigated a Fourth Amendment claim in criminal proceedings. And this fact is implicitly acknowledged by courts’ frequent insistence that Fourth Amendment restrictions on government actors are relaxed when the state pursues goals other than criminal law enforcement.<sup>12</sup>

---

<sup>11</sup> Cf. Guyora Binder, *Punishment Theory: Moral or Political?*, 5 *BUFF. CRIM. L. REV.* 321, 321 (2002) (“Punishment is never the isolated act of an individual: to punish is to act as an officer or agent participating in a system for enforcing an authoritatively promulgated norm.”); Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 *COLUM. L. REV.* 749, 794 (2003) (“[I]f we paid more attention to how power is allocated between [law enforcement] agents and prosecutors, we might better protect criminal defendants’ interests—and perhaps even their rights.”).

<sup>12</sup> See, e.g., *Ferguson v. City of Charleston*, 532 U.S. 67, 75 n.7 (2001) (“[I]n limited circumstances, a search unsupported by either warrant or probable cause can be constitutional when ‘special needs’ other than the normal need for law enforcement provide sufficient justification.”); *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) (“A search or seizure is ordinarily unreasonable in the absence of individualized suspicion. . . . [W]e have upheld certain regimes of suspicionless searches where the program was designed to serve ‘special needs, beyond the normal need for law enforcement.’”). New research suggests that police officers tend to have stronger punitive preferences than the average person, which may explain these portions of Fourth Amendment doctrine that place greater restrictions on law enforcement searches than others. See Richard H. McAdams, Dhammika Dharmapala & Nuno Garoupa, *The Law of Police*, 82 *U. CHI. L. REV.* 135, 135 (2015). Without contesting that explanation, I offer a simpler one: a police search is typically designed and expected to facilitate prosecution and punishment, which are understood to be more coercive than most other state actions.

A similar account describes Fifth and Sixth Amendment complaints about police interrogations. A motion to suppress an incriminating statement is not simply a complaint about what happened at the moment of interrogation; it is a complaint about the context and consequences of the challenged police action. The Supreme Court has sometimes made this explicit in its discussions of immunity statutes, which allow the government to compel testimony so long as the speaker will not face punishment on the basis of his compelled statements.<sup>13</sup> Compelled statements that bear no relation to punishment are less worrisome than those that lead to punishment. And in the Sixth Amendment context, an individual has the right to assistance of counsel when he or she is an *accused* (i.e., facing criminal punishment) and when the government seeks to elicit *incriminating* information (i.e., information that will support criminal punishment).<sup>14</sup> By and large, the constitutional restraints on investigative procedures are motivated by an understanding of the coercive nature of the criminal process as a whole, from investigation through adjudication to punishment.

Perhaps the suggestion that constitutional criminal procedure is concerned with the criminal process—the whole of that uniquely coercive process, including the punishment that is its usual aim and conclusion—should seem unremarkable and even tautological. But the singular and myopic focus on police regulation has led to doctrines (and scholarly evaluations of them) that consider police conduct in isolation, rather than as part of the entire criminal process. It is far easier to conclude that a police officer's actions are reasonable when we ignore the context of those actions, when we fail to acknowledge police action as part of a larger project of state coercion. Thus, the conception of criminal procedure as regulation of the police is a mischaracterization with profound consequences. It has generated conflicting and self-defeating doctrinal rules that do little to address the core concerns of the Fourth, Fifth,

---

<sup>13</sup> See *Kastigar v. United States*, 406 U.S. 441, 453 (1972) (claiming that the “sole concern” of the privilege against self-incrimination “is to afford protection against being ‘forced to give testimony leading to the infliction of ‘penalties affixed . . . to criminal acts’” (quoting *Ullmann v. United States*, 350 U.S. 422, 438-39 (1956))); *Brown v. Walker*, 161 U.S. 591, 595 (1896) (distinguishing between a “literal” interpretation of the Fifth Amendment that prohibited compelled testimony under any circumstances, and an alternative view in which “the object of the provision [is] to secure the witness against criminal prosecution,” and adopting the latter view); see also *Chavez v. Martinez*, 538 U.S. 760, 766-67 (2003) (plurality opinion) (finding that Fifth Amendment could not have been violated when suspect was arguably compelled to incriminate himself, but no charges were filed and no statements were introduced in any criminal prosecution).

<sup>14</sup> See, e.g., *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 198 (2008); *Brewer v. Williams*, 430 U.S. 387, 401 (1977) (“[O]nce adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him.”); *id.* at 399-400 (finding deliberate elicitation of incriminating information to constitute “interrogation” for purposes of Sixth Amendment).

and Sixth Amendments.<sup>15</sup> Most importantly, perhaps, the police regulation account underwrites the prevailing theories of the exclusionary rule—and the efforts to scale back or abandon that rule.<sup>16</sup> The unduly narrow focus on regulating *police* in particular has led judges and scholars alike to overlook what is really at stake when a criminal defendant makes a motion to suppress evidence seized in violation of one of these Amendments: an opportunity and a responsibility to revisit, refine, revise or reaffirm our understanding of the appropriate scope of *state* coercion.

Thus, the two accounts of constitutional criminal procedure that I have identified here differ in that one is motivated by a narrow concern with the police and the other reflects a broader concern with the state as a whole. The best-known prior attempt to conceptualize this field of law focused on the purposes of regulation, not its targets. Herbert Packer famously distinguished between rules designed to maximize crime control and rules designed to maximize due process values.<sup>17</sup> And indeed, the claim that constitutional criminal procedure exists to regulate the police could accommodate a variety of additional claims about the substantive values that should inform the regulatory regime.<sup>18</sup> But whatever the goal of police regulation, the dominant interpretive approach has assumed that it is the police, and only the police, whose conduct should be scrutinized and restricted by the constitutional doctrines applicable to the investigative process. Since the police do not punish, at least as a formal matter, the threat and eventual imposition of punishment has not been a significant part of the story of investigative procedure. This Article seeks to reveal the costs of placing the police at center stage—and excluding from the stage all other state actors—in our jurisprudence of investigative procedure. We need to reconnect our account of investigative procedure with the punishment that is the usual aim of police investigations. We need to restore a holistic view of the criminal process.

---

<sup>15</sup> See *infra* Part III.

<sup>16</sup> As noted above, the Court has distinguished separate exclusionary rules for the Fourth, Fifth, and Sixth Amendments. This “decoupling” of rules of exclusion is itself related to the focus on police regulation in constitutional criminal procedure. An account more attuned to various forms of state coercion would generate more cohesive principles of exclusion, as I will argue in Part III.

<sup>17</sup> Packer framed the central question in the field as a choice of values—crime control or due process. See generally Herbert Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964). For further discussion, see *infra* Part II.

<sup>18</sup> We could regulate the police to ensure they control crime efficiently, or to protect individual privacy, or to foster better police-community relations. We could regulate the police to ensure they are not unduly coercive. At various times courts have recognized each of these goals, and others. For several examples see Crocker, *supra* note 5, at 318-28. As I elaborate in Part III, the very fact that regulation can accommodate many different goals is part of the problem with the police regulation account. In that account, the individual rights ostensibly protected by the Constitution become reduced to just one of many goods to be weighed in the adjudicative balance.



There is a second important distinction between the criminal-procedure-as-police-regulation account and the alternative view advanced in this Article. This is the difference between regulation and resistance, between a top-down effort by centralized authorities to discipline state actors and bottom-up efforts by individual persons to resist state power.<sup>19</sup> So described, regulation and resistance are not mutually exclusive, of course. Regulation focuses on the rule-maker, while resistance focuses on the defendant's efforts. The adjudication of any constitutional claim is likely to have some regulatory effects. But one may acknowledge, and even embrace, the regulatory effects of constitutional adjudication without casting regulation as the primary function or rationale of adjudication.<sup>20</sup> Indeed, it is possible that judicial decisions will eventually prompt better regulatory frameworks if judges do not endeavor to design those frameworks themselves.<sup>21</sup> The framing of constitutional procedure as regulation has generated some of its most persistent legitimacy challenges, as many commentators and courts repeatedly insist that regulation is properly a legislative or executive enterprise, not a judicial one.<sup>22</sup> In any event, the focus on police regulation has obscured the role of defendants and the resistance that is intrinsic to constitutional claims under the Fourth, Fifth, and Sixth Amendments.<sup>23</sup> As noted above, these Amendments articulate

---

<sup>19</sup> Neither term—regulation or resistance—is entirely transparent. I say more about the concept of regulation in Sections I.B and I.C, and more about resistance in Part II.

<sup>20</sup> Many commentators have addressed “regulation through litigation” in other areas of law. For example, lawsuits by states against gun manufacturers have been criticized as efforts to circumvent usual regulatory measures—and the democratic process—by regulating through the courts instead. *See, e.g.,* W. KIP VISCUSI, *REGULATION THROUGH LITIGATION* (2002). These critiques assume that the proper role of litigation is something other than regulation, in stark contrast to the standard accounts of constitutional criminal procedure.

<sup>21</sup> *See* Rappaport, *supra* note 5, at 230-31 (“By suggesting that it would step aside where Congress provides a statutory remedy for rights violations, the Court encouraged Congress to act.”).

<sup>22</sup> *See infra* Section I.B.

<sup>23</sup> Because most claims under these Amendments are raised as motions to suppress evidence in a criminal prosecution, the claims are properly understood as efforts to resist punishment. Other scholars have described narrower forms of resistance, such as resistance targeted specifically at government surveillance rather than the punishment that often follows surveillance. *See* Elizabeth E. Joh, *Privacy Protests: Surveillance Evasion and Fourth Amendment Suspicion*, 55 *ARIZ. L. REV.* 997, 1000 (2013) (“[People] take steps to thwart police surveillance, not because they are seeking to conceal criminal acts, but out of ideological belief or personal conviction.”). And criminal defendants may engage in still broader forms of resistance that protest not only punishment but the entire adjudicative process or even the political and legal system as a whole. *See* Jenny Carroll, *The Resistance Defense*, 64 *ALA. L. REV.* 589, 592 (2013) (“Instead of seeking shelter in the protections afforded them by the Constitution, these defendants opted out. To these defendants, the right to a defense—a right integral to the American legal system—was the right to a sanctioned, bound narrative. And they wanted no part of it.”). For further discussion see *infra* Section

general principles about the appropriate scope of state coercion. Litigating those Amendments is always an exercise in core political argument.

I have described the Amendments as “jurisgenerative”: Robert Cover coined that term to describe the bottom-up process by which legal meaning may be created outside the state, when individuals or private groups develop independent accounts of what is or should count as law.<sup>24</sup> The Constitution is jurisgenerative in this way, even if courts are overwhelmingly jurispathic (to use another of Cover’s terms), killing off private individuals’ visions of law almost as fast as they arise.<sup>25</sup> Every mundane motion to suppress evidence is a claim that the government has overstepped its power, and thus a claim about the appropriate scope of government power. It is a petition for the redress of core political grievances. And for thousands of individuals, a motion to suppress evidence is the closest they will ever come to an attempt at self-government.<sup>26</sup> There is a value in that attempt, even when it fails.

Of course, most of those attempts do fail; most motions to suppress are denied. The Fourth, Fifth, and Sixth Amendments do not, in practice, provide much relief to individuals facing the power of the state to impose criminal sanctions. But the very denial of constitutional claims is itself illuminating: the ways and reasons that defendants’ claims are denied can sometimes reveal the normative visions of government power that underwrite our law and institutions.<sup>27</sup> Even if the Supreme Court will side with the government in eight of ten Fourth Amendment cases,<sup>28</sup> there is a value in pushing courts to make that choice and to articulate the reasons for it. Courts, unsurprisingly, are often uncomfortable with this role: that is one of the reasons why constitutional criminal procedure has focused narrowly on police officers rather than directly addressing the underlying questions of state coercion. Principles articulated may become principles examined and perhaps rejected, and it is often in the interest of all state institutions, including courts, to say as little as possible about the theories of legitimate coercion that underlie state action. But constitutional litigation creates a way in which non-state actors can keep raising the subject, and there is value even in noticing that the courts do not want to talk about it.

---

## II.A.

<sup>24</sup> Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 6-11 (1983).

<sup>25</sup> *Id.* at 40-44 (“The position that only the state creates law thus confuses the status of interpretation with the status of political domination. It encourages us to think that the interpretive act of the court is privileged in the measure of its political ascendance.”).

<sup>26</sup> See *infra* Section II.B.

<sup>27</sup> Cf. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979) (“Judges have no monopoly on the task of giving meaning to the public values of the Constitution, but neither is there reason for them to be silent. . . . Adjudication is the social process by which judges give meaning to our public values.”).

<sup>28</sup> See Baradaran, *supra* note 9, at 15 (“From 1990 to 2012, a review of Supreme Court opinions on criminal procedure matters indicates that individual rights have overcome government interests in just 20% of cases where the Court balanced these interests.”).

Thus, even those who wish different outcomes to Fourth, Fifth, and Sixth Amendment cases should be cautious about wishing the whole jurisprudential field out of existence. As the Supreme Court evinces increasing skepticism about the exclusionary rule (and perhaps about constitutional criminal procedure more generally), and as policing scholars look toward other forms of regulation, we should identify more precisely what is at stake in this area of constitutional adjudication. The Court and most scholars view this field of law as a project of judicial regulation of the police. That is one dimension of constitutional criminal procedure, but it is only one. Constitutional criminal procedure is also an adversarial project in which individual defendants resist the power of the state. It is a forum to discern and to debate our most basic conceptions of government power and its limits. And of course, the government is a much larger and more complex enterprise than the police.

Part I of this Article traces the development of the police regulation account. Many Warren Court opinions specifically addressed the need to regulate police officers, and these opinions introduced the language and concepts that underwrite modern constitutional criminal procedure. But, as Part I shows, the seminal Warren Court opinions that launched the “police regulation” narrative were themselves motivated by concerns about state coercion writ large, especially the coercions of prosecution and eventual punishment. This broader concern became obscured from view, however, as later decisions focused more narrowly on the police in isolation from other state actors.

Part II takes the threads of the more holistic understanding of criminal procedure that was implicit in Warren Court opinions (and earlier decisions), and elaborates this different vision of the role of the Fourth, Fifth, and Sixth Amendments. In this alternative vision, constitutional criminal procedure serves to limit state coercion, with a specific focus on punishment. There are many ways to limit coercion, of course, and it is significant that the Constitution elects to limit coercion in the criminal justice system through the particular mechanism of individual rights. Rights claims are a form of resistance to the state, and a Fourth, Fifth, or Sixth Amendment claim is a way of resisting punishment. These acts of resistance are part of our constitutional design. The litigation and jurisprudence they produce are an important part of our political discourse—even if defendants lose, and even if the resulting doctrines fail to regulate the police well.

Part III addresses some doctrinal implications of the emphasis on police regulation and the corresponding inattention to other dimensions of state coercion. Most importantly, the narrow focus on the police has increasingly distorted the account of the exclusionary rule, enabling the rule to be sharply limited and perhaps setting the stage for its abandonment. When we understand motions to suppress as claims about state coercion, however, the logic and the constitutional dimensions of the exclusionary rule become evident. Relatedly, the myopic focus on the police has led to the interpretation of “reasonableness” in the Fourth Amendment as a narrow inquiry about the reasonableness of a hypothetical police officer. A better approach would put the search or seizure

in context, and assess reasonableness with an eye to the whole criminal justice process. Again, this approach yields a very different—and much more stable—foundation for the exclusionary rule. Finally, a focus on resistance to coercion could change the doctrinal treatment of consent and waiver. As noted in Parts I and II, the background concern with state coercion has never been completely eliminated from criminal procedure doctrine. But the narrative of police regulation has relegated coercion to a subordinate concern, and consequently, the accounts of consent, cooperation, or waiver in existing law are grossly inadequate. Indeed, existing law effectively imposes *resistance requirements* on suspects in the moment of engagement with police, then sharply circumscribes the opportunities for later resistance in court.<sup>29</sup> That is, suspects must resist the police—in precisely the right way—in order to preserve their constitutional rights. These resistance requirements are nearly impossible to navigate successfully: any physical resistance to the police is categorically prohibited and extremely dangerous for the suspect, of course, but mere passivity or submission will often be treated as consent or waiver of one's constitutional rights.

Constitutional law is heavily path dependent, and it is not likely that courts will readily abandon the conception of criminal procedure as a project of police regulation. Nevertheless, those who reflect on this area of law can and should give a more accurate account of the functions of the Fourth, Fifth, and Sixth Amendments. It is time to recognize resistance, and not to fear it. Particularly in an age of mass incarceration, when American punishment practices are widely viewed as grossly excessive, it is time to recognize and enforce *all* the limitations that the Constitution places upon punishment.

## I. THE PROBLEM OF THE STATE

### A. *In the Beginning Were the Police*

Though it is now almost taken for granted that police regulation is the primary function of constitutional criminal procedure, this notion took nearly two centuries to develop. When the Bill of Rights was ratified in 1789, American cities did not have professional police forces.<sup>30</sup> Much of what we now view as policing—patrolling streets, investigating crime, apprehending suspects—was work performed by amateur recruits if it was done at all, and

---

<sup>29</sup> With the phrase “resistance requirements,” I refer deliberately to the now mostly-abandoned principle of rape law that viewed sex as consensual if the complainant had failed to “resist to the utmost.” See, e.g., I. Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345, 1351-53 (2010) (describing the decline of the “resist to the utmost” requirement). Indeed, there are striking parallels between the widely discredited concepts of consent in older rape law and the concepts of consent still embraced in constitutional criminal procedure. See *infra* Part III.

<sup>30</sup> See Risinger & Risinger, *supra* note 6, at 878 (“At [the time the Bill of Rights was ratified] there were no police agencies as we conceive of them . . .”).

these amateurs usually lacked both training and enthusiasm for the tasks thrust upon them.<sup>31</sup> It took several decades after the Founding for professional police forces to develop and become the norm in U.S. cities and smaller municipalities.<sup>32</sup>

Police departments gradually became more established through the second half of the nineteenth century, but courts did not immediately view police work as subject to constitutional constraints. Brutal treatment of racial minorities throughout the early twentieth century, and perhaps also Prohibition-era enforcement techniques, led to some initial applications of the Federal Constitution (specifically, the Fourteenth Amendment Due Process Clause) to police officers in the 1930s.<sup>33</sup> Dissatisfaction with due process regulation grew quickly, however. Courts and commentators looked for and eventually found more specific constitutional provisions to apply to the police. Only then, with the decisions of the Warren Court in the 1960s, does the history of modern Fourth (and Fifth, and Sixth) Amendment law begin. In a sense, then, modern constitutional criminal procedure begins with the premise that the police need to be regulated.

From another perspective, though, the project of police regulation was simply a new manifestation of an older enterprise—the effort to draw limits to state power, especially the powers exercised as part of the criminal law. That broader perspective, which keeps in mind more general concerns with state coercion, can be found in the same opinions that fostered the view that constitutional criminal procedure exists to regulate the police. Not until the 1970s and 1980s did subsequent decisions prune away the more holistic account and leave police regulation as the dominant narrative of constitutional criminal procedure.

---

<sup>31</sup> See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 27-28 (1993) (“Colonial justice was a business of amateurs. Amateurs ran and dominated the system. Today, professionals call the shots. . . . Nothing of the sort existed in the seventeenth century.”); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 830-32 (1994) (“Our twentieth-century police and even our contemporary sense of ‘policing’ would be utterly foreign to our colonial forebears.”).

<sup>32</sup> See FRIEDMAN, *supra* note 31, at 69 (listing several American cities that established police forces in the 1850s); see also Wesley Oliver, *The Neglected History of Criminal Procedure, 1850-1940*, 62 RUTGERS L. REV. 447, 459 (2010).

<sup>33</sup> See, e.g., *Brown v. Mississippi*, 297 U.S. 278, 279 (1936) (applying the Fourteenth Amendment to reverse convictions “which rest[ed] solely upon confessions shown to have been extorted by officers of the state by brutality and violence”); see also WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 199-209 (2011) (describing the Supreme Court’s Prohibition-era protections for civil liberties as well as the Court’s use of the Due Process Clause to respond to “Jim Crow justice”); Oliver, *supra* note 32, at 493-502 (detailing “rampant corruption and excesses in honest enforcement that accompanied Prohibition”).

To see this trajectory, consider a few key decisions from the Warren Court. *Mapp v. Ohio*<sup>34</sup> involved textbook intrusive behaviors by police officers: a physically destructive forced entry into a home, rough treatment of the resident, and a wide-ranging search of the home and seizure of personal effects—none of which was authorized by judicial warrant.<sup>35</sup> The question before the Court was not the legality of the search or seizures, but whether the Federal Constitution required the State of Ohio to suppress the evidence seized at the defendant's home. The substantive rights of the Fourth Amendment—its prohibition of unreasonable searches and seizures—had previously been held applicable to the states; now the Court was asked to extend the exclusionary rule to the states as well.<sup>36</sup>

Famously, it did so, offering multiple rationales that still dominate debates over the exclusionary rule.<sup>37</sup> One of the justifications offered was the claim that excluding illegally seized evidence would deter police misconduct.<sup>38</sup> This claim is only a small piece of the *Mapp* opinion, but it took on greater prominence in later decisions and may have done more than any other single proposition to establish the view of criminal procedure as regulation of the police. Under the deterrence theory, the police are at center stage: the problem is police misconduct, and the solution is an incentive directed at the police. Police officers want the evidence they obtain to be admitted in court, the deterrence theory presumes, and will adjust their behavior to avoid exclusion. With this focus on police incentives, other government actors fade from view.<sup>39</sup> Similarly, the individual raising the Fourth Amendment claim is

---

<sup>34</sup> 367 U.S. 643 (1961).

<sup>35</sup> *Id.* at 644-45.

<sup>36</sup> *See id.* at 645-46. The Fourth Amendment (like the rest of the Bill of Rights) originally applied only to the federal government, so courts needed a theory to extend the Amendment's reach if it was to regulate state and local police departments. Incorporation was that theory, and in 1949—four years before Earl Warren was appointed Chief Justice—the Supreme Court found the Fourth Amendment to be incorporated in the Fourteenth Amendment Due Process Clause and thus applicable to the states. *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949) (“The security of one’s privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in ‘the concept of ordered liberty’ and as such enforceable against the States through the Due Process Clause.”).

<sup>37</sup> *See Mapp*, 367 U.S. at 654-55. Justice Clark’s majority opinion argued that exclusion was necessary to give meaning and effect to the Fourth Amendment right, *id.* at 655-56; that illegally obtained evidence was tantamount to coerced testimony, *id.* at 656-57; that admission of illegally obtained evidence provided the wrong incentives to police, *id.* at 657-58; and that exclusion was necessary to preserve judicial integrity, *id.* at 659-60.

<sup>38</sup> *See id.* at 648 (characterizing the exclusionary rule as a “deterrent safeguard”); *see also id.* at 656 (characterizing the purpose of the rule as deterrence).

<sup>39</sup> As noted by Yale Kamisar, the deterrence account is “misleading” in treating the police as isolated actors, responsive to the “punishment” of exclusion, instead of recognizing the implications of the fact that “the police are members of a structural

relegated to the sidelines, a possibly lucky third-party beneficiary of the regulatory enterprise.

But read in its entirety, *Mapp* offers more than the myopic focus on the police that came to characterize later discussions of the exclusionary rule. The decision also raised broad concerns about state coercion, especially the coercion of criminal punishment. Indeed, at one point Justice Clark's majority opinion disavowed the suggestion that the police conduct, in isolation, formed the core constitutional violation. Quoting from *Boyd v. United States*,<sup>40</sup> the *Mapp* Court linked the Fourth and Fifth Amendments and compared illegally seized evidence to coerced testimony:

It is not the breaking of [a man's] doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or his private papers *to be used as evidence to convict him of crime* . . . is within the condemnation . . . [of those Amendments].<sup>41</sup>

Here, the constitutional violation is not the police action alone, but the search and seizure in conjunction with the actions of other officials: those who introduce the evidence in court, and those who rely on the evidence to convict and to impose punishment. The defendant's conviction on the basis of illegally seized evidence is the ultimate concern, not simply whatever inconvenience or insult occurs in the moment of the search. With conviction the ultimate concern, reversal was the ultimate remedy. The *Mapp* Court thus assumed without lengthy discussion that the appellate remedy for an inadequate trial remedy—the appropriate relief after the trial court's failure to exclude evidence—was reversal of the defendant's conviction.<sup>42</sup>

Likewise, the *Mapp* Court's concerns about collusion between federal and state law enforcement officers to violate the Fourth Amendment,<sup>43</sup> its

---

governmental entity." Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 597 n.204 (1983).

<sup>40</sup> 116 U.S. 616 (1886).

<sup>41</sup> *Mapp*, 367 U.S. at 646-47 (quoting *Boyd*, 116 U.S. at 630) (emphasis added). Prior to *Mapp*, this same passage was used by the Court to illustrate the proposition that the Fourth Amendment bound all government officials, including courts, and thus the exclusionary rule was a direct implication of the Fourth Amendment. See *Weeks v. United States*, 232 U.S. 383, 391 (1914) (quoting *Boyd*, 116 U.S. at 630); see also *id.* at 391-92 ("The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority.").

<sup>42</sup> See *Mapp*, 367 U.S. at 660.

<sup>43</sup> See *id.* at 658 ("In non-exclusionary States, federal officers, being human, [would] step

description of the government as role model for the citizenry,<sup>44</sup> and its emphasis on judicial integrity<sup>45</sup> all display a more holistic understanding of the entity that is bound by the Fourth Amendment. The police officer is but a part of the state, and most of the *Mapp* opinion has the whole state in view. These dimensions of the opinion have been obscured, unfortunately, by the Court's endorsement of deterrence as the purpose of excluding unconstitutionally obtained evidence. We will return to the exclusionary rule in Part II and again in Part III; as noted above, the deterrence theory of exclusion is central to the understanding of criminal procedure as regulation of the police.

Other Warren Court opinions applied additional constitutional restraints to police officers, so much so that by 1965 Judge Henry Friendly of the Second Circuit worried that the Court was turning the Bill of Rights into "a code of criminal procedure."<sup>46</sup> Friendly was concerned about the application of the Bill of Rights to various state actors, not just police officers, but the rules for police officers were certainly a large part of his critique. But criticism from Friendly, and others, did not turn the tide. Within a few years, the Warren Court produced two opinions that may be the two best representations of constitutional criminal procedure as police regulation: *Terry v. Ohio*<sup>47</sup> and *Miranda v. Arizona*.<sup>48</sup> Each was authored by Chief Justice Warren himself, who came to the Court with more criminal law enforcement experience than any Justice before or since,<sup>49</sup> and each contains detailed discussions of policing and its challenges.

---

across the street to the State's attorney with their unconstitutionally seized evidence.").

<sup>44</sup> See *id.* at 659 ("Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.").

<sup>45</sup> See *id.* (invoking "the imperative of judicial integrity").

<sup>46</sup> Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 954 (1965). In addition to *Mapp*, some of the decisions that drew Friendly's concern were: *Escobedo v. Illinois*, 378 U.S. 478 (1964) (reversing conviction of defendant who was denied the opportunity to consult with his counsel and had no warning of his constitutional right to remain silent); *Ker v. California*, 374 U.S. 23 (1963) (incorporating the Fourth Amendment's protections against illegal search and seizure to admit only evidence found with probable cause); *Wong Sun v. United States*, 371 U.S. 471 (1963) (excluding evidence obtained subsequent to constitutional violations and characterizing such evidence as "fruits of a poisonous tree"); and *Rochin v. California*, 342 U.S. 165 (1952) (finding evidence inadmissible under the Due Process Clause because it was discovered through forced entry into defendant's home). See Friendly, *supra*, at 932-33. *Rochin* was a due process case decided shortly before Earl Warren joined the Court.

<sup>47</sup> 392 U.S. 1 (1968).

<sup>48</sup> 384 U.S. 436 (1966).

<sup>49</sup> Before becoming Chief Justice, Warren had spent over twenty years as a prosecutor, had worked closely with police, sought to "professionalize" them, and had even interrogated suspects himself. Interestingly, he was also a crime victim: his father was murdered while Warren was Alameda County District Attorney and campaigning to be state attorney general. See Yale Kamisar, *How Earl Warren's Twenty-Two Years in Law Enforcement*



*Terry* is framed explicitly as an effort to address “difficult and troublesome issues regarding a sensitive area of police activity,” namely “the power of the police to ‘stop and frisk’ . . . suspicious persons.”<sup>50</sup> Although the interests of individuals are not ignored in the opinion, the primary arguments focus on the police: what responsibilities they have, what powers they need, what rules will effectively guide them, and what sanctions will effectively alter their behavior.<sup>51</sup> Notably, the harms to the individual that *Terry* identifies—the inconvenience of the stop, the indignity of the frisk, the risks of discriminatory policing<sup>52</sup>—are harms inflicted directly by the police officer. In contrast to *Mapp*, *Terry* does not discuss the harms of ensuing convictions and punishments. The opinion also personalizes the police officer: it names Officer Martin McFadden, who conducted the stop and frisk in this case, it details his extensive experience, and it quotes his sometimes colloquial account of the investigation at length.<sup>53</sup>

Throughout *Terry*, the Fourth Amendment is described as a way to circumscribe police authority, or to limit police conduct.<sup>54</sup> At one point the Court even identifies its project as “constitutional regulation” of “police action.”<sup>55</sup> Of course, the actual limitations imposed by *Terry* are few: the Court endorsed police authority to stop a suspect based on “reasonable suspicion”—rather than probable cause—to believe that criminal activity was afoot, and it endorsed the authority to frisk based upon reasonable suspicion that the suspect was armed and dangerous.<sup>56</sup> *Terry* is easily read as a paean to Officer

---

*Affected His Work as Chief Justice*, 3 OHIO ST. J. CRIM. L. 11, 12 (2005).

<sup>50</sup> *Terry*, 392 U.S. at 9-10.

<sup>51</sup> See, e.g., *id.* at 10-15.

<sup>52</sup> See *id.* at 14-15 (condemning discriminatory policing); see also *id.* at 16-17, 24-25 (finding stops and frisks intrusions upon the sanctity of the person).

<sup>53</sup> See *id.* at 5-6.

<sup>54</sup> See, e.g., *id.* at 11, 19. *Mapp* and *Terry* are two of the Warren Court’s three most important Fourth Amendment decisions. The third, *Katz v. United States*, 389 U.S. 347 (1967), introduced the “reasonable expectations of privacy” analysis that became central to Fourth Amendment jurisprudence. See *id.* at 351-52 (holding information an individual “seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected”). *Katz* focused on individual interests and did not frame its enterprise as police regulation, and at least one scholar has juxtaposed the privacy framework launched by *Katz* with the understanding of criminal procedure as police regulation. See Crocker, *supra* note 5, at 314 (“The twin goals of protecting privacy and regulating the police sometimes complement each other, but at other times operate in significant tension.”).

<sup>55</sup> See *Terry*, 392 U.S. at 17.

<sup>56</sup> See *id.* at 30 (“We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the court of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries . . . he is entitled for the protection of himself

McFadden and his ilk—the experienced, well-intentioned officer exercising wise discretion to protect us all. So the decision is not a particularly onerous regulation of the police, but it nevertheless makes clear that police regulation is its enterprise.<sup>57</sup>

*Miranda*, like *Terry*, focuses on police practices and police incentives at considerable length. Indeed, one of the first and most enduring criticisms made of the opinion is a complaint that the Court intruded into the police station without constitutional authority and wrote rules for police officers.<sup>58</sup> Chief Justice Warren’s opinion famously devotes several pages to police interrogation manuals in an attempt to shed light on actual police practices.<sup>59</sup> This focus is unsurprising if we recall that Warren came to the Court with decades of experience as a prosecutor.<sup>60</sup> The Court concluded that the Fifth Amendment privilege against self-incrimination required that “adequate safeguards” be established to ensure statements given to police officers were not compelled.<sup>61</sup> Of course, the Court did not simply identify the need for safeguards: it devised these safeguards, prescribing in detail a set of required warnings to suspects, as well as a very specific set of procedures to follow before and during interrogations.<sup>62</sup> These procedures are regulatory, in any ordinary sense of that word; *Miranda* surely is an effort to regulate the police.

But, as with *Mapp*, there is more to it. *Miranda*’s rationale for regulating police interrogations illustrates a holistic view of the entire criminal process

---

and others in the area to conduct a carefully limited search.”).

<sup>57</sup> See, e.g., *id.* at 29-30 (declining to “develop at length” the “limitations which Fourth Amendment places upon a protective seizure and search for weapons” but reserving the right to develop the limitations with individual cases). *Terry* did not entirely foreclose the view that the Fourth Amendment restricts the state generally rather than police officers specifically. The Court occasionally framed the Amendment as a restriction on “agents of the state.” *E.g.*, *id.* at 11. But the only such agents explicitly identified by the opinion were police officers. See, e.g., *id.* at 12 (discussing the role of the courts in defining the powers and limitations of police officers as dictated by the Fourth Amendment).

<sup>58</sup> *Miranda v. Arizona*, 384 U.S. 436, 510 (1966) (Harlan, J., dissenting) (“The Court’s opinion in my view reveals no adequate basis for extending the Fifth Amendment’s privilege against self-incrimination to the police station.”); see also *id.* at 523-24 (detailing non-judicial efforts at law enforcement reform, and characterizing the majority’s opinion as an unwelcome interference with those efforts).

<sup>59</sup> *Id.* at 448-55 (“[V]aluable . . . information about present police practices . . . may be found in various police manuals and texts which document procedures employed with success in the past, and which recommend various other effective tactics.”).

<sup>60</sup> He had even conducted interrogations himself. See Kamisar, *supra* note 49, at 12.

<sup>61</sup> *Miranda*, 384 U.S. at 457 (finding the current “interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner”).

<sup>62</sup> See *id.* at 444-45, 473-74 (detailing the necessary procedural safeguards during custodial interrogation). The Court disclaimed absolute authority over police regulation, and invited Congress and the states to develop alternative procedures, “so long as they are fully as effective as those described above . . .” *Id.* at 490.

rather than a narrow focus on the police in isolation. The Fifth Amendment right against self-incrimination could have been construed as a trial right that applied only in the courtroom—a proscription on dragging a defendant to the stand, or at most a rule about the admissibility of confessions at trial.<sup>63</sup> Instead, the Court took the controversial step of applying the Fifth Amendment to conduct inside the police station (or on the street) precisely because police interrogations were a crucial early step in the broader prosecutorial process. The constitutional text provides that no one “shall be compelled to be a witness against himself in any criminal case,”<sup>64</sup> and the *Miranda* Court reasoned that a compelled statement at the police station, even if obtained long before trial or even the filing of charges, was part of “a criminal case.”<sup>65</sup> In contrast to *Terry*, where the harms to individual suspects materialize at the moment of a stop and frisk, *Miranda* clearly portrays the harm of a compelled statement as the unique injury produced by eventual conviction and punishment based on one’s own statements.<sup>66</sup> The Fifth Amendment matters at the police station because the station is on the path to the courtroom and then the prison.

Consider, finally, *Massiah v. United States*,<sup>67</sup> a brief opinion holding that a federal defendant’s rights were violated when officers surreptitiously listened to his statements to an informant and later introduced evidence of these statements at trial.<sup>68</sup> Because the defendant had been arraigned and indicted before the federal agents eavesdropped on his conversation, the Court found that he had a right to the assistance of counsel under the Sixth Amendment.<sup>69</sup> Without counsel present, the agents were not permitted to “deliberately elicit[.]” incriminating testimony from an already arraigned or indicted defendant.<sup>70</sup> From one perspective, *Massiah* illustrates the same regulatory reaching (or overreaching) condemned by *Miranda*’s critics: the Court takes an apparent trial right and uses it to tie the hands of officers conducting investigations far from the courtroom. But one can also say that *Massiah*

---

<sup>63</sup> Arguably, this was the Court’s approach in *Bram v. United States*, 168 U.S. 532, 557-58 (1897).

<sup>64</sup> U.S. CONST. amend. V, cl. 3.

<sup>65</sup> See *Miranda*, 384 U.S. at 467 (“Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings . . . from being compelled to incriminate themselves.”).

<sup>66</sup> See *id.* at 460 (“[O]ur accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.”). This view was reinforced by *Chavez v. Martinez*, 538 U.S. 760 (2003) (plurality opinion), in which a plurality of the Court found no Fifth Amendment violation in police questioning that failed to follow *Miranda*’s guidelines but did not produce a statement that was introduced in a criminal trial. See *id.* at 766-68.

<sup>67</sup> 377 U.S. 201 (1964).

<sup>68</sup> *Id.* at 207.

<sup>69</sup> See *id.* at 205-06.

<sup>70</sup> *Id.* at 206.

regulates police officers via the Sixth Amendment with the same holistic view of the criminal process that motivated the Fifth Amendment regulations set forth in *Miranda*.<sup>71</sup> The harm of post-indictment eavesdropping did not occur in the moment of Massiah's conversation with his supposed confederate, but only once that conversation served as the basis of Massiah's conviction and punishment. Put differently, police investigation matters to the Sixth Amendment because of what other state actors will do with the information that the police gather.

Thus, Warren Court opinions were consistently attentive to the larger context of police action and cognizant of the connection between police investigations and eventual coercive punishment. But these opinions also contained the seeds of a view of constitutional criminal procedure that is more narrowly focused on the police, one that views the police as isolated, autonomous agents and seeks to regulate them as such. This narrower view flourished in later cases. The shift in focus is especially evident in the Court's discussions of the exclusionary rule, which began to frame police deterrence as the sole rationale for the rule.<sup>72</sup> The shift also became manifest in decisions about what counts as a constitutional violation. And outside of the courts, in academic commentary, the narrative of constitutional criminal procedure as police regulation became mainstream, widely embraced, and rarely questioned—until the law's regulatory failures led to disappointment and disillusionment, as detailed in the next section.

Now, it is fairly standard to view investigative criminal procedure as “substantive criminal law for cops,” in Carol Steiker's memorable phrase.<sup>73</sup> The analogy to substantive criminal law has strengths as well as limits, and both illustrate the analytic and normative priority of the police in Fourth, Fifth, and Sixth Amendment law. Like our substantive criminal laws, rules of criminal procedure rest on a highly individualistic view of human agency, focusing on the actions of the officer in isolation. And like our substantive criminal laws, the legal model is one of rules backed by deterrent sanctions. The exclusionary rule is repeatedly explained as a device to deter police misconduct. Unlike the penalties imposed on private individuals by the substantive criminal law, though, the sanction of exclusion is readily abandoned by courts at any suggestion that it does not deter.<sup>74</sup> Additionally, unlike most defendants prosecuted under the substantive criminal law, police

---

<sup>71</sup> See *id.* at 205-07. Though *Massiah* involved federal law enforcement officers, its holding applied to local and state police officers as well, since the Sixth Amendment right to counsel had previously been incorporated in *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963).

<sup>72</sup> For specific doctrinal implications of the police regulation account, see *infra* Part III.

<sup>73</sup> Carol S. Seiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2470 (1996).

<sup>74</sup> See, e.g., *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (discussing the social costs of the exclusionary rule and why it is cautiously applied); see also *infra* Section III.A.

enjoy a very broad “rule of lenity” in which any legal ambiguity is construed to protect the police officer from personal liability.<sup>75</sup> So central have the police become to the contemporary conceptions of constitutional criminal procedure that one of the nation’s leading criminal procedure scholars, in one of the nation’s leading law reviews, has described Fourth Amendment jurisprudence as addressing the question “whether and how much Fourth Amendment protection exists for different police practices.”<sup>76</sup> On this account, the police are not only the center of attention in constitutional criminal procedure, but also the beneficiaries of that field.

### B. *Out From the Garden*

In the heyday of the Warren Court and for years afterward, many observers saw its criminal procedure decisions as necessary and welcome limitations on police excesses.<sup>77</sup> The police *needed* to be regulated, these observers believed, and judicial regulation through the Fourth, Fifth, and Sixth Amendments was as good as or better than other regulatory devices. Some commentators still hold this view, but as this section explains, recent years have seen growing judicial and scholarly disillusionment with constitutional criminal procedure as a means of regulating the police. One source of ambivalence is the very term “regulation,” which is used in many different and sometimes inconsistent ways, as discussed below. In addition, some critics see constitutional law as too permissive of police conduct, some see it as too constraining, and a great many observers see the field as hopelessly incoherent. There is specific dissatisfaction with exclusionary remedies, which probably do not deter police much at all, and which are perceived to exact great social costs.

This issue—exclusion of illegally obtained evidence—is the main occasion for expressions of *judicial* disenchantment with the police regulation account of constitutional criminal procedure. As noted, the Fourth Amendment exclusionary rule was justified with several different arguments in *Mapp v. Ohio*, but subsequent decisions increasingly emphasized deterrence of police misconduct as the primary or even the sole rationale for the rule. The deterrence theory posited that police cared about the admissibility of evidence,

---

<sup>75</sup> Cf. Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 230 (2006) (characterizing qualified immunity doctrine as a “reasonable mistake-of-law defense for public officials charged with unconstitutional conduct”). In addition, the Supreme Court recently held that officers’ reasonable mistakes of law can serve as a constitutional basis for an investigatory stop. See Heien v. North Carolina, 135 S. Ct. 530, 534 (2014).

<sup>76</sup> Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 479 (2011).

<sup>77</sup> See, e.g., Donald A. Dripps, *Why Gideon Failed: Politics and Feedback Loops in the Reform of Criminal Justice*, 70 WASH. & LEE L. REV. 883, 902 (2013) (“The basic liberal narrative about constitutional criminal procedure celebrates the Warren Court’s project of reforming the criminal process to advance liberty and equality, and condemns the Supreme Court’s pro-prosecution turn in the years since Warren’s retirement in 1969.”).

presumably because they wanted the suspects they investigated and arrested to be convicted. But the empirical evidence of police deterrence has never been very strong, and conceptual arguments that exclusion will not deter in particular circumstances are easy to find.<sup>78</sup> As Justices insisted ever more stridently on deterrence as the primary or sole justification of the exclusionary rule, they grew ever less likely to apply the rule.<sup>79</sup> Indeed, in the newest limitations placed on the exclusionary rule, one hears a broader disinclination to attempt judicial regulation of police conduct. For example, *Hudson v. Michigan*<sup>80</sup> held in 2006 that the exclusionary rule did not apply to violations of the knock-and-announce rule, and also expressed skepticism whether the Court could give officers clear guidelines for knock-and-announce entries.<sup>81</sup> *Hudson* claimed that suppression of evidence was always a “last resort,”<sup>82</sup> and it framed deterrence as a necessary but not sufficient condition for exclusion.<sup>83</sup> Supporters of the exclusionary rule reacted to *Hudson* with dismay, fearing that the Court was preparing to abolish the rule altogether.<sup>84</sup> The Court’s next

---

<sup>78</sup> See, e.g., *United States v. Leon*, 468 U.S. 897, 918-19 (1984); *Stone v. Powell*, 428 U.S. 465, 492 (1976) (observing “the absence of supportive empirical evidence” that the exclusionary rule deters police misconduct). See also William C. Heffernan, *The Fourth Amendment Exclusionary Rule as a Constitutional Remedy*, 88 GEO. L.J. 799, 871-72 (2000) (pointing out the lack of empirical evidence supporting the deterrent effects of the exclusionary rule, but arguing that there are nonetheless sound reasons to believe that the exclusionary rule is more effective than other currently available remedies).

<sup>79</sup> See, e.g., *Leon*, 468 U.S. at 922 (holding that exclusionary rule does not apply when police act in reasonable reliance on a subsequently invalidated search warrant, since exclusion would not deter in these circumstances); *United States v. Janis*, 428 U.S. 433, 454 (1976) (“[E]xclusion from federal civil proceedings of evidence unlawfully seized by a state criminal enforcement officer has not been shown to have a sufficient likelihood of deterring the conduct of the state police so that it outweighs the societal costs imposed by the exclusion.”); *United States v. Calandra*, 414 U.S. 338, 351 (1974) (“Whatever deterrence of police misconduct may result from the exclusion of illegally seized evidence from criminal trials, it is unrealistic to assume that application of the rule to grand jury proceedings would significantly further that goal.”). The Supreme Court’s most recent decision concerning the Fourth Amendment exclusionary rule claims (apparently for the first time) that deterrence is in fact the “sole purpose” of the rule. See *Davis v. United States*, 131 S. Ct. 2419, 2426 (2011) (citing earlier cases, none of which actually maintain that deterrence is the exclusive purpose of the rule).

<sup>80</sup> 547 U.S. 586 (2006)

<sup>81</sup> *Id.* at 589-90.

<sup>82</sup> *Id.* at 591.

<sup>83</sup> *Id.* at 596. As discussed in Part III, though, even the *Hudson* majority did not (perhaps, could not) abandon non-deterrence rationales for the exclusionary rule. See *id.* at 593 (identifying privacy interests protected by the Fourth Amendment and noting that “[e]xclusion of the evidence obtained by a warrantless search vindicates that entitlement”); see also *infra* Part III.

<sup>84</sup> See, e.g., David A. Moran, *The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment*, 2006 CATO SUP. CT. REV. 283, 284

two opinions to consider the rule did not go that far, but they further narrowed the rule and expressed continuing doubts about its wisdom.<sup>85</sup>

This growing judicial disinclination to exclude evidence—or to place restrictions on police conduct—is not limited to Fourth Amendment doctrine. Most interpreters have understood the Fifth Amendment’s prohibition of compelled self-incrimination as a textual (rather than judicially created) mandate to exclude compelled confessions.<sup>86</sup> But in recent years, some Justices have questioned whether the detailed requirements of *Miranda* are actually constitutionally mandated (by the Fifth Amendment or any other provision), and these Justices have suggested that evidence obtained through violations of *Miranda*’s rules need not be excluded in all circumstances.<sup>87</sup> As in the Fourth Amendment context, these judicial critiques of exclusion reflect more general resistance to the project of police regulation.<sup>88</sup> Finally, the Sixth Amendment restrictions established by *Massiah* have been considerably weakened in recent years by broad interpretations of what constitutes a valid waiver of Sixth Amendment rights.<sup>89</sup>

The narrative of constitutional jurisprudence as police regulation has always been more explicit in scholarly commentary than in court opinions—and the disillusionment with this narrative is also more explicit in the scholarly

---

(“[*Hudson*] calls into question the entire rationale of the exclusionary rule, not just in the knock-and-announce context, but for all types of Fourth Amendment violations.”).

<sup>85</sup> *Davis v. United States*, 131 S. Ct. 2419, 2429 (2011) (holding that evidence obtained by police conduct that relies on binding, but later overruled, appellate precedent is not subject to the exclusionary rule); *id.* at 2426-27 (emphasizing that exclusion is merely a prudential doctrine, not a personal constitutional right, and characterizing exclusion as a “bitter pill” to be swallowed only when necessary); *Herring v. United States*, 555 U.S. 135, 147-48 (2009) (holding that police mistakes resulting from negligent police recordkeeping are not subject to the exclusionary rule).

<sup>86</sup> *See, e.g., United States v. Patane*, 542 U.S. 630, 640 (2004) (plurality opinion) (“[T]he Self-Incrimination Clause contains its own exclusionary rule.”); Steven D. Clymer, *Are Police Free to Disregard Miranda?*, 112 YALE L.J. 447, 450 (2002) (“Unlike the Fourth Amendment proscription on unreasonable searches and seizures, which is a direct restraint on police conduct that courts enforce through a judicially created exclusionary rule, the Fifth Amendment privilege is simply an exclusionary rule.” (footnotes omitted)); *id.* at 476 n.120 (citing other scholars and courts who have suggested that the Fifth Amendment privilege is an exclusionary rule).

<sup>87</sup> *See Patane*, 542 U.S. at 639 (characterizing *Miranda* warnings as “prophylactic rules” that “sweep beyond the actual protections of the Self-Incrimination Clause”); *see also id.* at 643 (holding that physical evidence obtained via a statement taken in violation of *Miranda* was not subject to exclusion).

<sup>88</sup> The *Patane* plurality explicitly rejected the characterization of *Miranda* doctrine as regulation of the police. *Id.* at 637 (“The *Miranda* rule is not a code of police conduct, and police do not violate the Constitution (or even the *Miranda* rule, for that matter) by mere failures to warn.”).

<sup>89</sup> *See Montejo v. Louisiana*, 556 U.S. 778, 796-97 (2009); *see also infra* Part III.

literature.<sup>90</sup> Here one might ask just what it means for judges to “regulate” as opposed to adjudicate. Regulation often suggests a top-down, comprehensive rule-making enterprise that seems to extend beyond courts’ traditional powers.<sup>91</sup> Thus unease with the project of police regulation set in early, as constitutional law scholars (even those not focused specifically on criminal procedure) questioned whether the Supreme Court was promulgating rules not required by the Constitution and thus beyond the Court’s authority.<sup>92</sup> Among scholars focused directly on criminal procedure, the work of the late William Stuntz has been especially influential. The characterization of Fourth and Fifth Amendment law as regulations for the police runs throughout Stuntz’s considerable body of scholarship, as does a sharp critique of that regulatory effort.<sup>93</sup> Stuntz argued that the Warren Court’s efforts to regulate the police

---

<sup>90</sup> For example, several commentators have explicitly urged the abolition of the exclusionary rule, often emphasizing its ineffectiveness in regulating the police. *See, e.g.*, AKHIL AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 20-31 (1997); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 365 (“The exclusionary rule is significantly flawed as a deterrent device, especially when compared to more direct sanctions on the police and police departments.”).

<sup>91</sup> Judges have asked what it means “to regulate” fairly often as they interpret Congress’s Article I power “to regulate commerce.” *See, e.g.*, *Champion v. Ames (The Lottery Case)*, 188 U.S. 321 (1903). In that context, courts seem confident that to regulate is to prescribe rules. *See* Jack Balkin, *Commerce*, 109 MICH. L. REV. 1, 28 & n.101 (2010). But the meaning of regulation varies by context. Many references to “the regulatory state” invoke a concept of regulation as rule-making by executive agencies rather than legislatures. Sometimes, regulation is used to identify the breadth of a decision’s applicability rather than the identity of the decisionmaker. *See, e.g.*, Kenneth S. Abraham, *Four Conceptions of Insurance*, 161 U. PA. L. REV. 653, 666 (2013) (distinguishing judicial regulation from “mere adjudication” by the “uniform and broad application” of certain judicial interpretations). For a survey of different definitions of regulation, and an attempt to systematize them, see Julia Black, *Critical Reflections on Regulation*, 27 AUSTL. J. LEGAL. PHIL. 1, 11-21 (2002).

<sup>92</sup> *Mapp*, *Miranda*, and other criminal procedure decisions have been central to debates over the legitimacy of “constitutional common law,” and to theorists’ distinctions between interpreting and implementing the constitution. *See, e.g.*, Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1276 (2006); Henry Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2-3 (1975).

<sup>93</sup> *See, e.g.*, William J. Stuntz, *Miranda’s Mistake*, 99 MICH. L. REV. 975, 978 (2001) (characterizing *Miranda* as “a bad regulatory scheme [that] removed all possibility of developing a good one”); William J. Stuntz, *Terry’s Impossibility*, 72 ST. JOHN’S L. REV. 1213, 1215 (1998) (“*Terry* doctrine seems to represent a serious attempt to regulate street-level policing, to forbid bad police encounters while permitting good ones.”); Stuntz, *supra* note 5, at 434 (characterizing the Fourth Amendment as “the primary body of law that regulates day-to-day police work”); *id.* at 396 (“We have taken a privacy ideal . . . that had no connection to ordinary criminal law enforcement, and used it as the foundation for much of the vast body of law that polices the police. Predictably, the combination has not worked out very well.”).



actually made things much worse for criminal defendants, in part because legislatures responded to the Warren Court by expanding the scope of the substantive criminal law to enable police and prosecutors to evade procedural restraints.<sup>94</sup> As he became increasingly dismayed with the criminal justice system over the course of his career, Stuntz urged federal courts to get (mostly) out of the business of regulating the police, and suggested a return to local control over the rules of investigative procedure.<sup>95</sup> A number of scholars have followed or expanded upon Stuntz's work, and a recent volume in his honor details his considerable influence.<sup>96</sup>

As I elaborate in Part II, there is a peculiar irony in Stuntz's complaints about the judicial regulation of the police. That conception of constitutional law is often based on a myopia that treats the police as isolated from the rest of the criminal justice system. If anyone should have decried that myopia, Stuntz seems an excellent candidate. Perhaps more than any other criminal procedure scholar of the last half-century, he was extraordinarily attentive to the ways that different state actors and institutions interact with one another; he did not believe that government entities act in isolation.<sup>97</sup> He specifically rejected the portrait of constitutional criminal procedure as a "self-contained universe."<sup>98</sup> And Stuntz clearly recognized that it was possible to read the Fourth and Fifth Amendments as restraints on the scope of substantive government power.<sup>99</sup> But

---

<sup>94</sup> See STUNTZ, *supra* note 33, at 216 ("It is one of history's stranger ironies that Earl Warren . . . helped usher in the harsh politics of crime that characterized the twentieth century's last decades."); *id.* at 265 ("[B]roader and more specific substantive law was a means of inducing guilty pleas, which were in turn a means of evading the otherwise costly procedural rights that Earl Warren's Court created.").

<sup>95</sup> William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 781, 832 (2006) ("[T]he best thing to do with the massive body of Fourth Amendment privacy regulation, together with the equally massive body of law on the scope and limits of the exclusionary rule, is to wipe it off the books. Let states experiment with different regulatory regimes."). Stuntz envisioned a "modest" role for constitutional law in regulating police violence, discrimination, and corruption, which would include some regulation of police interrogations. See *id.* at 833-34 ("[C]onstitutional law probably should regulate, modestly, three other kinds of police misconduct: violence, discrimination, and corruption.").

<sup>96</sup> See generally THE POLITICAL HEART OF CRIMINAL JUSTICE: ESSAYS ON THE THEMES OF WILLIAM J. STUNTZ (Michael Klarman, David Skeel & Carol Steiker eds., 2014). For one of many other examples, see Darryl Brown, *The Warren Court, Criminal Procedure Reform, and Retributive Punishment*, 59 WASH. & LEE L. REV. 1411, 1411-12 (2002).

<sup>97</sup> See, e.g., William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 525-27 (2001) (discussing the interaction of state actors with the expansion of criminal liability); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 3-4 (1998) [hereinafter Stuntz, *Uneasy Relationship*] (emphasizing "the larger system" in which criminal procedure rules are embedded).

<sup>98</sup> Stuntz, *Uneasy Relationship*, *supra* note 97, at 3.

<sup>99</sup> Stuntz, *supra* note 5, at 394 ("To a surprising degree, the history of criminal procedure is not really about procedure at all but about substantive issues, about what conduct the

he saw this reading as a relic of the past, foreclosed by the modern regulatory state.<sup>100</sup> And notwithstanding his own admonitions, Stuntz did treat modern policing (though not constitutional decision-making) as a largely self-contained enterprise. As detailed above, he repeatedly characterized contemporary constitutional doctrine as “mere” police regulation, peripheral to the substantive power to punish. Not surprisingly, once constitutional provisions were recast as rules for the police rather than broader restraints on state power, it was easy to construct an account in which constitutional litigation is a sideshow that both disguises and encourages expansions in the substantive criminal law. That account is one of Stuntz’s best-known legacies.

Related criticisms of constitutional criminal procedure have been made by other scholars, especially those who frame their inquiries as the study of policing rather than the study of legal doctrine. In a notable recent article entitled *The Problem of Policing*, Rachel Harmon takes up a question inverse to the one I raise here.<sup>101</sup> I begin with constitutional criminal procedure and ask why it is all about policing; Harmon begins with “the problem of policing” (the question of how to regulate the police) and asks why it’s all about constitutional criminal procedure. Given that references to “regulatory approaches” or “the regulatory state” frequently emphasize the prevalence of rule-making by executive agencies, it is unsurprising that scholars might conclude police regulation is not a job for courts. Harmon shows that the judicially crafted rules of constitutional criminal procedure are insufficient constraints on police behavior,<sup>102</sup> and she follows many other critics in emphasizing the “limited institutional capacity” of courts.<sup>103</sup> Ultimately, Harmon recommends that Congress and the states do more to regulate police forces.<sup>104</sup> Harmon does not go as far as Stuntz and urge us to “wipe off the books” existing constitutional doctrines, but she makes clear that these doctrines are not a wise or effective path to police regulation.<sup>105</sup>

---

government should and should not be able to punish.”).

<sup>100</sup> See *id.* at 428-34 (“*Boyd*-era Fourth and Fifth Amendment law cast a shadow on a host of regulatory arrangements at a time when the popularity of such arrangements was rising, not falling.”); *infra* Section II.A.

<sup>101</sup> Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 764 (2012) (asking “not how the Constitution constrains the police but how law and public policy can best regulate the police”).

<sup>102</sup> See *id.* at 776-81 (discussing how courts “lack the institutional capacity to regulate the police without substantial assistance” from other institutions).

<sup>103</sup> See *id.* at 763; see also *id.* at 775-76.

<sup>104</sup> See *id.* at 812-15.

<sup>105</sup> Other scholars have likewise argued that constitutional doctrine is a flawed mechanism for police regulation. See, e.g., DAVID ALAN SKLANSKY, *DEMOCRACY AND THE POLICE* 5 (2008) (“Because thinking about criminal procedure has tended to focus on the questions taken up by courts, the unfortunate result has been not just that *judges* have largely failed to consider the systemic requirements for democratic policing, but that most of the rest of us have, too.”); Seth Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 848-49

### C. *Turtles All the Way Down*

As should be clear, this Article challenges the claim that the primary function of defendants' rights claims is or should be the regulation of the police. Before turning to an alternative account of the doctrines of investigative procedure, however, a brief word on the scholarly critiques addressed in the previous section is in order. Even if we adopt police regulation as our primary aim and look for the best way to accomplish that end, the complaints about judicially crafted restrictions miss the mark. It is true that judicial regulation of the police is largely ineffective—but so is judicial regulation of many other government actors, and so is *non-judicial* regulation of government actors and institutions. The problem of policing is just the problem of the state: the difficulty of constructing arrangements in which state institutions will limit their own power, or in which some state institutions will meaningfully check the power of others.<sup>106</sup> State-builders and political theorists have tackled that problem for centuries, attempting to constrain state power through mechanisms such as separation of powers or adequate popular representation. Judicial enforcement of individual rights is one of many such mechanisms, and if it has had only mixed success as a limitation on state power, it is hardly unique in that regard.<sup>107</sup>

Importantly, arguments that the judiciary lacks institutional competence to regulate the police rely on a myth—namely, the myth that institutions are ever competent. If that indictment seems too harsh, keep in mind that scholars who study courts more closely than other institutions are likely to be particularly attuned to the institutional limitations of the judiciary—and sometimes are insufficiently attuned to the pathologies of other political institutions. Among political science scholars and even among legal scholars who look beyond the judiciary, there is no shortage of accounts of the inefficiencies and

---

(2014) (arguing that many of the Supreme Court's decisions are based on empirically inaccurate assumptions about policing).

<sup>106</sup> See generally SCOTT GORDON, *CONTROLLING THE STATE: CONSTITUTIONALISM FROM ANCIENT ATHENS TO TODAY* (1999); Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1796 (2009) (“[W]e have systems of public law, international and constitutional, which cast the state as the *subject* (and product) rather than solely the *source* of law.”); Alice Ristroph, *Covenants for the Sword*, 61 U. TORONTO L.J. 657, 666 (2011) (discussing the challenges presented by limits imposed by the sovereign upon its own power).

<sup>107</sup> The scholarly skepticism about the benefits of Fourth and Fifth Amendment litigation by individual defendants is part of a larger trend of disillusionment with constitutional rights litigation; many scholars emphasize the benefits of structural regulation or procedural reform over individual rights claims. *E.g.*, Richard A. Bierschbach & Stephanos Bibas, *Constitutionally Tailoring Punishment*, 112 MICH. L. REV. 397, 399, 418-21 (2013) (detailing limits of substantive rights litigation and advocating for procedural reform). In the arena of punishment, though, structural or procedural regulatory approaches have not accomplished much. One need only look to capital sentencing, an example used repeatedly by Bierschbach and Bibas, to see that procedural regulation fails to deliver on its promises.

incompetencies of legislatures, administrative agencies, and other state institutions.<sup>108</sup> Of course, many institutional competence arguments are implicitly or explicitly comparative, alleging that courts are simply less well suited to a particular task than other institutions. But the claims of comparative advantage are often poorly substantiated. With respect to restricting the police, there is, unfortunately, little evidence that other institutions (legislatures, agencies, community review boards) will do a better job than courts have done. Indeed, the evidence suggests otherwise: as several critics of Stuntz's work have pointed out, the Warren Court took up the cause of police regulation precisely because other institutions had failed at that project.<sup>109</sup>

I do not suggest that we throw in the towel on regulating the police, or restricting state power more broadly. We might as well try the non-judicial forms of regulation proposed by Harmon and others. My pessimism about the project of disciplining the state does not cross the line into nihilism (or to invoke Albert Camus, I'm still prepared to wage war against our revolting fate).<sup>110</sup> But efforts to regulate the police, whether judicial or non-judicial, can and should exist in conjunction with a robust jurisprudence of constitutional criminal procedure. To see why, it helps to consider what criminal procedure offers *beyond* regulations of the police. That is the subject of the next Part.

## II. "A STRUGGLE FROM START TO FINISH"

Rights, not rules, are the impetus that produce constitutional criminal procedure. The rights protected by the Fourth, Fifth, and Sixth Amendments vindicate an array of interests, including security, dignity, privacy, and

---

<sup>108</sup> See, e.g., DAVID LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN* 4 (2003) (suggesting that a study of administrative structure is necessary to understand why agencies are either "too 'politicized'" or "pathologically unresponsive"); Terry Moe, *The Politics of Bureaucratic Structure*, in *CAN THE GOVERNMENT GOVERN?* 267 (John E. Chubb & Paul E. Peterson eds., 1989) ("American public bureaucracy is not designed to be effective."); Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132, 151-53 (1988) (discussing congressional committee system and its facilitation of "pork barrel" politics). Often, a defense of legislative authority points to the weaknesses of agencies, or vice versa. See, e.g., Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 2-3 (2014) (describing congressional dysfunction and its implications for administrative agencies).

<sup>109</sup> Stephen J. Schulhofer, *Criminal Justice, Local Democracy, and Constitutional Rights*, 111 MICH. L. REV. 1045, 1050-58 (2013) (reviewing STUNTZ, *supra* note 33); David Alan Sklansky, *Killer Seatbelts and Criminal Procedure*, 119 HARV. L. REV. FORUM 56, 57 (2006) (reviewing Stuntz, *supra* note 95) ("I think Stuntz is wrong to blame the legislatures' failures on the courts and wrong to suggest that the politicians would likely do better if the judges would simply leave them alone.").

<sup>110</sup> ALBERT CAMUS, *LETTERS TO A GERMAN FRIEND* 28 (1960) ("[R]efusing to accept that despair and that tortured world, I merely wanted men to rediscover their solidarity in order to wage war against their revolting fate.").

autonomy. One theme unites these various interests and the many different claims that individual defendants raise: principled limitations on the coercive power of the state, especially the power to punish. In terms of constitutional design, we can say that these Amendments limit the ways that the state may infringe security, dignity, etc. as it seeks to impose punishment. In terms of individual litigants, we can view constitutional rights as their mechanisms to resist state coercion.

Consider Herbert Packer's two now-famous models of the criminal process: the Crime Control model, in which criminal procedures should be designed to remove innocent suspects from the process as quickly as possible and ferry all others to conviction and punishment as quickly as possible; and the Due Process model, in which criminal procedures should establish repeated opportunities for judicial determination of both legal and factual guilt.<sup>111</sup> As different as the normative priorities of these models might be, they appear to rest on a common descriptive account of the criminal process, a matter-of-fact summary that Packer apparently believed observers of any normative bent would recognize instantly:

People who commit crimes appear to share the prevalent impression that punishment is an unpleasantness that is best avoided. They ordinarily take care to avoid being caught. If arrested, they ordinarily deny their guilt and otherwise try not to cooperate with the police. If brought to trial, they do whatever their resources permit to resist being convicted. And, even after they have been convicted and sent to prison, their efforts to secure their freedom do not cease. It is a struggle from start to finish. This struggle is often referred to as the criminal process . . . .<sup>112</sup>

If the text of the Constitution (and its silence on police) does not make it clear, Packer's account should: the enterprise of constitutional criminal procedure has much more to do with resisting punishment than regulating the police.<sup>113</sup> The prototypical Fourth or Fifth Amendment claim alleges police

---

<sup>111</sup> Packer, *supra* note 17, at 13 ("If the Crime Control Model resembles an assembly line, the Due Process Model looks very much like an obstacle course.").

<sup>112</sup> *Id.* at 2. Commentators, especially those engaged in comparative legal studies, have often questioned whether criminal procedure should be conceived as a highly adversarial battle between state and individual. See, e.g., John Griffiths, *Ideology in Criminal Procedure or a "Third Model" of the Criminal Process*, 79 YALE L.J. 359, 371 (1970) (considering a "Family Model" to replace the adversarial approach in Packer's models).

<sup>113</sup> In a book that included but reached beyond the *Two Models of the Criminal Process* article, Packer developed arguments very much in keeping with the suggestions of this Article. He suggested that the state's various powers to enact criminal legislation, to police, and to punish must be considered in relation to one another. See HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 5 (1968). Unfortunately, Packer suffered a stroke the year after this book was published and never fully recovered. His legacy for criminal law scholars has been the narrower analysis of criminal procedure as a clash between Crime Control and Due Process values. For example, a recent essay honoring the fortieth anniversary of Packer's book focuses exclusively on the models of the criminal process. See

misconduct, to be sure, but the immediate goal of such a claim is not better policing. Instead, the prototypical claim is an individual's act of resistance against state coercion: it is an effort to avoid punishment by claiming that the state has overstepped its powers. Importantly, this act of resistance is itself constitutionally sanctioned by the Bill of Rights—even if the defendant is guilty. Unfortunately, Packer's models have been interpreted in the context of a widespread assumption that the most important role of adjudication is the determination of guilt.<sup>114</sup> It is more accurate to say that criminal adjudication determines whether the conditions for punishment have been satisfied, and guilt is only one of these conditions. Compliance with specified investigative procedures is also a constitutional requirement to be met before the state may punish. Thus it is open to individual defendants to resist punishment by alleging an unreasonable search or seizure, or an unconstitutional interrogation. Such resistance is both an effort at personal self-preservation and a form of political action. The defendant has been forced to engage with the state by being made subject to its coercive powers; the usual and natural response is to resist.

Most of the time, the resistance is futile. Much of the time, perhaps, it should be. Nevertheless, the resistance should be recognized, and even celebrated. A world in which people did not resist punishment would be a world without instincts for dignity, autonomy, and self-preservation. It would be a world without *individuals* as we know them. Moreover, there are social benefits to a truly adversarial criminal justice system, one in which the defendant is empowered by the Constitution to resist the imposition of punishment. I am not sure whether truth-seeking, in its traditional conception as the accurate sorting of guilty suspects from innocent ones, is such a benefit. But constitutional criminal procedure encourages another kind of honesty: it creates pressure on the state to articulate and defend the principles of coercion that underlie the operation and enforcement of the criminal law. This Part develops these claims.

#### A. *Conditions for Punishment*

From the moment an individual becomes a suspect, punishment looms on the horizon of the criminal process. The Constitution, which shows no special regard for the police in comparison to other state actors, shows a special regard for those facing punishment. It offers these individuals specific protections against the state; it sets a variety of conditions that must be satisfied before the

---

Hadar Aviram, *Packer in Context: Formalism and Fairness in the Due Process Model*, 36 *LAW & SOC. INQUIRY* 237, 238-45 (2011) (reviewing critiques of Packer's models).

<sup>114</sup> See Aviram, *supra* note 113, at 246-47 ("In Packer's original dichotomy, crime control emphasized the investigatory stage, while due process emphasized the trial stage. Within the trial phase, formalist due process focuses on the adjudication of guilt as the 'main show' of the criminal trial and therefore guarantees rights that are directly related to this phase; the most important of these rights is the presumption of innocence.")

state may punish. The state must define the prohibited conduct in advance and give notice of its prohibition.<sup>115</sup> Criminal prohibitions must be both forward-looking and generally applicable, rather than targeted at specific individuals.<sup>116</sup> Of course, criminal prohibitions are also subject to the constitutional constraints that apply to all state action, such as the protections for speech and religion in the First Amendment. But the Constitution establishes a number of constraints specific to the criminal process. Before the state may punish, it must establish guilt at a jury trial, if the defendant so elects, and must ensure that the defendant has adequate legal counsel.<sup>117</sup> At that trial, or in other adjudicative proceedings to establish guilt, the state must avoid reliance on compelled self-incrimination.<sup>118</sup> Any punishment eventually imposed must not be cruel or unusual.<sup>119</sup> And of course, individuals must not be deprived of life, liberty, or property without due process of law, a requirement that has been interpreted to imply various further conditions on punishment, such as the state's obligation to prove each element of a crime beyond a reasonable doubt.<sup>120</sup>

Not surprisingly, courts and commentators readily and frequently recognize that the threat of punishment frames the adjudicative process and imposes distinctive constitutional requirements on it. For example, this basic idea has underwritten recent Sixth Amendment sentencing jurisprudence: increases in punishment have triggered appellate scrutiny of the preceding fact-finding process and led courts to conclude that juries, not judges, must determine the facts that authorize more severe sentences.<sup>121</sup> But it bears emphasis that

---

<sup>115</sup> These general principles of legality and notice underlie the *ex post facto* clause, and they are also understood as implications of the Due Process Clause. U.S. CONST. art. I, § 9; *id.* amend. XIV.

<sup>116</sup> *Id.* art. I, § 9, cl. 3 (prohibition of bills of attainder).

<sup>117</sup> *Id.* amend. VI.

<sup>118</sup> *Id.* amend. V.

<sup>119</sup> *Id.* amend. VIII.

<sup>120</sup> *Id.* amend. XIV; *In re Winship*, 397 U.S. 358, 364 (1970) (“Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

<sup>121</sup> *See, e.g.,* *Alleyne v. United States*, 133 S. Ct. 2151, 2162 (2013) (“[T]he essential Sixth Amendment inquiry is whether a fact is an element of the crime. When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury.”). *See also* Kate Stith, *Crime and Punishment Under the Constitution*, 2004 SUP. CT. REV. 221, 221 (“[T]he essential holdings of *Apprendi v. New Jersey* and *Blakely v. Washington* seem constitutionally obvious . . . . [W]hen a legislature decides that certain conduct warrants an increase in criminal punishment, such conduct is part of the ‘crime’ that must be charged and proven in accordance with the requirements of the Fifth, Sixth, and Fourteenth Amendments of the Constitution.” (internal citations omitted)).

punishment looms on the horizon of the investigative process as well. The constitutional provisions that are applied most often to the police have, by and large, been so used because the police facilitate the imposition of punishment. The Fourth Amendment prohibition of unreasonable searches and seizures is not limited to criminal cases, but the state's efforts to punish provide the occasion for the vast majority of searches and seizures. The Fourth Amendment (like the First Amendment) restricts the power to punish even though it also applies in civil contexts.<sup>122</sup> One way it accomplishes this end, at least in theory, is to restrict the state's power to define conduct as criminal: a statute that imposed criminal penalties on anyone who refused a police officer's request to enter her home, whatever the basis of the request, would almost certainly violate the Fourth Amendment.<sup>123</sup> But the more common and more significant way in which the Fourth Amendment restricts the power to punish is a restriction on investigation. By prohibiting unreasonable searches and seizures, the Amendment prohibits the state from using certain tactics to gather the evidence that it is required (by other constitutional provisions) to present in order to establish guilt and impose punishment.<sup>124</sup> Again, the Fourth Amendment is not limited to criminal investigations, but courts have repeatedly recognized that investigations aimed at detecting crime trigger particular Fourth Amendment scrutiny.<sup>125</sup>

---

<sup>122</sup> I argue here that the Fourth Amendment restricts the power to punish both by restricting the substantive criminal law and by constraining investigations. Daniel Solove has made a similar claim about the First Amendment: though we typically think of the First Amendment's implications for criminal law solely in terms of constraints on the substantive criminal law, it also constrains investigative practices. Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 121 (2007).

<sup>123</sup> Cf. *Hiibel v. Sixth Judicial Dist. Ct.*, 542 U.S. 177, 188-89 (2004) (sustaining against a Fourth Amendment challenge a statute that penalized failure to identify oneself to a police officer, but noting specifically that the statute required the officer to have a Fourth Amendment justification to stop and request identification). In addition, the Fourth Amendment limits the substantive criminal law by making it impossible to criminalize conduct that cannot be detected except by unreasonable searches. See *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965) (striking down a ban on the use of contraception); see also Nadia B. Soree, *Whose Fourth Amendment and Does It Matter? A Due Process Approach to Fourth Amendment Standing*, 46 IND. L. REV. 753, 777 (2013) ("The Fourth Amendment may act as a direct check on the legislature since, as a practical matter, the legislature may refrain from criminalizing conduct that would be difficult to detect absent a Fourth Amendment violation.").

<sup>124</sup> See *Winship*, 397 U.S. at 364 (interpreting the Fourteenth Amendment Due Process Clause to require the state to prove each element of a crime beyond a reasonable doubt). For further discussion of the evidentiary implications of the Fourth Amendment, see *infra* Section III.A.

<sup>125</sup> This premise is at least as old as *Boyd v. United States*, 116 U.S. 616 (1886), where the Court applied the Fourth Amendment in a civil forfeiture proceeding but felt it necessary to emphasize that the government action, "though technically a civil proceeding, is in substance and effect a criminal one." *Id.* at 634. Today, the Fourth Amendment's heightened



The claims I am making are fairly straightforward implications of the constitutional text. No wordplay or fuzzy linguistics are required to accept them. Moreover, these implications of the Constitution were readily understood by the Supreme Court in most of its initial interpretations of the Fourth, Fifth, and Sixth Amendments. As discussed in Section I.A, the key Warren Court criminal procedure decisions understood the relevant provisions of the Bill of Rights to be motivated by a broad concern with state coercion, especially coercive punishment. *Mapp*, *Miranda*, and *Massiah* applied respectively the Fourth, Fifth, and Sixth Amendments to police conduct, but each opinion raised specific concerns about the use of unconstitutionally obtained evidence to convict and punish individual defendants.<sup>126</sup> Before the Warren Court, early judicial applications of the Fourth and Fifth Amendment were even more explicit in characterizing those provisions as constraints on the power to punish.

A useful illustration is *Boyd v. United States*, the same nineteenth-century case that *Mapp v. Ohio* quoted at length to explain the values underlying the Fourth Amendment.<sup>127</sup> Boyd, an importer, was ordered by the government to produce shipping invoices or have adverse evidentiary conclusions drawn against him in a civil forfeiture proceeding.<sup>128</sup> Boyd claimed that the order of production violated the Fourth and Fifth Amendments.<sup>129</sup> The case did not involve the police, or even a formal criminal law. But the Supreme Court found the order of production “tantamount”<sup>130</sup> to compelled self-incrimination, and the proceedings criminal “in substance and effect.”<sup>131</sup> Only after analogizing the underlying state coercion to punishment did the Court find that the Fourth and Fifth Amendments applied.<sup>132</sup> These Amendments, the Court held, prohibited “any forcible and compulsory extortion of a man’s own

---

concern with criminal investigations is most often expressed in discussions of the special needs doctrine, which relaxes constitutional requirements for searches that serve needs other than criminal law enforcement. See, e.g., *Ferguson v. City of Charleston*, 532 U.S. 67, 74 n.7 (2001) (“[I]n limited circumstances, a search unsupported by either warrant or probable cause can be constitutional when ‘special needs’ other than the normal need for law enforcement provide sufficient justification.”).

<sup>126</sup> See *Miranda v. Arizona*, 384 U.S. 436 (1966); *Massiah v. United States*, 377 U.S. 201 (1964); *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>127</sup> See *Mapp*, 367 U.S. at 646-47 (“[I]n *Boyd v. United States* . . . this Court held that the doctrines of [the Fourth and Fifth Amendments] ‘apply to all invasions on the part of the government and its employees of the sanctity of a man’s home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . .’” (quoting *Boyd*, 116 U.S. at 630)).

<sup>128</sup> *Boyd*, 116 U.S. at 618, 620.

<sup>129</sup> *Id.* at 621.

<sup>130</sup> *Id.* at 621-22.

<sup>131</sup> *Id.* at 634.

<sup>132</sup> *Id.* at 622.

testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods . . . .”<sup>133</sup> Notably, these specific restrictions on the government’s power to investigate crime did not survive: the Court has since authorized compulsory production in a number of contexts.<sup>134</sup> But the underlying conceptual framework of *Boyd*—the Fourth and Fifth Amendments as limitations on the ways that the government can gather the evidence it needs to punish—has never been disavowed. Indeed, the Court continues to cite *Boyd*’s broader statements of principle favorably.<sup>135</sup>

In other contexts, the Court has occasionally assumed without elaboration that the Constitution sets various conditions for legitimate punishment.<sup>136</sup> This assumption is not surprising, but it raises an important question. The reading of the Constitution offered here requires no great extrapolation from the text, and it has been endorsed by the Supreme Court on several occasions. Why, then, has this reading been so greatly obscured in contemporary doctrine and scholarship?<sup>137</sup> Why do so many scholars and jurists view Fourth and Fifth Amendment jurisprudence as regulations for the police, rather than contestations over the power to punish? I have no definitive answers, but I can offer two possible explanations.

First, American legal thought and especially American criminal law is deeply influenced by a sharp dichotomy between “substance” and

<sup>133</sup> *Id.* at 630.

<sup>134</sup> *See, e.g.*, *Hale v. Henkel*, 201 U.S. 43, 70 (1906) (corporate documents); *Shapiro v. United States*, 168 F.2d 625, 626 (3d Cir. 1948) (required records); *see also* *Warden v. Hayden*, 387 U.S. 294, 300-01 (1967) (abolishing “mere evidence” rule that had been derived from *Boyd*). Many commentators have drawn contrasts between *Boyd* and modern law. A standard refrain is that *Boyd* represents a property-focused conception of the Fourth Amendment, which the Warren Court replaced with a privacy-focused conception. *See, e.g.*, Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 312-13 (1998). This particular contrast seems inapt—*Boyd* surely emphasized privacy, and later cases continue to emphasize property. A more intriguing suggestion is Stuntz’s suggestion that *Boyd* depicted a hostility toward the regulatory state that has since been abandoned. *See infra* note 143.

<sup>135</sup> *See, e.g.*, *Riley v. California*, 134 S. Ct. 2473, 2494-95 (2014) (applying *Boyd* to privacy protection for cell phones); *Florida v. Jardines*, 133 S. Ct. 1409, 1415 (2013) (similarly referencing *Boyd* for its discussion of sacred areas of privacy); *United States v. Hubbell*, 530 U.S. 27, 51 (2000) (Thomas, J., concurring) (citing *Boyd* for its discussion of the common law).

<sup>136</sup> *See, e.g.*, *Schick v. Reed*, 419 U.S. 256, 264 (1974) (finding the pardon power to be plenary and allowing the President to place any conditions on a pardon “which do not in themselves offend the Constitution”).

<sup>137</sup> My reading is not totally foreign to criminal procedure scholarship, even if it is rarely articulated. *See, e.g.*, Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: “Here I Go Down that Wrong Road Again,”* 74 N.C. L. REV. 1559, 1564 (1996) (“Limits on searches and interrogation, like juries and the right to confront adverse witnesses, are only means to the larger end of preventing punishment not authorized by judgment rendered after a fair trial.”).

“procedure.”<sup>138</sup> Crimes and punishments are the subject of the substantive criminal law. Investigations and adjudications are the subject of criminal procedure. Scholars often treat the two sides of this dichotomy as fully independent of one another, and they also tend to treat the dichotomy as a hierarchy.<sup>139</sup> Substantive criminal law is where the real force of state power is exercised, on the usual account, and thus (for those concerned with judicial overreaching) the area least appropriate for judicial review. In contrast, criminal procedure is, well, insubstantial, at least as a form of official power. In reality, of course, all of these practices—criminalization, investigation, adjudication, and punishment—are carried out by state agents who interact with and are influenced by one another. All of these practices are state practices, and all involve the exercise of official power. Somehow, though, the substance/procedure distinction seems to have created the notion that the state exercises power only when it makes certain kinds of choices—when it criminalizes, for example, but not when it issues a warrant.

Once again, Bill Stuntz’s work merits attention. He directly identified “the substantive origins of criminal procedure,” recognizing that the Fourth and Fifth Amendments did not enter American jurisprudence as regulations of the police.<sup>140</sup> Instead, on Stuntz’s telling these amendments were initially applied as constraints on the prosecution of “objectionable crimes—heresy, sedition, or unpopular trade offenses.”<sup>141</sup> On this account, “the history of criminal procedure is not really about procedure at all but about substantive issues, about what conduct the government should and should not be able to punish.”<sup>142</sup> There are obviously important parallels between this claim and the one developed in this Article, and indeed Stuntz relied on none other than *Boyd* to make his case. He argued that *Boyd*, like the earlier English opinions that inspired it, protected “privacy” less for its own sake than to prevent the enforcement of disfavored substantive prohibitions—in *Boyd* itself, an

---

<sup>138</sup> The dichotomy persists notwithstanding many thoughtful critiques. Notably, many of the critiques focus on civil rather than criminal law. See, e.g., Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 802 (2010) (arguing that “[p]rocedure is an instrument of power that can, in a very practical sense, generate or undermine substantive rights,” and illustrating the claim with reference to employment discrimination law).

<sup>139</sup> For example, Markus Dubber writes that “[a]lthough the lines in the sand drawn by the Fourth, Fifth, and Sixth Amendments have been guarded with remarkable vigilance, all too little thought has been expended on the question of how to choose among the multitude of possible systems of punishment imposition that would satisfy the vague and modest requirements of the Constitution.” Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 602 (1997). Thus Dubber assumes that the Fourth, Fifth, and Sixth Amendments are not themselves constitutional requirements of a system of punishment imposition.

<sup>140</sup> Stuntz, *supra* note 5, at 395-96.

<sup>141</sup> *Id.* at 394.

<sup>142</sup> *Id.*

unpopular trade regulation.<sup>143</sup> Stuntz read *Boyd* as a constraint on the power to punish, as do I, but to Stuntz the constraint was specifically a concern with *criminalization* rather than *investigation*. “Substance,” to Stuntz and most criminal law scholars, has to do with what conduct is defined as criminal.<sup>144</sup>

The opinion in *Boyd* belies the claim that the Court’s main concern was criminalization, however. The Court made clear that it did not question the state’s power to regulate trade through customs inspections, excise taxes, and duties—or even to conduct some kinds of searches of imported items to enforce such regulations.<sup>145</sup> The Court’s concern in *Boyd* was not with the underlying trade regulation, but with the particular method of investigation used here: “The search for and seizure of . . . goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man’s private books and papers for the purpose of obtaining information therein contained . . . .”<sup>146</sup> *Boyd* did seek to constrain the power to punish, but it did so by constraining the power to investigate, not by limiting the power to criminalize. Both powers, of course, are “substantive” in that they are part of the state’s exercise of coercion against individual citizens.

---

<sup>143</sup> See *id.* at 396-411, 421-25. According to Stuntz, *Boyd* represented hostility to state regulation writ large, and it had to be abandoned or at least defanged to make possible the modern regulatory state. But Stuntz overstates the degree to which *Boyd* is at odds with contemporary regulation. The *Boyd* Court does try—not always persuasively—to carve out a distinction between civil regulation and criminal, and to make the case that the compulsory production in the instant proceedings was properly understood as criminal. See *Boyd v. United States*, 116 U.S. 616, 621-22 (1886).

<sup>144</sup> Scholars often contrast constitutional regulation of the substantive criminal law with constitutional regulation of procedure. See, e.g., STUNTZ, *supra* note 33, at 209; Ronald J. Allen, *Foreword: Montana v. Egelhoff—Reflections on the Limits of Legislative Imagination and Judicial Authority*, 87 J. CRIM. L. & CRIMINOLOGY 633, 633-34 (1997); John C. Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1331 (1979). What makes Stuntz’s work both especially fascinating and especially frustrating, from my perspective, is that he so often observed the interaction of substance and procedure; he came most of the way to the arguments advanced here but stopped short. He even urged an interpretation of the Fourth Amendment as a “limit [on] the use of coercion and violence,” but apparently meant only *police* coercion. William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1042 (1995). What is punishment, though, if not a form of state coercion and violence? What in the Fourth Amendment suggests that it is uniquely concerned with police officers? Even when police officers are not themselves violent, they participate in the state project of coercive punishment. Stuntz emphasized the interaction between different state actors when he critiqued the doctrines of the Warren Court, but he did not apply that same integrated view of the state and the criminal justice process to his own interpretation of the Fourth and Fifth Amendments.

<sup>145</sup> The first such regulations were passed by the same Congress that proposed the Bill of Rights, the Court noted, so “it is clear that the members of that body did not regard searches and seizures of this kind as ‘unreasonable . . . .’” *Boyd*, 116 U.S. at 623.

<sup>146</sup> *Id.*

To say that the history of criminal procedure “is not really about procedure at all but about substantive issues”<sup>147</sup> is to take for granted the dichotomy between procedure and substance, and thus to fail to recognize that investigative and adjudicative procedures are always exercises of substantive power.<sup>148</sup>

The contemporary failure to view constitutional criminal procedure as conditions for punishment might be traced to another culprit: the field of punishment theory. Theories of punishment, at least those most visible in the legal academy, have tended to focus on the target of punishment rather than its agent.<sup>149</sup> Much of the vast literature on justifications for punishment is comprised of riffs on the assertion that the guilty deserve to be punished.<sup>150</sup> This formulation puts punishment in the passive voice, obscuring questions about who should do the punishing and what constraints might bind that agent.<sup>151</sup> Not surprisingly, punishment theory has been charged as insufficiently attentive to *political* theory; punishment theory too often lacks normative accounts of legitimate state power and descriptive accounts of the ways in which state institutions operate and interact.<sup>152</sup> Moreover, the procedure/substance divide described above permeates criminal law scholarship: most scholars of criminal procedure are not punishment theorists, and most punishment theorists are not attentive to criminal procedure. As a consequence, punishment theorists often fail to spell out specific political and

---

<sup>147</sup> Stuntz, *supra* note 5, at 394.

<sup>148</sup> Cf. Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 815 (2015) (discussing the substantive powers exercised through arrests).

<sup>149</sup> For illustrations, see Alice Ristroph, *Just Violence*, 56 ARIZ. L. REV. 1017, 1020-21 (2014).

<sup>150</sup> For example, Jean Hampton distinguishes varieties of retributive claims: “1. Only the guilty deserve to be punished. . . . 2. All and only the guilty deserve to be punished. 3. It is morally required that all and only the guilty deserve to be punished.” Jean Hampton, *Retribution and the Liberal State*, 1994 J. CONTEMP. LEGAL ISSUES 117, 124; see also ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 45-46 (1976); Kent Greenawalt, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 347 (1983) (describing retributivism as the view “that punishment is justified because people deserve it”).

<sup>151</sup> See Ristroph, *supra* note 149, at 1021 (“Retributive theorists tend to work in the passive voice—their question is why the criminal deserves *to be punished* rather than why the state has the power or authority *to punish him*.”).

<sup>152</sup> See, e.g., Binder, *supra* note 11, at 321-22 (arguing that moral analysis of punishment alone is insufficient without discussing the institutions that impose punishment); Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment?*, 87 COLUM. L. REV. 509, 510-11 (1987) (“A complete theory of punishment must concern itself not merely with the moral desirability of the goals sought by punishment . . . but also with the equally important question of whether the pursuit of these goals is *part of the legitimate business of the state*—whether these goals are properly realized through the mechanism of state coercion.”).

procedural criteria that must be satisfied in order for the state to punish.<sup>153</sup> Too often they imply that guilt is itself a sufficient condition for punishment.

Criminal procedure scholars, in turn, seem often to take that suggestion for granted.<sup>154</sup> Many assert that the central purpose of the criminal justice process is to sort the guilty from the innocent, too often implying that the determination of guilt is all that is required to impose punishment.<sup>155</sup> To be sure, courts make similar assertions, especially as the police regulation model of criminal procedure has become ascendant.<sup>156</sup> The fact that some procedural restraints make it more difficult to ascertain guilt leads scholars to decry the restraints, or at least feel it necessary to apologize for them. Indeed, that may be the most common and enduring complaint about constitutional criminal procedure: it sometimes allows the guilty to escape punishment, to get off on “technicalities,” to go free because the constable has blundered.

But in our constitutional scheme, guilt is not the sole condition for punishment. It should be a necessary condition, although it is not always treated as such,<sup>157</sup> but it most certainly is not a sufficient condition. A defendant who wears an obscene T-shirt to court, or who burns a flag, may be guilty of a criminal prohibition barring such displays, but he is not punishable.<sup>158</sup> A guilty defendant whose trial is conducted by a clearly biased

<sup>153</sup> Punishment theorists often discuss the conditions for just punishment, but the conditions are normative, philosophical concepts such as harm or desert. *See, e.g.*, Heidi M. Hurd, *What in the World is Wrong?*, 1994 J. CONTEMP. LEGAL ISSUES 157, 162 (identifying moral desert as a condition for punishment). Obviously, conditions such as desert or harm focus on the target of punishment and his actions. Conditions applicable to the agent of punishment are ignored, since the agent himself (or itself) is usually ignored in punishment theory.

<sup>154</sup> For a similar critique of criminal law scholarship, see Louis Michael Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 483-91 (1980).

<sup>155</sup> *E.g.*, AMAR, *supra* note 90; STUNTZ, *supra* note 33, at 218 (describing the “central task” of the criminal justice system as “separating those defendants who deserve punishment from those who don’t”). In his powerful book that elsewhere condemns the scale of American punishment, Stuntz could not tell the story of *Boyd* without emphasizing that the defendant was a dishonest tax cheat. To Stuntz, Boyd’s guilt was as or more important as anything the government might do to try to establish it. *See id.* at 197; *see also id.* at 220 (police conduct a less important issue than defendant’s conduct and intent); *id.* at 228.

<sup>156</sup> *See, e.g.*, *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) (“[T]he central purpose of a criminal trial is to decide the factual question of the defendant’s guilt or innocence.”). *But see* Seidman, *supra* note 154, at 437 (“[T]he Burger Court’s criminal procedure decisions are not consistent with a guilt-or-innocence model of criminal justice. On the contrary, the Court has continued to use the criminal justice system as a tool for social engineering, even when this pursuit of broad social goals conflicts with the need to reach factually reliable judgments in individual cases.”).

<sup>157</sup> *See* *Herrera v. Collins*, 506 U.S. 390, 393 (1993) (claim of actual innocence based on newly discovered evidence not sufficient grounds for independent habeas claim).

<sup>158</sup> To be specific, the defendant is not punishable under a statute that targets speech

judge is not punishable.<sup>159</sup> A guilty defendant whose crime cannot be proven to a jury beyond a reasonable doubt is not punishable.<sup>160</sup> Together, these propositions illustrate that the criminal process is less an effort to sort the guilty from the innocent than it is an effort to ensure that all conditions for punishment, including but not limited to guilt, are satisfied before the state exercises this particular mode of coercion.

Again, mainstream punishment theory may be partly to blame for this focus on guilt at the expense of other necessary conditions for punishment. But a neglected alternative account invites us to look beyond guilt. Consider Thomas Hobbes's surprising theory of punishment, which endorses both the state's right to impose punishment and the individual's right to resist it.<sup>161</sup> Though Hobbes is famous for his social contract theory and the powerful sovereign it produces, he denied that punishment was authorized by this social contract (or by any form of consent from the punished).<sup>162</sup> Instead, he saw punishment as a manifestation of an extra-political right to exercise defensive and even preemptive violence.<sup>163</sup> Every person held this right of preemptive violence in the state of nature, but only the sovereign continues to possess it once civil society is established.<sup>164</sup> As one would expect of a political theorist, Hobbes contemplated directly the agent of punishment and set forth a number of conditions for the sovereign's actions to constitute legitimate punishment.<sup>165</sup>

---

itself. See *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Cohen v. California*, 403 U.S. 15, 26 (1971) ("[A]bsent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense."). But the defendant may be punishable if the state finds another way to meet the constitutional conditions for punishment—for example, by prosecuting the flag burner under a general arson statute. See *id.* at 412 n.8 ("We also emphasize that Johnson was prosecuted only for flag desecration—not for trespass, disorderly conduct, or arson.").

<sup>159</sup> See *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991) (citing *Tumey v. Ohio*, 273 U.S. 510 (1927)) ("The entire conduct of the trial from beginning to end is obviously affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial.").

<sup>160</sup> See *In re Winship*, 397 U.S. 358, 364 (1970). Some commentators use the term "legal guilt" to mean "guilt established beyond a reasonable doubt," so they might deny that a defendant whose crime is not provable is legally guilty. Fair enough, but unless the term legal guilt is defined much more broadly, to include all constitutional (and non-constitutional) restrictions on the state's power to punish, we should not suggest that guilt is a sufficient condition for punishment.

<sup>161</sup> See Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 CAL. L. REV. 601, 613-15 (2009).

<sup>162</sup> THOMAS HOBBS, *LEVIATHAN* 214 (Richard Tuck ed., 1991) (1651).

<sup>163</sup> *Id.*; see also Ristroph, *supra* note 161, at 613-15.

<sup>164</sup> HOBBS, *supra* note 162, at 214.

<sup>165</sup> *Id.* at 214-215.

Even legitimate punishment, however, is a form of violence that threatens the well-being of the person punished. Thus Hobbes, ever attuned to human vulnerabilities and our efforts to avoid death, claimed that an inalienable right to self-preservation gave each condemned person a right to resist the punishment he faced.<sup>166</sup>

This account is radical in tone, though not necessarily in practical implications.<sup>167</sup> It is not my purpose here to reorient modern punishment theory toward Hobbes, though I believe his account to be more honest and insightful than the dominant retributive and consequentialist theories of punishment. There are obviously ways in which Hobbes's theories fit poorly with twenty-first century American law and politics: he did not recognize enforceable constitutional rights, for instance, and he was unduly afraid that a government of separated powers would be hopelessly unstable. More generally, Hobbes had a different conception of rights than the predominant contemporary understanding. The right to resist punishment implies no correlative duty not to punish; it is instead a "blameless liberty," something more akin to a Hohfeldian privilege but not even exactly that.<sup>168</sup> It is difficult today to contemplate an individual right that imposes no duty on the state. Despite these discordances, Hobbes's account—fundamentally adversarial, recognizing the conflict between sovereign and prisoner, honest about the violence of punishment—suggests an alternative way to understand our own system. Without endorsing physical violence against the arresting officer or other agents of the punishing state, our constitution provides various ways for a criminal defendant to challenge the state's efforts to punish him. When an individual raises a Fourth, Fifth, or Sixth Amendment claim in the course of criminal prosecution, what else is that claim but an effort to resist punishment?

### B. *Motions of Resistance*

If regulating the police were the project, it is hard to understand why we would put criminal defendants in charge. Regulation suggests a relatively broad, relatively coherent set of rules promulgated by a central authority.<sup>169</sup>

<sup>166</sup> See, e.g., *id.* at 98.

<sup>167</sup> Since Hobbes did not believe that rights implied correlative duties, the subject's right to resist did not alter the sovereign's right to punish. One scholar has characterized Hobbes's right to resist punishment as little more than "the right to kick and scream on the way to the gallows." James Martel, *The Radical Promise of Thomas Hobbes: The Road not Taken in Liberal Theory*, PROJECT MUSE: THEORY & EVENT (2000), [https://muse.jhu.edu/journals/theory\\_and\\_event/v004/4.2martel.html](https://muse.jhu.edu/journals/theory_and_event/v004/4.2martel.html) [<http://perma.cc/FQ93-Y525>].

<sup>168</sup> See Ristroph, *supra* note 161, at 616-17 (explaining Hobbes's account of right and noting that it does not fit into the Hohfeldian framework that dominates most discussions of rights in legal theory).

<sup>169</sup> But as Julia Black has noted, the traditional notions of regulation as the act of a centralized authority have encountered some challenges by those who would "decenter" regulation. See Black, *supra* note 91, at 10-14.



Though the Supreme Court is a central authority, it makes rules for police officers only when criminal defendants raise specific complaints about an actual police investigation.<sup>170</sup> To frame constitutional jurisprudence as a project of police regulation is to put criminal defendants in one of two strange positions: either they are like *qui tam* plaintiffs, using private rights of action to enforce what is really a public claim, or they are sideliners at their own prosecutions, watching the judicial regulation of the police and hoping to be an undeserving beneficiary of that regulatory effort.<sup>171</sup> From the typical criminal defendant's perspective, however, the aim of constitutional litigation is not to produce general guidelines for police conduct. The individual defendant who raises a Fourth, Fifth, or Sixth Amendment complaint about the police is nearly always seeking to suppress evidence, and the motion to suppress is an effort to avoid conviction and punishment.<sup>172</sup>

From investigation through adjudication, the criminal process is a forum in which the state pursues punishment and the defendant resists it. As Packer noted, most persons believe "punishment is an unpleasantness that is best avoided."<sup>173</sup> There are occasionally exceptions who attempt to facilitate or hasten their own punishments, such as Socrates and Gary Gilmore.<sup>174</sup> But such outliers tend to waive the criminal process altogether, which only reinforces the suggestion that for defendants the criminal process is a forum to resist punishment. Indeed, punishment does entail profound restrictions on liberty that most humans do and should wish to avoid. That is the design of punishment on nearly any account; it is not supposed to be enjoyable or readily endured. Importantly, the representative form of punishment in our contemporary system, incarceration, operates through the exercise of physical

---

<sup>170</sup> To be sure, the volume of criminal cases, in conjunction with the Supreme Court's certiorari power, allows the Court to be selective in its rule-making endeavors.

<sup>171</sup> Cf. Seidman, *supra* note 154, at 437 ("What has not changed at all, however, is the habit of treating criminal defendants as bit players in a larger social struggle."); *id.* at 502 ("It matters little whether we use [defendants] to make an example of what happens to people who disobey society's norms or we use them to demonstrate our commitment to social justice. In the end, we are using them still, and use for one purpose breeds use for another.").

<sup>172</sup> There are alternative postures and alternative remedies, of course. Individuals sometimes seek injunctions or monetary damages for violations of the Fourth, Fifth, and Sixth Amendments. But the most frequent context in which these claims are litigated is a motion to suppress evidence in a criminal prosecution.

<sup>173</sup> Packer, *supra* note 17, at 2.

<sup>174</sup> Socrates raised a spirited defense to the substantive charges brought against him—corrupting the youth of Athens. But once this defense failed and he was convicted, he famously declined an opportunity to escape and instead obligingly drank hemlock to kill himself. See I.F. STONE, *THE TRIAL OF SOCRATES* 184 (1989). Gary Gilmore, after conviction for capital murder in Utah, tried unsuccessfully to kill himself in prison, then waived all appeals and urged the state to execute him. See NORMAN MAILER, *THE EXECUTIONER'S SONG* 619 (1979).

force against the prisoner. Even if the prisoner is not beaten or shackled, he or she is confined by force. This force is ongoing, and it renders the prisoner dependent upon, and vulnerable to, his or her captors. Given all of this, it should be easy to understand (as Hobbes did) resistance to even non-capital punishments as a manifestation of the human instinct for self-preservation.<sup>175</sup>

To recognize the instinct for self-preservation does not require us to endorse it. One could argue, as a normative matter, that in some circumstances humans should suppress this instinct. For example, one might claim that factual guilt of a criminal offense implies a moral duty to submit to punishment.<sup>176</sup> A version of that idea underlies some accounts of the “civility” in civil disobedience: the conscientious lawbreaker must report to the jailhouse on time.<sup>177</sup> If we adopt the Hohfeldian view that rights imply correlative duties, and if we frame the authority to punish as a “right” of the state (rather than a power), it follows that individuals have a duty to submit. In my view, the arguments for a moral duty to submit to punishment are too anti-individualist or dishonest to be attractive, but we need not enter this philosophical debate in detail here.<sup>178</sup> Our inquiry concerns the American criminal justice system, and this system clearly rejects a duty to submit to punishment. It guarantees all defendants the opportunity to plead “not guilty” and to present a defense. It places the burden of proof in criminal trials on the state. This is at least part of what it means to say our system is “adversarial”—it recognizes that the state and those it targets for punishment are adversaries.<sup>179</sup>

---

<sup>175</sup> See HOBBS, *supra* note 162, at 93.

<sup>176</sup> See, e.g., JACOB ADLER, *URGINGS OF CONSCIENCE: A THEORY OF PUNISHMENT* (1991); Michael S. Green, *The Privilege's Last Stand: The Privilege Against Self-Incrimination and the Right to Rebel Against the State*, 65 BROOK. L. REV. 627, 686-87 (1999) (contrasting John Locke's punishment theory to Hobbes, in part by emphasizing that for Locke the guilty have a duty to submit to punishment).

<sup>177</sup> See, e.g., JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 269 (1979).

<sup>178</sup> For more detailed philosophical discussions, see Alice Ristroph, *The Imperfect Legitimacy of Punishment*, in HOBBS TODAY: INSIGHTS FOR THE TWENTY-FIRST CENTURY (Sharon Lloyd ed., 2012); Ristroph, *supra* note 161, at 619-22.

<sup>179</sup> As David Sklansky has noted, many celebrations of our system as “adversarial” are simply reactions against a perceived foreign (and inferior) model of “inquisitorialism.” David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1635-36 (2009). Neither term is particularly precise, or often explained clearly. But it is safe to say that at a minimum, an adversarial system conceives of the parties to litigation as adversaries; in the criminal context, that means that the defendant is understood and expected to oppose the prosecution's efforts. This Article takes for granted adversarialism, so defined. Even this minimalist version of adversarialism has its critics, of course. See, e.g., John Griffiths, *Ideology in Criminal Procedure or A Third “Model” of the Criminal Process*, 79 YALE L.J. 359 (1970). The vision of the criminal defendant as an independent agent, pursuing his or her own self-preservation, is in my view, much more attractive than alternative conceptions of defendants as wayward children, or even worse, dangerous objects, to be acted upon by a benevolent but coercive state.

To be sure, American law does not endorse violence against police officers, prosecutors, judges, or corrections officials. Indeed, in various ways the law *does* impose duties to submit to specific exercises of state force: it is a crime to resist arrest, or flee from prosecution (“jump bail”), or escape from custody. But these criminal offenses should not be understood to create an overarching duty to submit to punishment. Instead, they reflect the way in which our legal system has addressed the very human tendency to resist punishment. Physical flight and violent resistance are prohibited, but legal resistance is accommodated, and even embraced.

Legal resistance is, or should be, principled resistance. One should not be misled if defendants or their beleaguered attorneys sometimes view constitutional protections simply as furniture to be thrown in the prosecutor’s path. A motion to suppress unconstitutionally obtained evidence is very different from the many illicit ways one might try to avoid conviction and punishment, such as efforts to destroy evidence, intimidate witnesses, or bribe state officials. The Bill of Rights articulates principled limitations on the state’s coercive power, and to stand a chance of success the defendant who moves to suppress evidence must frame his resistance in terms of those principles. It is also worth distinguishing motions to suppress evidence from acts of resistance that are aimed more narrowly or more broadly. For example, individuals concerned solely with government’s surveillance powers, independent of any punishment that might ensue from surveillance, can and do resist the surveillance itself.<sup>180</sup> At the other extreme, persons disillusioned with the entire American legal system might refuse to participate in, or otherwise seek to disrupt, their own criminal trials.<sup>181</sup> The resistance described in this Article is directed most specifically at punishment (which is, again, a complex state activity that involves multiple actors and institutions), but it does not entail a wholesale rejection of the entire criminal justice system or the state that operates it.

It is significant, on my account, that several of the Constitution’s limitations on the power to punish are framed as individual rights. Rights are but one of several mechanisms to limit state power (and they are not necessarily the most effective alternative). In contrast to structural constraints such as the separation of powers, rights invite an individual, standing alone, to articulate a claim about the appropriate scope of state power. Rights invite principled challenges to the state that are at least initially bottom-up rather than top-down (or horizontal); they invite the subjects of the state to initiate the mechanism of limitation.

Of course, criminal defendants do not really stand alone most of the time (and if they do, they are in trouble). In a system that allows legal resistance but

---

<sup>180</sup> See Joh, *supra* note 23, at 1000-01 (discussing efforts to evade official surveillance, such as encrypting electronic communications or using “burner” cell phones, as efforts to protest the government’s surveillance powers).

<sup>181</sup> See Carroll, *supra* note 23, at 590-93.

not physical resistance, the defendant needs a good lawyer. It is the defense attorney who will take the facts of the police investigation and try to construct a legally cognizable argument for a motion to suppress. Thus the right to counsel is essential to an account of criminal procedure (including investigative procedure) as a limitation on the power to punish. The importance of this right is already widely recognized in principle, although not always vindicated in practice: it is commonplace to characterize the right to counsel as the right upon which all other rights depend.<sup>182</sup> And even the best defense attorney is not sufficient to wage effective resistance against state coercion: rights depend on judicial interpretation and enforcement, and perhaps on enforcement from other branches as well.<sup>183</sup> But the fact that the bottom-up claim will eventually require top-down enforcement should not obscure the importance of the individual claimant. The story of James Earl Gideon, of *Gideon v. Wainwright*<sup>184</sup> fame, is so compelling because it is a rare and stark illustration of individual initiative in resisting state coercion. From his jail cell, without a lawyer, Gideon constructed his handwritten plea and claimed the Supreme Court's attention—and won for future defendants a promise of appointed counsel.<sup>185</sup> Gideon, of course, did not seek to regulate the police, or criminal court trial judges. Regulation was the eventual byproduct of his resistance, not the other way around.

A motion to suppress evidence on the grounds that it was obtained in violation of the Constitution begins as an individual effort at resisting punishment, motivated by individual self-interest.<sup>186</sup> This is not something to

---

<sup>182</sup> See, e.g., *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (“[T]he right to be represented by counsel is among the most fundamental of rights . . . [I]t is through counsel that all other rights of the accused are protected.”).

<sup>183</sup> For a powerful account of both the importance and the limits of the defense lawyer, see Alexandra Natapoff, *Gideon Skepticism*, 70 WASH. & LEE L. REV. 1049, 1050-51 (2013) (“Ever since *Gideon v. Wainwright* proclaimed that ‘any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him,’ the Supreme Court has quietly established the inverse proposition: if a person had competent counsel, his conviction was probably fair.” (quoting *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963))).

<sup>184</sup> 372 U.S. 335 (1963).

<sup>185</sup> See ANTHONY LEWIS, *GIDEON'S TRUMPET* 208 (1964). By some accounts, Gideon was not entirely without legal counsel when he prepared his petition to the Court: his cellmate was a former attorney who may have assisted Gideon. See Bruce R. Jacob, *Memories of and Reflections About Gideon v. Wainwright*, 33 STETSON L. REV. 181, 214-15 (2003) (“Turner, Gideon's attorney at the second trial, says Gideon received the assistance of fellow inmate, former attorney, and later municipal judge, Joseph A. Peel, Jr., a Stetson law graduate! According to Turner, Peel, Gideon's cellmate, stood over his shoulder as Gideon wrote and told him what to say.”).

<sup>186</sup> The Court has acknowledged that litigation functions as resistance to punishment in the capital context. See *Hill v. McDonough*, 547 U.S. 573, 581 (2006) (describing “the practical reality of capital litigation tactics: inmates file [habeas and § 1983 actions]

hide or deny—even if the motion is made by a factually guilty defendant. Factual guilt is not the only condition the state must satisfy in order to impose punishment, and our legal system invites the defendant to insist upon *all* the various conditions that restrict the power to punish. At the same time, it is a mistake to view motions to suppress evidence—motions of resistance—as mere assertions of individual self-interest, lacking social value and necessarily imposing great social costs. In the remainder of this section, I trace some important societal implications of suppression litigation in criminal cases.

First, to claim one's rights under the Constitution is a kind of political participation: it is an effort at self-government.<sup>187</sup> If the defendant successfully avoids punishment, he or she retains far greater control over day-to-day existence, but that literal sense of self-government is not what I mean to emphasize here. A claim that evidence has been obtained in violation of the Constitution is political in the sense that it states an argument about the permissible scope of state power. This is, of course, part of what makes motions to suppress controversial. If investigative criminal procedure is “substantive criminal law for the police,”<sup>188</sup> then each motion to suppress is a little indictment. No doubt, that's part of what makes motions to suppress so distasteful to those of an authoritarian disposition. Anthony Duff has described criminal trials as a way of calling a defendant to account for his actions;<sup>189</sup> in a parallel sense, motions to suppress evidence are efforts to call the state (not only the police officer, but the state more broadly) to account for its coercive practices. That demand for accountability is an assertion of the defendant's status as an autonomous agent in the larger political community.

If widespread political participation is valuable, then we should take note that many individuals will engage with the state only when they absolutely must—that is, only when the state takes them to court. A great many criminal defendants do not vote, march in picket lines, or write letters to their elected representatives. More likely, they seek to avoid contact with state institutions and officials as much as possible. As one young African-American (who had not himself ever been convicted of any crime) put it, the criminal justice system is “the only government I know,”<sup>190</sup> and it is understandably viewed as

---

intending to forestall execution”). The *Hill* Court expressed concern about “abusive litigation tactics” that brought piecemeal or repetitive claims, but ultimately allowed the prisoner's challenge to an execution procedure to move forward.

<sup>187</sup> As the Supreme Court has recognized, litigation is a form of political expression. *See, e.g.,* NAACP v. Button, 371 U.S. 415, 429 (1963).

<sup>188</sup> *See* Steiker, *supra* note 73, at 439.

<sup>189</sup> ANTHONY DUFF, ANSWERING FOR CRIME 15-18 (2009).

<sup>190</sup> Vesla Weaver, The Only Government I Know: How the Criminal Justice System Degrades Democratic Citizenship, *Bos. Rev.*, June 10, 2014, <http://bostonreview.net/us/vesla-m-weaver-citizenship-custodial-state-incarceration> [<http://perma.cc/952Z-GBQT>]. Weaver presents survey data that shows that among persons eligible to vote, those with more contacts with the criminal justice system are less likely to vote. *See id.*

a government best avoided. A criminal prosecution is a moment at which the otherwise disaffected and disengaged person has no choice but to confront the state, and the constitutional rights afforded defendants give them a rare opportunity for a kind of political participation that may actually be meaningful to them.

Here again it is important to recognize the role of the defense lawyer, and acknowledge that the vast majority of criminal defendants will not—and probably should not—speak on their own behalf before the court. Alexandra Natapoff has raised concerns about the widespread silencing of defendants in court precisely because it furthers the political disempowerment of an already deeply disadvantaged population.<sup>191</sup> Natapoff's argument is premised on an understanding of criminal litigation as political participation: “[S]ilent defendants are denied many of the cognitive and participatory benefits of expressive engagement in their own cases. . . . Since defendants speak for themselves so infrequently, judges, prosecutors, and lawmakers almost never hear from them, and the democratic processes that generate our justice system proceed without those voices.”<sup>192</sup> Natapoff is surely correct that there is room for much greater and more meaningful defendant participation in criminal court proceedings, and in public discourse about criminal justice more generally.<sup>193</sup> And she, and other commentators, are right to urge us not to overlook the many instances in which our criminal justice system fails to ensure real adversarial contestation between defendant and state. But these sobering reminders should not obscure the extent to which suppression motions presently function as a kind of political resistance—and the reasons we might want to enable and embrace further resistance.

Can such resistance matter given that it is so often futile? The vast majority of motions to suppress are denied.<sup>194</sup> In other contexts, scholars have

---

<sup>191</sup> Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1449-53 (2005).

<sup>192</sup> *Id.* at 1452. Without diminishing the concerns about defendant silence in the courtroom, it should be noted that most criminal defendants are *not* silent to police officers—*Miranda* warnings notwithstanding, the majority of suspects give statements to the police, usually to the suspects' detriment. See Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 859 (1996) (presenting evidence that about eighty-four percent of suspects waive their *Miranda* rights). Once a suspect has spoken to the police, silence in the courtroom and a motion to suppress the statement is often the best course.

<sup>193</sup> Some defense attorneys have begun to practice, and advocate, a model of client representation that they call “participatory defense,” which “amplifies the voices of the key stakeholders—people who face criminal charges, their families, and their communities—in the struggle for system reform.” Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281, 1281 (2015).

<sup>194</sup> Most of the empirical data is dated, but an oft-cited 1979 federal study found that between eighty to ninety percent of suppression motions were denied. See U.S.

previously articulated the benefits of losing litigation.<sup>195</sup> For public interest lawyers, legal reformers, and political activists, losing in court can nonetheless be a powerful step forward. It may generate publicity, inspire action outside the courts, or generate a helpful public backlash.<sup>196</sup> These arguments may not seem readily applicable to the private interest claims raised by criminal defendants: ordinary motions to suppress are typically denied by a magistrate or the trial court, out of the public eye. Most never gather the attention of appellate courts, or the media. And the losing defendant has neither resources nor (usually) inclination to publicize his defeat. In any event, for most failed suppression motions it is unlikely that greater public awareness would generate outrage rather than approval.

Still, there is one potential benefit of losing litigation that may apply to constitutional criminal procedure as much as to public interest lawsuits. The sheer volume of suppression motions—which is, of course, a consequence of the vast scale of the coercion inflicted in the criminal justice system—means that some will reach appellate courts, and some cases will go all the way to the Supreme Court. These claims do get public attention, and there are a fair number of them. As noted at the outset of this Article, the Fourth and Fifth Amendments are jurisgenerative.<sup>197</sup> They are jurisgenerative not just in the bottom-up sense that Robert Cover used that term, but also along a more traditional top-down understanding of legal meaning. The defendants' rights provisions of the Constitution generate *official* law in large quantities; they generate more Supreme Court opinions than casebooks can hold, to say nothing of lower appellate court opinions.<sup>198</sup> As regulations for the police,

---

COMPTROLLER GEN., U.S. ACCT. OFF., IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS 8, 10 (1979).

<sup>195</sup> See, e.g., Ben Depoorter, *The Upside of Losing*, 113 COLUM. L. REV. 817 (2013); Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477 (2004); Jules Lobel, *Losers, Fools, and Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331 (1995) [hereinafter Lobel, *Losers, Fools, and Prophets*]; Douglas NeJaime, *Winning by Losing*, 96 IOWA L. REV. 941 (2011).

<sup>196</sup> See, e.g., Depoorter, *supra* note 195, at 821; Lobel, *Losers, Fools, and Prophets*, *supra* note 195, at 1332 (“In many losing cases . . . the primary point of the cases is to inspire political action.”).

<sup>197</sup> See *supra* note 1 and accompanying text.

<sup>198</sup> The sheer number of criminal procedure cases is all the more remarkable given the Court's explicit efforts to “ration constitutional remedies.” Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. (forthcoming 2015). The volume of criminal procedure decisions does not itself guarantee that the law will be favorable to defendants, of course. See Anthony O'Rourke, *The Political Economy of Criminal Procedure Litigation*, 45 GA. L. REV. 721, 725-26 (2011) (arguing that defendants' power to shape constitutional law has been diminished by a broad right to counsel, because more claims are litigated and the Court has gained “more freedom to select cases that present a constitutional question in a way that conforms to the ideological preferences of the Court's Justices”).

these opinions frustrate law enforcement officials, and scholars, as we have seen. The opinions are rife with inconsistencies, minute specificity on some issues, vague hand-waving on others, and apparent oblivion to many empirical realities.

Suppose, however, we read these opinions not as regulations for the police, but as efforts to delimit or defend the coercive practices that generate the litigation. Cover observed that common law adjudication entailed not only dispute resolution but “norm articulation,” and the same is surely true of constitutional adjudication.<sup>199</sup> The norms articulated in the jurisprudence of criminal procedure are not always attractive, or consistent, but there is value in having them made explicit.

### C. *Adjudication as Articulation*

Among the many kinds of packages in which law arrives, judicial opinions garner particular interest, and judicial opinions interpreting the Constitution may receive the most attention of all.<sup>200</sup> Even non-lawyers will often pore over a Supreme Court pronouncement on a constitutional question, while there is no guarantee that anyone reads legislation (including the people who vote for it).<sup>201</sup> The interest in adjudication, especially constitutional adjudication, is not simply a matter of misplaced priorities in the legal academy.<sup>202</sup> It is instead a reflection of the role of the Constitution and constitutional discourse in our political system. For better or worse, in the United States the Federal Constitution creates a forum in which we, as a country, tackle fundamental questions of political theory, including questions about the appropriate scope of state coercion.<sup>203</sup> We express our understandings of government through

---

<sup>199</sup> See Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 643 (1981); see also Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979) (“Judges have no monopoly on the task of giving meaning to the public values of the Constitution, but neither is there reason for them to be silent. . . . Adjudication is the social process by which judges give meaning to our public values.”); Lobel, *Losers, Fools, and Prophets*, *supra* note 195, at 529-31.

<sup>200</sup> Many scholars have noted the fixation on adjudication over other forms of law. See, e.g., ROBERTO MANGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* 106-10 (1996) (discussing obsession with judges and adjudication); JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

<sup>201</sup> One U.S. Representative alleged that no Senator read the actual text of the PATRIOT Act, and another reported that “[w]e don’t read most of the bills.” FAHRENHEIT 9/11 (Lionsgate Films 2004) (interviews with Reps. Jim McDermott and John Conyers Jr.).

<sup>202</sup> See A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949, 2026-39 (2012) (criticizing the case method and the focus on adjudication in legal pedagogy).

<sup>203</sup> One can see this interaction between constitutional doctrine and political discourse in many fields. For example, our understandings of the appropriate role of religion in public life are articulated primarily through debates about the First Amendment. Our views about private gun ownership—and larger questions about private violence and the right of private



arguments about what the Constitution requires, permits, or prohibits. We articulate, question, and amend core principles when we argue about the interpretation and application of the Constitution. The Constitution is not the only venue in which we do political theory, but it is a primary one.<sup>204</sup> By “we,” I mean not only or even primarily judges, but political leaders and ordinary citizens too. For each piece of constitutional doctrine articulated in judicial opinions, there is a much larger constitutional discourse, and the doctrine and the discourse influence one another.

Thus, adjudicating the Constitution tends to force a surfacing, or perhaps an excavation, of core political principles.<sup>205</sup> What is usually implicit is made explicit. Again, in Cover’s phrase, adjudication is a project of “norm articulation.”<sup>206</sup> To be sure, judges are often uncomfortable with this role, especially if the normative choices necessary to a decision are not obviously dictated by the constitutional text itself.<sup>207</sup> The ascendancy of originalism, in its many varieties, is premised on the suggestion that the constitutional text, in its original meanings, generates determinate outcomes in contemporary cases and relieves judges of the burden of articulating—or even determining—core underlying norms.<sup>208</sup> Thus, judicial opinions do not always directly state the core assumptions on which they inevitably rest. The surfacing project is always incomplete. Notwithstanding originalist promises of determinacy, the actual practice of constitutional adjudication inevitably entails selecting and sometimes stating guiding normative principles.<sup>209</sup> Once we acknowledge this

---

citizens to use force—are articulated largely through debates about the Second Amendment, even though the Second Amendment might not have originally applied to individuals at all. And our understandings of equality—racial, sexual, economic—are often articulated through debates about the Equal Protection Clause.

<sup>204</sup> Look at a syllabus for a course on American political thought and you will see many Supreme Court opinions, as well as commentary on or reactions to those opinions.

<sup>205</sup> Of course, this account of constitutional adjudication is not specific to criminal procedure. It applies as well to most areas of constitutional litigation.

<sup>206</sup> Cover, *supra* note 199, at 643; see also Louis Bilionis, *Legitimizing Death*, 91 MICH. L. REV. 1643, 1662-63 (1993) (“[T]he bookish exercise that one might label norm articulation is doubtless an essential predicate to constitutional adjudication.” (internal quotation marks and citation omitted)). The label “norm articulation” may be bookish, but the exercise itself is not necessarily bookish at all: the “popular constitutionalism” of ordinary citizens clearly involves claims about the basic political values protected by the Constitution.

<sup>207</sup> Cf. Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 708 (1975) (“The dominant norms of decision are those large conceptions of governmental structure and individual rights that are at best referred to, and whose content is scarcely at all specified, in the written Constitution—dual federalism, vested rights, fair procedure, equality before the law.”).

<sup>208</sup> See, e.g., Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L.J. 1183, 1183-84 (2012) (declaring that “[o]riginalism is ascendant” and detailing its claims of determinacy).

<sup>209</sup> This proposition “is not likely to be controversial among most teachers of

dimension of constitutional adjudication, it becomes clear that litigating defendants' rights is valuable even if the defendants lose and the litigation fails to impose meaningful restrictions on police officers.

Whenever the Supreme Court adjudicates a constitutional claim raised by a criminal defendant, it must evaluate one of the state's most fundamental and intrusive powers—the power to punish. Whether the defendant raises a claim under the Fourth, Fifth, or Sixth Amendment (or the Eighth, or some other constitutional provision), the coercive authority of the state is tested against a limitation deemed sufficiently important to be stated in our foundational legal document. This confrontation encourages (again, not always successfully) a formal pronouncement of the principles that inform our criminal justice choices. For example, it is fairly common for the Supreme Court to appeal to “effective law enforcement” as a generic aim justifying coercive practices by the state.<sup>210</sup> It is clear from context that, as the Court uses this phrase, effective law enforcement does not mean that criminal laws will not be violated. Instead, the assumption is that detection and apprehension of wrongdoers constitutes effective law enforcement. This is telling. It suggests that notwithstanding rhetoric of deterrence and public safety, punishment may be more important to our system than prevention. Moreover, effective law enforcement often operates as a trump card, automatically defeating whatever individual interest has been raised.<sup>211</sup> Though defendants obviously do not benefit from a presumption that effective law enforcement—defined as apprehension, conviction, and punishment—is the paramount purpose of our criminal justice system, as a society we are better off if we state that choice explicitly.

Constitutional adjudication creates a visible and easily accessible record of core social choices. Sometimes it is a shameful record, so much so that we may speak of an “anticanon” of decisions that are nearly universally disavowed today.<sup>212</sup> Instead of illustrating narrow legal missteps, anticanonical cases

---

constitutional law,” though it may be resisted in “popular political rhetoric.” Todd E. Pettys, *Judicial Discretion in Constitutional Cases*, 26 J. L. & POLITICS 123, 124 (2011). See also Rosenthal, *supra* note 208, at 1232-42 (analyzing recent ostensibly “originalist” decisions and detailing their inevitable reliance on nonoriginalist normative principles).

<sup>210</sup> See, e.g., *Wyoming v. Houghton*, 526 U.S. 295, 304 (1999); *Davis v. United States*, 512 U.S. 452, 461 (1994); *McNeil v. Wisconsin*, 501 U.S. 171, 180-81 (1991); *California v. Acevedo*, 500 U.S. 565, 574 (1991).

<sup>211</sup> See Baradaran, *supra* note 9, at 16 (“[T]he stated need for effective law enforcement seems to persuade the Court more often than any other interest and was invoked in over half of cases since 1990.”).

<sup>212</sup> See, e.g., Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011). Greene argues that the cases in the anticanon, such as *Dred Scott v. Sanford*, 60 U.S. 393 (1857), and *Plessy v. Ferguson*, 163 U.S. 537 (1896), are not characterized by exceptionally poor legal reasoning; to the contrary, “the traditional modes of legal analysis arguably support the results in anticanon cases.” Greene, *supra* at 384. Similarly, Mark Graber has written of *Dred Scott* that its horror is not that it got the Constitution wrong, but that it may have gotten the Constitution right. See MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF*

illustrate broader political and social ones. These cases have become striking examples of fundamental normative choices that our nation made at one point in its history, then later renounced with vehemence. I doubt that any existing criminal procedure decision would ever be reassigned to the anticanon. Nevertheless, adjudication of the Fourth, Fifth, and Sixth Amendments (as well as the Eighth) has generated a fairly detailed public statement of key choices underlying the American approach to criminal justice. It is by no means a complete statement, of course; judicial pronouncements are hardly the only ones that matter. All the same, judicial reasoning often reports or reflects society's broader normative choices. For example, just as the Court's criminal procedure decisions in the first half of the twentieth century created a public record of a growing concern with racial injustice, the Court's more recent decisions document several explicit refusals to treat racial bias in the criminal justice system as a problem of constitutional significance.<sup>213</sup> *McCleskey v. Kemp*,<sup>214</sup> declining to treat statistical evidence of racial bias in death sentencing as an equal protection violation, may not join the anticanon, but it is an important historical document nonetheless, illustrating that racial disparities are a price we are willing to pay in order to preserve broad discretion for official violence.<sup>215</sup> Similarly, *Whren v. United States*<sup>216</sup> is important for its explicit conclusion that racial bias is not unreasonable within the meaning of the Fourth Amendment.<sup>217</sup> Whether individual commentators agree with these conclusions or not, there is value in having them stated openly.<sup>218</sup>

---

CONSTITUTIONAL EVIL 4 (2006).

<sup>213</sup> The classic account of racial injustice as the catalyst that spurred the Court to regulate criminal procedure in the states is Michael J. Klarman, *The Racial Origins of Criminal Procedure*, 99 MICH. L. REV. 48 (2000). Klarman focuses primarily on four key cases decided between the First and Second World Wars. More recently, the Court has declined to use criminal procedure doctrine to address claims of racial injustice. *See, e.g., Whren v. United States*, 517 U.S. 806, 813 (1996) ("We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment."); *see also McCleskey v. Kemp*, 481 U.S. 279, 292-99 (1986) (rejecting equal protection challenge to racial disparities in capital sentencing).

<sup>214</sup> 481 U.S. 279 (1986).

<sup>215</sup> *Id.* at 313 ("Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious.").

<sup>216</sup> 517 U.S. 806 (1996).

<sup>217</sup> *Id.* at 813 ("[T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

<sup>218</sup> The world without a Fourth Amendment might offer an opportunity to start from scratch in devising police regulations, as Christopher Slobogin has imagined. *See generally* Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1 (1991). Whatever the benefits of starting anew in the regulatory enterprise, a world without Fourth

Perhaps society at large is better off if most motions to suppress fail and the defendants are duly convicted. But I have suggested here that we are also better off if the motions are made, and adjudicated. The adjudication of the Bill of Rights does not produce coherent regulation, as we have seen: the Court will draw lines, and erase them, contradict itself, and (occasionally) admit the mess it has made. This may be reason to emphasize non-judicial mechanisms of regulation, though we should remember that regulating the state is difficult no matter who does it.<sup>219</sup> Whether explicitly regulatory in aim or only incidentally so, constitutional adjudication will involve difficult questions about the appropriate scope of state coercion and the degree to which an individual can avoid it. These questions should be tackled openly. And to the extent that our courts respond to the difficulties by disavowing responsibility—by simply adopting a sanguine view of state power and deferring to other government institutions—let’s keep that explicit, too.

If we think of constitutional adjudication as the (incomplete) surfacing of political principles, including principles of appropriate coercion and its limits, then we might read Fourth, Fifth, and Sixth Amendment opinions differently—and we might develop better arguments for how those opinions should be decided differently. The next Part turns to these questions.

### III. EXCLUSION AND OTHER DOCTRINAL IMPLICATIONS

Neither of the accounts of constitutional criminal procedure discussed in this Article—police regulation or resistance to coercive punishment—will necessarily dictate precise outcomes in particular cases. There are many possible ends of regulation, and there are many possible accounts of permissible coercion. Nonetheless, the focus on police regulation has had significant consequences. As we have already seen, the police regulation account frames the constitutional claim as “peripheral” or “technical” and thus less important than the “merits” of guilt or innocence, doubtless inclining courts toward decisions in favor of the government on issues of investigative procedure.<sup>220</sup> This Part explores more specific doctrinal implications of the police regulation account and suggests ways in which renewed attention to state coercion, and its limits, might yield different results. My discussion here is necessarily selective: a single Article cannot document the many ways that the emphasis on police regulation has shaped constitutional doctrine. Instead, I discuss one issue at length—exclusionary rule doctrine, which has been deeply affected by the focus on regulating the police—and then mention briefly a few other doctrinal implications. More should be said about investigative procedure reconceived (or reclaimed) as a forum for resistance to state coercion, but those further elaborations will require subsequent scholarship.

---

Amendment *adjudication* would be a world without an important forum for debating normative principles of policing.

<sup>219</sup> See *supra* Section I.C.

<sup>220</sup> See *supra* Sections II.A and II.B.

A. *Exclusion and Fourth Amendment Reasonableness*

As is already clear from Parts I and II of this Article, the notion of investigative procedure as police regulation has gone hand-in-hand with a conception of the Fourth Amendment exclusionary rule as a (mere) sanction to deter police misconduct. Police regulation and the deterrence theory of exclusion are linked in one obvious way—it is the police who are supposed to be deterred. They are also linked in a less obvious way—the deterrence justification of the exclusionary rule is premised on a particular conception of the timing of a constitutional violation and the identity of the violator(s). Specifically, the Supreme Court has sometimes claimed that a Fourth Amendment violation is complete at the moment that the search or seizure is complete.<sup>221</sup> On this view, the Fourth Amendment contemplates police conduct alone, without reference to the prior or subsequent actions of any other state official. That is, the reasonableness of a search or seizure is assessed by focusing on the particular state official who carries out the search or seizure, not those who collaborate with the searching official and rely upon his efforts. The individual interests protected by the Amendment are infringed, if at all, only in the moment that the search or seizure takes place. It follows on this view that exclusion of evidence at trial is not really a “remedy” for the earlier violation, for the harm to privacy has been done and any “[r]eparation comes too late.”<sup>222</sup>

Though deterrence was but one of the rationales offered in early exclusionary rule cases, this rationale has now nearly eclipsed all others in official doctrine.<sup>223</sup> The greater emphasis on deterrence has yielded a number of limitations on the rule, as the Court declines to exclude evidence if deterrent effects are minimal or uncertain.<sup>224</sup> Again, the focus on police regulation has

---

<sup>221</sup> See, e.g., *Stone v. Powell*, 428 U.S. 465, 486 (1976) (“[The exclusionary rule] is not calculated to redress the injury to the privacy of the victim of the search or seizure.”); *United States v. Calandra*, 414 U.S. 338, 347 (1974) (“The ruptured privacy of the victims’ homes and effects cannot be restored. Reparation comes too late.” (quoting *Linkletter v. Walker*, 381 U.S. 618, 637 (1965))).

<sup>222</sup> *Linkletter*, 381 U.S. at 637. It is curious, in my view, that this refrain has not been subject to more criticism. If taken literally, it would serve as an argument against monetary damages and any other form of constitutional remedy as well, since no remedy can actually “undo” the invasion of privacy. But of course, in most contexts we do not expect legal remedies to actually undo the harm that has transpired. Money damages can never undo nonmonetary injuries. Moreover, the “reparation comes too late” argument presumes that the Fourth Amendment protects privacy alone, but that is neither what the Amendment says nor a logical implication of its text. Security against “unreasonable searches and seizures” is a value much broader than the privacy interests that are invaded in the moment of a search.

<sup>223</sup> See *supra* notes 34–45 and accompanying text. Arguably, the very first Supreme Court case to apply the remedy of exclusion for a Fourth Amendment violation was *Boyd v. United States*, 116 U.S. 616 (1886), which did not mention deterrence at all.

<sup>224</sup> See, e.g., *Hudson v. Michigan*, 547 U.S. 586, 596–97 (2006) (declining to apply the exclusionary rule to violations of the knock-and-announce rule, on the grounds that

fostered a view of police activity as wholly independent of other state actions, so courts can treat an illegal police search as unrelated to a prosecutor's later use of the evidence obtained. Moreover, the framing of exclusion as simply a regulatory incentive has produced the corollary claim that exclusion is not "a personal constitutional right."<sup>225</sup> With time, this understanding of the exclusionary rule has rendered it doctrinally precarious, perhaps poised for abolition altogether.<sup>226</sup>

This dominant account of the exclusionary rule rests on what Mark Kelman labeled "interpretive construction": prior to the activity of legal reasoning, we make (often, unconsciously) a number of normative and ideological choices about the way we will frame the facts to which the law applies.<sup>227</sup> A given construction of facts will often force a particular outcome, but if we are unaware of the process of interpretive construction, we might mistakenly conclude that neutral principles of law rather than our interpretive choices dictated the outcome. Two of the unconscious interpretive techniques identified by Kelman operate in discussions of the exclusionary rule: "time-framing" and "disjoined" accounts. Time-framing refers to the selection of the starting point and ending point of the relevant facts.<sup>228</sup> Relatedly, a disjoined account of a sequence of facts separates facts into discrete, unrelated incidents rather than unifying them as a single event.<sup>229</sup> Kelman focused on substantive criminal law, but his argument sheds light on criminal procedure doctrine, too. The usual account of the exclusionary rule depends on an underlying interpretive construction of the search or seizure referenced in the Fourth Amendment as an isolated, independent incident rather than part of a more continuous state action. Reasonableness is to be assessed within a narrow time frame (ending at the moment of the search itself) rather than a broader one that would place the search or seizure in context.<sup>230</sup> For purposes of this Article, it is important to notice the link between these interpretive choices and the claim

---

"deterrence of knock-and-announce violations is not worth a lot"); *Nix v. Williams*, 467 U.S. 431, 445-46 (1984) (adopting an "inevitable discovery" exception to the exclusionary rule, on the rationale that if police know that evidence will be discovered eventually, they are unlikely to violate the Constitution in an effort to obtain the evidence and thus deterrence is unnecessary); *Calandra*, 414 U.S. at 351-52 (declining to apply the exclusionary rule to grand jury proceedings, in part because it would produce only "a speculative and undoubtedly minimal advance in the deterrence of police misconduct").

<sup>225</sup> See, e.g., *Stone*, 428 U.S. at 486.

<sup>226</sup> See *supra* Section I.B (discussing *Hudson* and its aftermath).

<sup>227</sup> Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 593 (1981) ("Legal argument can be made only *after* a fact pattern is characterized by interpretive constructs.").

<sup>228</sup> *Id.* at 593-94.

<sup>229</sup> *Id.* at 594-95.

<sup>230</sup> See, e.g., *United States v. Leon*, 468 U.S. 897, 906 (1984) ("The wrong condemned by the Amendment is 'fully accomplished' by the unlawful search or seizure itself." (quoting *United States v. Calandra*, 414 U.S. 338, 354 (1974))).

that the Fourth Amendment functions primarily as a device to regulate police officers.

Whether we do so consciously or unconsciously, we can clearly narrow the protections of the Constitution by limiting the actors or actions to which it applies. This approach has been pursued openly with respect to the First Amendment, for example, by commentators who urge that the Amendment restricts only Congress and not other government actors,<sup>231</sup> or by those who used to argue that the press and speech clauses prohibited prior restraints but not post-publication punishments.<sup>232</sup> Something similar has happened with respect to the Fourth, Fifth, and Sixth Amendments; courts have narrowed these protections by framing them as regulations for the police. A better way to understand the Bill of Rights, I have argued in this Article, is to view it as restricting the state as a whole, and the state in turn should be understood as a complex set of actors and institutions interacting with one another. The Fourth, Fifth, and Sixth Amendments set limits to permissible coercion in the criminal justice system, and they offer individual defendants a mechanism to resist allegedly excessive coercion, whatever actor or actors do the coercing.

A concern with state coercion, rather than simply police conduct, and an understanding of motions to suppress as efforts to resist punishment on the grounds that the conditions for punishment have not been fulfilled, obviously generates a more robust exclusionary rule.<sup>233</sup> Once we recognize that the Fourth Amendment restricts all state actors, it makes sense to view the Amendment as a limitation on the power to punish. In general, the state may decide which conduct to criminalize and how (much) to punish it, but this general power is subject to several specific limitations, as noted in Section II.A. The prohibition of unreasonable searches and seizures is one such

---

<sup>231</sup> See, e.g., Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1252-53 (2010) (“Like the rest of the Bill of Rights, the First Amendment is a restriction on federal governmental *action*. But unlike the rest of the Bill of Rights, the First Amendment is written in the *active* voice, with a clear and express subject. Its ringing first words are: ‘Congress shall make no law . . .’”). Rosenkranz is clearly motivated to limit the reach of each provision of the Constitution, even if he must vary his interpretive approaches to achieve that end. In a companion article, Rosenkranz argues that the Fourth Amendment limits only the Executive Branch, notwithstanding the phrasing of the right against unreasonable searches in the passive voice. Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1034-35 (2011).

<sup>232</sup> See, e.g., *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (stating that the freedom of speech and freedom of press clauses prevent “previous restraints” on speech but “do not prevent the subsequent punishment of such” (quoting *Commonwealth v. Blanding*, 20 Mass. (3 Pick.) 304, 313 (1825))), *abrogated by* *Bridges v. California*, 314 U.S. 252 (1941).

<sup>233</sup> Notably, nascent democracies around the world have adopted exclusionary remedies even as the United States has scaled back its own exclusionary rule. The usual rationale for the exclusion of illegally seized evidence is a broad appeal to limited government and the rule of law, not any strategy to deter police misconduct. See Jenia Iontcheva Turner, *The Exclusionary Rule as a Symbol of the Rule of Law*, 67 SMU L. REV. 821, 821 (2014).

limitation, and it means that the evidence used to obtain a conviction must have been legally obtained. The Fourth Amendment is not simply a rule of evidence, of course, but it is a restriction on courts as well as other state actors.<sup>234</sup> The primary way it restricts courts is to prohibit the introduction of unconstitutionally obtained evidence.

Two scholars have recently appealed to the notion of due process to defend the exclusionary rules along lines similar to the argument I advance here.<sup>235</sup> Nadia Soree argues that searches and seizures are themselves deprivations of liberty and property, and that “[e]ach step in the criminal process requires more justification and more process as the severity of the liberty deprivation increases.”<sup>236</sup> Accordingly, “if the Court permits the prosecution’s use at trial of evidence seized in violation of the Fourth Amendment, the ultimate deprivation of liberty (the conviction and subsequent punishment) is itself predicated on a denial of due process and cannot be tolerated.”<sup>237</sup> Richard Re has argued that the Fourth Amendment sets forth rules of investigative process that are (now) encapsulated by the Fourteenth Amendment Due Process Clause, so that a conviction based on illegally obtained evidence may constitute a deprivation of liberty without due process of law.<sup>238</sup> It makes sense

---

<sup>234</sup> As emphasized throughout this Article, these claims are a return to earlier understandings of the Fourth Amendment and the exclusionary rule rather than a radical new reinterpretation. For example, when it first adopted a federal exclusionary rule, the Supreme Court emphasized that the Fourth Amendment restricted all federal officials, including courts. *See Weeks v. United States*, 232 U.S. 383, 391-92 (1914) (“The effect of the Fourth Amendment is to put the courts of the United States and Federal officials . . . under limitations and restraints as to the exercise of [their] power and authority . . .”).

<sup>235</sup> *See* Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1890 (2014); Soree, *supra* note 123, at 782-87. For earlier due process defenses of the exclusionary rule, see Lane V. Sunderland, *The Exclusionary Rule: A Requirement of Constitutional Principle*, 69 J. CRIM. L. & CRIMINOLOGY 141, 150 (1978) (arguing that the exclusionary rule is necessary “[s]imply because the due process clause requires it, independently of the efficacy of the rule as a deterrent, or independently of the comparative efficacy of alternative remedies”); James Boyd White, *Forgotten Points in the “Exclusionary Rule” Debate*, 81 MICH. L. REV. 1273, 1274 (1983) (“The historical roots of exclusion lie in a conception of property which holds that even where a search is procedurally reasonable the government simply has no right to seize the property of the citizen for use against him in a criminal proceeding.”).

<sup>236</sup> Soree, *supra* note 123, at 785-86.

<sup>237</sup> *Id.* at 786.

<sup>238</sup> Re, *supra* note 235, at 1890 (“When a criminal defendant is convicted based on unconstitutionally obtained evidence, that defendant’s ‘liberty’ has been ‘deprived’ without ‘due process of law.’”). Re rightly considers the interactions among various government actors when interpreting the Due Process Clause, but unfortunately, he does not take the same approach to the Fourth Amendment itself. He adopts unquestioningly the view of the Fourth Amendment as a regulation for the police alone, and this leads him to interpret its substantive protections quite narrowly. He asks, for example, “How, indeed, can a search be *unreasonable* if an officer *reasonably* believed it was appropriate?” *Id.* at 1944. The answer,



to think of the exclusionary rule as an implication of the Due Process Clause, and Re's analysis in particular should be attractive to those who want to reconcile the contemporary exclusionary rule with the Founders' failure to exclude illegally obtained evidence.<sup>239</sup>

For those less committed to the belief that the first interpretations of the Constitution are necessarily the best or most relevant interpretations, one might see an exclusionary rule implied in the terms of the Fourth Amendment itself—in the concept of reasonableness. What criteria render a search or seizure unreasonable? Courts tend to focus primarily on the police officer's degree of suspicion at the time of the search; they also ask whether the officer has obtained prior judicial authorization (though this factor is not dispositive).<sup>240</sup> But why should reasonableness be solely a matter of the officer's suspicions, or the magistrate's evaluation of those suspicions? The Court has sometimes found reasonableness to depend also on the manner in which a search or seizure is conducted, or on the purposes for which it is conducted.<sup>241</sup> What is reasonable is a matter of context,<sup>242</sup> or still more

---

of course, is that Fourth Amendment reasonableness is not reducible to police officer reasonableness. And even if it were, one might ask whether it is sufficient to be able to attach the label "reasonable" to a single attribute of the officer. Would a search or seizure based on no suspicion whatsoever be nonetheless reasonable so long as the officer involved spoke in a reasonable voice?

<sup>239</sup> See *id.* at 1918-25 (explaining that courts admitted illegally obtained evidence at the Founding, but arguing that in the early twentieth century courts came to view pre-trial investigation as subject to due process regulation); see also *id.* at 1891 ("[D]ue process supplies a response to originalists who contend that suppression was unheard of at the Founding . . .").

<sup>240</sup> Some degree of individualized suspicion is usually necessary (and often sufficient) to establish Fourth Amendment reasonableness. See, e.g., *Maryland v. King*, 133 S. Ct. 1958, 1969 (2013) ("In giving content to the inquiry whether an intrusion is reasonable, the Court has preferred 'some quantum of individualized suspicion . . . [as] a prerequisite to a constitutional search or seizure. But the Fourth Amendment imposes no irreducible requirement of such suspicion.'" (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-61 (1976))); see also Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 485-86 (1994) ("Although the concept of individualized suspicion has an explicit constitutional basis only in the particularity requirement contained in the Warrant Clause of the Fourth Amendment, it historically has been required of all searches and seizures."). Courts still occasionally refer to "the warrant requirement," but warrants are at best a factor tending to establish reasonableness rather than a requisite component of it.

<sup>241</sup> See, e.g., *Tennessee v. Garner*, 471 U.S. 1, 7 (1985) (rejecting argument that once probable cause is established, "the Fourth Amendment has nothing to say about *how* [a] seizure is made"); *id.* at 8 ("[I]t is plain that reasonableness depends on not only when a seizure is made, but also how it is carried out."); *New Jersey v. T.L.O.*, 469 U.S. 325, 340-41 (1985) (stating that the governmental purpose in carrying out a search is relevant to the reasonableness inquiry); see also *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931) ("There is no formula for the determination of reasonableness. Each case is to be

broadly, of the “totality of the circumstances.”<sup>243</sup> Reasonableness is a capacious term, and it makes sense to think it includes an inquiry into the uses to which a search or seizure is put. A search in which police enter my home without a warrant and rummage through my personal effects is itself unreasonable. But what happens next matters, too. If after an illegal entry the police put my things back, disappear, and never bother me again, the search is *less* unreasonable than it would be were the police to take my possessions, arrest me, and then ask other state agents to use the seized items to prosecute and punish me. Indeed, this is a plausible account of the rationale of *Mapp v. Ohio*, which first applied the exclusionary rule to the states: the use in court of illegally obtained evidence extended and aggravated the unreasonableness of the initial search.<sup>244</sup> The account offered here of the exclusionary rule is a significant departure from recent doctrine, but it is a return to older judicial understandings.

### B. *Coercion, Consent, and Waiver*

I have focused on the exclusionary rule thus far, but a conceptual reorientation of constitutional criminal procedure would have other important doctrinal implications. In the interests of finality (for this Article, if not for its arguments), I will mention a few other implications only briefly. If, as this Article has argued, the concept of state coercion is central to the Fourth, Fifth, and Sixth Amendments, has existing doctrine really managed to obscure that concern with its focus on police regulation? Not entirely. Constitutional jurisprudence could not entirely avoid the issue of state coercion; it is simply too central to the constitutional text and to the initial interpretations of the Bill of Rights. But the focus on police regulation that began with the Warren Court and has only increased since then has relegated coercion, and the related issues of consent and cooperation, to a subsidiary concern. The Court mentions coercion, consent, and cooperation fairly often throughout Fourth, Fifth, and Sixth Amendment doctrine, but relies on impoverished accounts of those

---

decided on its own facts and circumstances.”).

<sup>242</sup> *T.L.O.*, 469 U.S. at 337 (“Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place.”).

<sup>243</sup> *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (“We have long held that the touchstone of the Fourth Amendment is reasonableness. Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances.” (internal citations omitted)).

<sup>244</sup> Importantly, the *Mapp* Court characterized questions about the scope of the exclusionary rule as “recurring questions of the reasonableness of searches.” *Mapp v. Ohio*, 367 U.S. 643, 653 (1961) (quoting *United States v. Rabinowitz*, 339 U.S. 46, 63 (1950)). In Justice Clark’s majority opinion, the remedy of exclusion is implied by, rather than extrinsic to, the right against unreasonable searches and seizures. *Id.* at 648 (stating that the Court requires “strict adherence” to the remedy of exclusion, which is “a clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard”). See also *supra* Section I.A.

concepts. Refocusing on state coercion could force a number of doctrinal adjustments. And even in the absence of any doctrinal change, recall the value of articulation: we may develop a more accurate and honest account of our criminal justice system by reexamining what counts as coercion or cooperation.

Consider, for example, the inquiry into whether a Fourth Amendment seizure has occurred. In the contested cases, an individual usually claims that he was detained against his will, and the government often counters with the claim that the individual was free to walk away and was not held by coercive authority.<sup>245</sup> Thus, coercion is central to the concept of a seizure, and the Court has recognized that much.<sup>246</sup> To decide whether a seizure has occurred, the Court asks whether a reasonable person would feel “free to decline the officers’ requests or otherwise terminate the encounter.”<sup>247</sup> Nominally, this is a totality-of-the-circumstances inquiry, but the Court’s decisions reveal that the “circumstances” actually considered are relatively narrow. The Court tends to focus on details of the officer’s conduct in the moment of the alleged seizure: his statements, tone of voice, display of a weapon, physical placement in relation to the suspect, and the presence or absence of other people.<sup>248</sup> It gives relatively short shrift to what is probably the most important circumstance of all: the fact, obvious to all involved, that the officer carries the authority of the state to use force and make arrests.<sup>249</sup> In other words, the most coercive factor in a typical police-citizen encounter has little to do with the individual officer’s

---

<sup>245</sup> When the government takes possession of physical property, or takes a person into physical confinement, the existence of a seizure is not usually contested. Seizure is more ambiguous when there is an encounter between officer and individual without immediate arrest or use of physical force. *Cf.* *Brendlin v. California*, 551 U.S. 249, 255 (2007) (“When the actions of the police do not show an unambiguous intent to restrain or when an individual’s submission to a show of governmental authority takes the form of passive acquiescence, there needs to be some test for telling when a seizure occurs in response to authority, and when it does not.”).

<sup>246</sup> *See Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968) (“Obviously, not all personal intercourse between policemen and citizens involves ‘seizures’ of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a ‘seizure’ has occurred.”).

<sup>247</sup> *Florida v. Bostick*, 501 U.S. 429, 439 (1991).

<sup>248</sup> *See United States v. Drayton*, 536 U.S. 194, 203-04 (2002) (“When Officer Lang approached respondents, he did not brandish a weapon or make any intimidating movements. He left the aisle free so that respondents could exit. He spoke to passengers one by one and in a polite, quiet voice.”); *I.N.S. v. Delgado*, 466 U.S. 210, 212-13 (1984) (“The agents displayed badges, carried walkie-talkies, and were armed, although at no point during any of the surveys was a weapon ever drawn. . . . During the survey, employees continued with their work and were free to walk around within the factory.”).

<sup>249</sup> *Cf. Florida v. Royer*, 460 U.S. 491, 497 (1983) (“Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure . . .”).

actions and much to do with his or her status as the face of the criminal justice system. To recognize this is not to claim that every police-citizen encounter is necessarily a seizure; the officer's status as agent of the state is not dispositive. But it is highly relevant, and the Court's discussions often obscure this factor. A "request" for cooperation from a police officer is nothing like a request for cooperation from another private citizen. Were we to focus on the likelihood of coercion in a police-citizen encounter, we may well conclude that police officers should advise citizens of their option not to cooperate in order to dissipate the subtle coercion that always accompanies an agent of law enforcement.<sup>250</sup>

The same reasoning extends to Fourth Amendment doctrine on consensual searches. Here too, courts care about consent because they have implicitly (and sometimes explicitly) recognized that coercion is at the heart of the Amendment.<sup>251</sup> The harm inflicted by an unreasonable search is not just the exposure of private information, which could occur by accident, or at the hands of another private citizen, but the coercive taking of the information by a state agent, against the will of the individual. A consensual search may expose private information, but it does so without coercion, and is thus constitutionally permissible even in the absence of suspicion or other justification.<sup>252</sup> But in deciding what counts as valid consent, the Court has again paid little heed to the officer's status as an agent of the criminal justice system. The precise legal standard for valid consent—a totality of the circumstances voluntariness test<sup>253</sup>—is less revealing than the particular factors that are considered, or ignored, in actual cases. In finding valid consent, the Court has emphasized that an encounter took place in public, that the searching officials claimed legal authority to search, and that the individual eventually acquiesced in the request.<sup>254</sup> The first of these factors could support a finding of a voluntary

---

<sup>250</sup> The Eleventh Circuit had taken this approach before *Drayton*, at least with respect to encounters on buses. See, e.g., *United States v. Washington*, 151 F.3d 1354, 1357 (11th Cir. 1998) ("Agent Perkins held his badge above his head and identified himself as a federal agent. He announced what he wanted the passengers to do, and what he was going to do. Absent some positive indication that they were free not to cooperate, it is doubtful a passenger would think he or she had the choice to ignore the police presence. Most citizens, we hope, believe that it is their duty to cooperate with the police."). But in *Drayton*, the Supreme Court rejected the apparent per se requirement that police advise bus passengers of their option not to cooperate. *Drayton*, 536 U.S. at 202-03.

<sup>251</sup> See, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973) ("[T]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force.").

<sup>252</sup> See *id.* at 222 ("[A] search conducted pursuant to a valid consent is constitutionally permissible.").

<sup>253</sup> *Id.* at 227 ("[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined by the totality of all the circumstances.").

<sup>254</sup> See, e.g., *id.* at 233-34; *Zap v. United States*, 328 U.S. 624, 628-29 (1946).

decision to cooperate on the theory that the individual was protected by the public venue, but it could just as easily indicate pressure to avoid refusing the request and causing a scene. The fact that the officials seeking consent claimed authority to search seems to weaken a finding of consent, not to strengthen it.<sup>255</sup> And the fact of eventual acquiescence could show the efficacy of coercion as much as an agreement to the search.

Importantly, the Court has explicitly rejected a requirement that the officer advise the individual of his right to refuse consent. The rationale for rejecting this requirement is an appeal to "practicality": "[I]t would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning. Consent searches are part of the standard investigatory techniques of law enforcement agencies . . . . Our decision is not intended to hamper the traditional function of police officers in investigating crime."<sup>256</sup> Notice that the Court does not focus on the perspective of the individual who gives consent, or the benefits of the warning to this individual, but on the needs of law enforcement. Indeed, the primary objection to a required notification of a right to refuse cooperation seems to be that such a warning may be too effective and thus prevent police from gathering information that they would otherwise obtain through subtle coercion.

If this Fourth Amendment question were approached as one about the permissible limits of state coercion, it would again be relevant that the police officer who requests consent to search is positioned as an agent of the state, with the power to arrest and initiate the criminal justice process. Citizens who encounter officers are acutely aware of this role, and their reactions to officers' requests are informed by that awareness. This does not necessarily mean that no one can ever give meaningful, voluntary consent to an officer's request, just as the officer's status does not suggest that every individual is seized the moment he or she encounters a police officer. But the legal analysis of these questions—whether a seizure has transpired, or whether valid consent has been given—must acknowledge the officer's role in a coercive system that threatens various forms of violence, including punishment.

In the specific context of custodial interrogations, the Court has taken a different approach, recognizing the "inherent compulsions" of the situation and

---

<sup>255</sup> In *Zap*, the Court cited the searching officers' claim to authority as evidence of the constitutionality of the search. 328 U.S. at 628-29 ("[T]hey acted under the auspices and with the authority of representatives of the Navy Department who were authorized to inspect."). But in other cases, the Court has treated a (false) claim of authorization to search as a factor weighing against a finding of valid consent. *See, e.g., Bumper v. North Carolina*, 391 U.S. 543, 550 (1968) ("When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent.").

<sup>256</sup> *Schneckloth*, 412 U.S. at 231-32 (quoting *Miranda v. Arizona*, 384 U.S. 436, 477 (1966)).

requiring specific warnings of one's right to refuse cooperation.<sup>257</sup> Even in this context, though, the protections against coercion are vitiated almost as soon as they are issued. Though police officers must advise suspects of their rights to silence and to counsel before securing an admissible confession, officers may also seek waiver of these rights.<sup>258</sup> And in seeking waiver, the police may employ a wide range of deceptive and otherwise coercive tactics: they are free to exploit the "inherent compulsions" of custody to seek waiver even if they are nominally prohibited from exploiting those compulsions to obtain an unwarned statement.<sup>259</sup> Moreover, the Court has consistently relaxed the standards for a showing of valid waiver, so that now (contrary to the standards first promulgated in *Miranda*) the fact that a suspect speaks is itself nearly conclusive evidence of a valid waiver of the right to remain silent.<sup>260</sup> The Supreme Court is unlikely to revisit these doctrines of consent and cooperation. But even if we do not or should not aspire for doctrinal change, we can mine the judicial opinions for their visions of permissible coercion, and permissible resistance. Across the doctrines of seizures, consent searches, and waivers of rights at interrogation, we see the Court contemplating resistance, and foreclosing as much of it as possible. One could say that at the moment of a street encounter or a custodial interrogation, the Court effectively imposes a resistance requirement on the suspect, but demands that the resistance take a very specific form. Any physical resistance to the officer is prohibited, of course. Instead, the person under investigation must refuse cooperation in

---

<sup>257</sup> *Miranda*, 384 U.S. at 467 ("[W]ithout proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.").

<sup>258</sup> *Id.* at 444 ("The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently."); *id.* at 475-77; *see also* *North Carolina v. Butler*, 441 U.S. 369, 373 (1979) (holding that an express statement is not necessary to establish valid waiver).

<sup>259</sup> *See, e.g., Moran v. Burbine*, 475 U.S. 412, 423-24 (1986) (finding that police failure to notify a suspect that his attorney was trying to reach him did not invalidate the suspect's waiver of his *Miranda* rights).

<sup>260</sup> *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010), effectively abolished *Miranda*'s "heavy burden" on the state to prove waiver and adopted a presumption of waiver. *Id.* at 2261 ("[W]aivers can be established even absent formal or express statements of waiver that would be expected in, say, a judicial hearing to determine if a guilty plea has been properly entered."). *Thompkins* received warnings, said almost nothing as the police questioned him for about three hours, and then eventually gave a one-word incriminating statement: asked if he prayed to God for forgiveness for shooting the victim, *Thompkins* said yes. *Id.* at 2257. In analyzing the waiver question, the Court effectively placed the burdens of production and proof on *Thompkins*, and renounced *Miranda*'s assertion that custodial interrogation is "inherently coercive." *Id.* at 2263 ("*Thompkins* does not claim that police threatened or injured him during the interrogation . . . [A]pparently he was in a straight-backed chair for three hours, but there is no authority for the proposition that an interrogation of this length is inherently coercive.").

precisely the right terms, asking the right questions to force the officer to make explicit his authority: “Am I free to leave? Am I under arrest? I would like a lawyer.” Failure to ask these questions, or failure to invoke a right to counsel “unambiguously”—failure to resist properly, that is—is deemed consent or waiver and leaves the individual with little opportunity to resist via constitutional litigation later.

The constitutional text leaves little room to deny that in theory, individuals have rights of noncooperation. But existing doctrine seeks to minimize the likelihood that an individual will actually exercise those rights of resistance in the moment of the encounter with the police, and the doctrine then attempts to foreclose subsequent legal resistance through its definitions of seizure, consent, and waiver. Broadly, these doctrines reflect a judgment about the permissible scope of state coercion: if the looming authority of the state writ large helps individual police officers secure cooperation, so much the better. This cooperation is not voluntary as we use that word in other contexts; it depends upon individuals’ fear and ignorance. But perhaps criminal justice is a special sphere, and the interest in “effective law enforcement” is sufficient to justify exploitations of suspects’ fear or ignorance. Though I do not subscribe to this normative vision, it seems to underlie several areas of existing doctrine. And it should be made explicit. As argued in Section II.C, one of the advantages of constitutional jurisprudence is the articulation of our underlying normative commitments.

#### CONCLUSION

Constitutional doctrine does not regulate the police well. It could probably regulate them better, but it is unlikely ever to provide the kind of comprehensive, centralized guidance necessary to reshape American policing. Scholars and advocates who seek policing reform are right to look beyond the Constitution.

At the same time, for those who seek to understand and implement the constitutional provisions that bear upon investigative procedure, it is time to look beyond policing. The Fourth, Fifth, and Sixth Amendments were not designed to regulate police officers, but to enable individuals facing the coercive power of the state to pursue specific forms of resistance. Litigation under these Amendments is an important form of political contestation; it is the primary venue for challenges to the state’s power to punish. And to evaluate challenges to the punitive power, we need to understand it in context. Criminal justice in the United States is a process; a lengthy endeavor in which various public officials identify, apprehend, prosecute, and ultimately punish those who violate the law. This Article has sought to reconnect the various steps in the criminal justice process—to emphasize the connections among investigation, adjudication, and punishment, and to show that the Constitution governs the entire process.

The recovery of the Bill of Rights’ broad concern with state coercion, and its mechanisms to resist that coercion, may not itself directly produce criminal

justice reform. A more accurate conception of the Fourth, Fifth, and Sixth Amendments would yield some doctrinal changes, as we have seen, but constitutional doctrine is more likely to reflect reforms initiated elsewhere than to produce new reforms. Nevertheless, those dismayed at the state of American criminal justice might find reason to reclaim the account of investigative procedure offered here. It is an account that insists on the connections among various state actors and the various stages of the criminal process, and attention to these connections will be essential to effective reform. Even more importantly, perhaps, the understanding of constitutional criminal procedure in this Article is one that sees punishment as something to resist. For the condemned individual, punishment is always something best avoided. Once we recognize that, it may be easier to reach a place where society, too, finds ways to resist the temptation to address every social ill with punishment. Our system cannot do without punishment, but it could probably do well with much less punishment. To make reductions in punishment politically feasible, we might begin by recovering the constitutional concern with resistance to coercion.



*BOSTON UNIVERSITY LAW REVIEW*