
ARTICLE

ANNOY NO COP

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The objective of the legality principle is to promote autonomy by providing individuals with opportunities to plan courses of conduct free from state intrusion. If precise rules are not prescribed in advance, individuals may lack notice of what is prohibited and may be subjected to arbitrary treatment. Thus, the Constitution commands that legal officials honor formal terms of engagement and limit enforcement efforts to narrowly defined crimes. But, under pressing conditions, the prevailing rules may prove too rigid, compelling courts to carve out post hoc exceptions. As a matter of practice, these exceptions tend to operate asymmetrically—benefiting the state only. This Article uses Fourth Amendment doctrine to examine that asymmetry.

I coin the term “meaningful understanding” to describe the functional Fourth Amendment methodology by which courts sometimes accommodate law-enforcement needs, fears, and even mistakes. The enterprise is admirable, but there is a dark side: a judge cannot understand meaningfully a reasonable officer in his particular situation without concurrently tolerating an otherwise impermissible intrusion upon autonomy. The officer enjoys a piecemeal exception that the individual experiences as a piecemeal (and often unanticipated) burden. In this way, meaningful understanding works to excuse unexpected coercion. The individual is left unfairly surprised—unable to plan a law-abiding life consistent with the promise of the legality principle.

This troubling state of affairs arises most often in the context of order-maintenance policing. Street encounters are fast-moving and understandably unpredictable. In such circumstances, officers may end up deviating unforeseeably from the usual rules, confounding the capacity of pedestrians and motorists to comprehend the scope of state

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power and the quality of individual rights. We need not look far to find tragic real world examples. I discuss several, including the traffic stop and arrest of Sandra Bland, a motorist whose subsequent death in a jail cell became a focus of the legal and social justice movement known as “Black Lives Matter.”

The jurisprudential path forward, however, is not to command greater fidelity to formal Fourth Amendment rules, but instead to try within limits to understand much more. In this vein, Jeremy Waldron has described a “procedural” conception of legality, characterized by “modes of argumentation” capacious enough to bring all reasonable sides of the story to bear. The goal is ambitious. But the Article concludes with a modest and viable set of doctrinal reforms to better pursue meaningful understanding—articulated and evaluated bilaterally.

It wasn't only wickedness and scheming that made people unhappy, it was confusion and misunderstanding; above all, it was the failure to grasp the simple truth that other people are as real as you. And only in a story could you enter these different minds and show how they had an equal value. That was the only moral a story need have.

IAN MCEWAN, ATONEMENT (2001)

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INTRODUCTION

I like to ride my bike on the sidewalk, to let my dog run free, to spend warm afternoons in the park with a cold beer. But, obviously, I may not be allowed to do these things. The state manages my existence in public spaces. It picks sides. By constraining my autonomy to do what I want to do with my bike, pet, and intoxicants, the state has created an environment in which another individual may enjoy the outdoors without dodging dogs and bikes, without smelling stale beer. This is the story of order-maintenance enforcement.¹ As the name implies, it is a story of state ordering. The state forces me to trade disordered autonomy for engineered autonomy—autonomy within state bounds.²

In a liberal criminal justice system, the exchange may be considered fair enough, even before we appeal to some invented notion of the social contract.³ Liberalism presupposes certain checks on the manner by which the state manufactures order—checks intended to ensure, at a minimum, that offenses are promulgated and enacted prospectively and plainly.⁴ The objective, here, is not only to provide the public with notice of proscribed conduct but also to limit the state’s arbitrary exercises of power.⁵

The principle of legality is the name given to this requirement that offenses be previously and precisely defined. In our criminal justice system, it finds expression through a series of “bulwarks” designed to promote notice and to protect against arbitrary and capricious enforcement—constitutional

1 On order-maintenance enforcement, see generally BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* (2005); Josh Bowers, *Grassroots Plea Bargaining*, 91 MARQ. L. REV. 85 (2007) [hereinafter Bowers, *Grassroots Plea Bargaining*]; Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655 (2010) [hereinafter Bowers, *Legal Guilt, Normative Innocence*]; Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211 (2012).

2 See RICHARD BONNIE ET AL., *CRIMINAL LAW* 41 (4th ed. 2015) (“At the level of societal organization, Enlightenment thought emphasized . . . [that t]he state owed its authority to the aggregate surrenders of individual freedom necessary to the formation of the social compact. Everyone gave up some freedom in order to secure the benefits of an ordered society.”); cf. *infra* notes 47, 52–55 and accompanying text (defining individual autonomy as the capacity of the individual to predict, plan, and live according to her own reasons).

3 See THOMAS HOBBS, *LEVIATHAN*, ch. XIV, para. 7 (1651) (discussing obligations that arise from the social contract); see also JOHN RAWLS, *A THEORY OF JUSTICE* 11 (1971) (describing the formation of a social contract). But see Rolf Sartorius, *Political Authority and Political Obligation*, 67 VA. L. REV. 3, 12 (1981) (“As an account of the putative foundation of political obligation . . . any theory of an implied social contract must fail.”).

4 See *infra* notes 46–53, 61–64, 114, and accompanying text.

5 See *infra* notes 26, 41–42, 113, 127, 295, 385, 431, and accompanying text (discussing the conventional perspective that formalism best checks arbitrary exercises of power).

rules against, for instance, *ex post facto* laws and vague offenses.⁶ The rule of lenity may also be understood as legality's effort—in the face of constitutionally tolerable statutory ambiguity—to give the benefit of the doubt to the individual whose liberty is threatened by conviction and punishment. Even burdens of proof (and the presumption of innocence more generally) operate on a like notion that—unless and until the state can demonstrate otherwise—the rights of the individual against the coercion of the criminal law ought to trump the instrumental needs of the state.⁷

Of course, this idea of notice is no more than a fiction for a number of well-examined reasons. Holmes' "bad man" does not pore over penal codes,⁸ and public-order offenses are *mala prohibita* only.⁹ Accordingly, even the "good" man—the man who wishes only to do the right thing—may lack "social duty" notice that the state has proscribed criminally some instance of state-determined disorderly conduct.¹⁰ When it comes to public-order offenses, the notion that "everyone is presumed to know the law" carries comparatively less

6 *Hurtado v. California*, 110 U.S. 516, 531-32 (1884); *see also* HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 93 (1968) ("The devices worked out by the courts to keep the principle of legality in good repair comprise a cluster of doctrines that give the criminal law much of its distinctive content.").

7 *See* RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 109-10 (2004) (describing the burden of proof beyond a reasonable doubt as a constraint on government power); *see also* Rinat Kitai, *Presuming Innocence*, 55 OKLA. L. REV. 257, 280 (2002) ("The presumption of innocence determines the allowed limits of interference by the State in the autonomy of an individual . . .").

My project is non-consequential. I am concerned with the legality principle and the judge's obligation to administer it. Accordingly, I bracket the empirical question of whether order-maintenance policing works either to promote public safety and order or to counteract more serious crime. As the debate over broken-windows theory has demonstrated, the answers to these questions are largely unsettled. *See generally, e.g.*, FRANKLIN ZIMRING, *New York City's Natural Experiment*, in *THE GREAT AMERICAN CRIME DECLINE* (2007) (evaluating the effectiveness of order-maintenance policing); *see also* Jeffrey Fagan & John MacDonald, *Policing, Crime, and Legitimacy in New York and Los Angeles: The Social and Political Contexts of Two Historic Crime Declines*, in *NEW YORK AND LOS ANGELES: AN UNCERTAIN FUTURE* 243 (2013) (same); HARCOURT, *supra* note 1 (arguing that order-maintenance policing is ineffective). My personal opinion is that even if heavy-handed order-maintenance tactics were to be proven effective at fighting serious crime, the negative externalities would remain prohibitively high. *See* Bowers & Robinson, *supra* note 1, at 279-280 & n.318 (suggesting decriminalization of public-order offenses). These social costs are measured in broken households, broken relationships, and broken bones. *Supra* notes 33-40, 113-16, 204-08, 279-96, 422-31 and accompanying text; *see also* Bowers, *Grassroots Plea Bargaining*, *supra* note 1, at 92-93 & n.35 (describing the collateral costs of order-maintenance policing). But, again, that empirical question is largely tangential to the immediate project.

8 Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

9 *See* Bowers & Robinson, *supra* note 1, at 279-80.

10 *Nash v. United States*, 229 U.S. 373, 377 (1913); *see also* Bowers & Robinson, *supra* note 1, at 214 (describing the "faithful man" as "an individual who complies with the law not because he rationally calculates that it is in his best interest to do so but because he sees himself as a moral actor who divines that it is right to defer to legitimate authority").

weight than when our criminal codes approximate a shared morality.¹¹ Moreover, law enforcers have no shortage of public-order offenses from which to choose, leaving some only seldom or selectively enforced.¹² In such circumstances, even a diligent study of the law may reveal only so much about whether, when, where, and how police officers might concentrate their energies. And, to the extent the individual guesses right, her predictions often have less to do with binding legal codes than with sociopolitical, economic, and cultural forces and considerations—some, normatively defensible; others, less so.¹³

This is a pessimistic picture. But it is not new. In the past two decades, there has developed a rich literature on “overcriminalization,” which catalogues the difficulties of predicting state action based on even precisely defined public-order offenses.¹⁴ There are also some scholars who have examined the intersection that intrigues me most here—the manner by which Fourth Amendment doctrines have contributed to the shortcomings of code law. In this Article, I rehearse some familiar observations—most notably, the failure of the Fourth Amendment to adequately check pretextual searches and seizures.¹⁵ But my principal aim is to identify, analyze, and criticize an underappreciated and counterintuitive way in which Fourth Amendment doctrines have operated to obscure the individual’s capacity to forecast what she can and cannot do, free from state intrusion.

Imagine that an officer hopes to arrest me for drinking alcohol in the park. The principle of legality ostensibly dictates that he needs an applicable valid statute and sufficient proof of guilt, which the Supreme Court has defined as probable cause.¹⁶ Or does he? The Court has carved several exceptions to its purportedly hard-and-fast Fourth Amendment rules. Most notably, it has held that an officer may get things wrong yet remain on the right side of the Fourth Amendment. He may make a reasonable mistake about the facts that he relies upon to establish probable cause. He even may err about the scope

11 Compare *State v. Boyett*, 32 N.C. 336, 343–44 (1849) (“[E]very one has an innate sense of right and wrong, which enables him to know when he violates the law, and it is of no consequence, if he be not able to give the name, by which the offence is known in the law books, or to point out the nice distinctions between the different grades of offence.”), with Peter W. Low & Joel S. Johnson, *Changing the Vocabulary of the Vagueness Doctrine*, 101 VA. L. REV. 2051, 2055, n.13 (2015) (explaining that “fair notice” is a particular problem when it comes to “street cleaning” statutes and other public-order offenses), and John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 216 (1985) (same).

12 See *infra* Part II.

13 See *infra* Part II (discussing police officers’ good and bad reasons for action).

14 See *infra* notes 432–44, 85, and accompanying text.

15 See *infra* Part II.

16 *Atwater v. City of Lago Vista*, 532 U.S. 318, 354–55 (2001); see also *United States v. Watson*, 423 U.S. 411, 424–25 (1976) (upholding search incident to a warrantless arrest); *infra* notes 87–88, 93, 99–113, 117 (discussing *Atwater* and related doctrine).

of the criminal law itself (which is, paradoxically, the kind of mistake almost wholly unavailable to an untrained layperson).¹⁷

Consider a few twists to the hypothetical. Suppose that the law has changed such that the open-container ordinance in question no longer applies to a container of alcohol wrapped in a paper bag. Moreover, suppose that my paper bag suitably conceals my container such that the officer mistakes a flash of the red exterior of my alcohol-free Coca-Cola for a Budweiser beer. If the officer's legal and factual mistakes are deemed reasonable, then his conduct—the arrest—is constitutional. In turn, I am subjected to a different constraint. As I read it, the operative rule is no longer defined exclusively by statutory language (simplified to the following): *In public, possess no open containers of alcohol*. It is defined also by the officer's perspective and practice: *In public, possess no open containers of something that an officer reasonably could believe to be alcohol (even if it is not) in a manner he reasonably could believe violates the law (even if it does not)*. The end result is that the officer has the opportunity to arrest me with neither sufficient proof of a criminal act nor even an applicable criminal statute. My autonomy is constrained by the reasonable officer's belief, evaluated from his perspective. Put differently, the arresting officer's reasonable belief constitutes an extenuating circumstance sufficient to excuse him from legality's usual rules.

To get to this point, the Supreme Court has relied upon an odd (but, conceptually, neither incompatible nor indefensible) pairing of methodologies. The first and primary methodology is founded on the *principle of legality*. The second is founded on what I call a *principle of meaningful understanding*. The principle of legality is thought to dictate that police officers must be guided by bright-line rules or, at least, well-structured standards—most notably, the Fourth Amendment's ostensible warrant and probable cause requirements.¹⁸ The principle of meaningful understanding recognizes, by contrast, that it may be impractical or even impossible to hold officers categorically to these rules and standards. Consequently, a court may use a methodology of meaningful understanding to prioritize affective and particularistic questions of what constitutes *reasonable enough* police behavior, all things considered.¹⁹ Here, the judicial craft is closer to sociology than conventional legal analysis and decisionmaking. Max Weber, for instance, championed a method of sociological inquiry called *verstehen*, which translates roughly to “meaningful understanding.” The central premise of *verstehen* is

¹⁷ See *infra* Section IV.A (describing doctrine and discussing traditional rule that mistake or ignorance of law is no excuse).

¹⁸ See *infra* notes 73–78 and accompanying text (discussing baseline Fourth Amendment requirements).

¹⁹ See *infra* Section I.C (discussing “general reasonableness”).

that we cannot expect to understand meaningfully a situation until we “wear the shoes” of the actors involved “to see things from their perspective.”²⁰

But the seemingly peculiar feature of the Supreme Court’s prevailing Fourth Amendment methodology of meaningful understanding is that it has come to operate almost entirely asymmetrically—to the benefit of the state only. The critical legal studies camp would argue that this asymmetry is a product of institutional indifference, implicit and systemic bias, or even purposeful discrimination. And those arguments may have merit.²¹ But there is also a more charitable explanation—an unidentified neutral logic—that might account, at least partially, for the Court’s asymmetric methodology of understanding. My positive contribution is to pinpoint this neutral logic, to map it onto Fourth Amendment doctrine, and, perhaps counterintuitively, to trace its roots back to the dominant conception of the legality principle. My normative contribution is to reveal why the Court’s neutral logic—even if conceptually defensible—remains practically flawed. Finally, my prescription is to urge the Court not to abandon its methodology of understanding, but to carry it further—to try, within limits, to understand much more.

* * *

The hitch is that the criminal justice system cannot function fairly or effectively with reference to only the rules designed to guide and control conduct. Inevitably, the system must carve *exceptions*. And, when it comes to these exceptions, the conventional wisdom is that the system need not speak in terms prospective and precise.²² Rather, exceptions permissibly may be

²⁰ JOHN J. MACIONIS & LINDA M. GERBER, *SOCIOLOGY* (7th ed. 2010); *see also infra* Section III.A, notes 303–06, and accompanying text.

²¹ *See* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 323 (1987) (summarizing the critical legal studies movement with the quip that “people in power sometimes abuse law to achieve their own ends”); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 567–70 (1983) (outlining judicial lack of objectivity). Likewise, there may be other comparatively benign biases at work. For instance, the Court may unconsciously prioritize safety and policing need, evaluating these aims in the aggregate but the intrusion in isolation. *See* RONALD JAY ALLEN ET AL., *COMPREHENSIVE CRIMINAL PROCEDURE* 384 (3d ed. 2011) (“Whatever the best answer in theory, historically Fourth Amendment law does seem to have responded to law enforcement needs.”); *see also* *Terry v. Ohio*, 392 U.S. 1, 39 (1968) (Douglas, J., dissenting) (“There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand.”); *cf.* TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* 84 (2015) (maintaining that Americans consider “safety . . . a higher value than justice, perhaps the highest value”); Joseph E. Kennedy, *Monstrous Offenders & the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 852 (2000) (observing that aggregative reasoning may lead to harsh criminal justice policies).

²² *See infra* notes 142–145 and accompanying text (describing why piecemeal affirmative defenses do not offend the rule of law).

post hoc and particularistic—at least as long as they operate only to *forgive* rule violations. The rationale is twofold. First, positive legality is not offended by pleasant surprises, and an exception that tends toward leniency produces only a *pleasant* surprise. Second, there is no comparable need to classify *ex ante* (and with precision) the rulebreaking behavior that might qualify for a lenient exception, because an individual could not plan for the qualifying behavior in any event. Consider, for example, the hungry man, tempted to steal food. The dominant conception of the legality principle dictates that he must have the means to know that theft is generally prohibited, but he need not be made aware also of the circumstances under which he might be forgiven for carrying away a loaf of bread. Genuine necessity will find him. If he is truly starving, he will seek nourishment, independent of applicable legal rules or contextual exceptions therefrom.²³

Return to my hypothetical. Positive legality demands that I have the means to know the substantive rule that forbids me from drinking in public. Likewise, the arresting officer must have the means to know the substantive and procedural rules that specify how he may enforce my rules against me. But, in the face of extenuating and often unforeseeable circumstances, one or the other of us might come to enjoy a piecemeal and post hoc exception. It is not necessary, however, that the respective beneficiary anticipates the exception since the exception does not burden the beneficiary with additional legal oversight. The beneficiary remains as free as before to plan and carry out a rulebound course of action.²⁴ The practical mistake, however, is to assume that the officer and I plan our courses of action in isolation. In fact, our two sets of rules and exceptions operate relationally—almost reciprocally. When the officer plans his conduct, he plans *his exercises of power over me*. And when a court excuses that officer for some failure to abide by his own rules, the court extends his dominion. This is the unappreciated price of a judicial methodology of meaningful understanding that asymmetrically benefits government regulators. Once a court understands the regulator in an empathetic and affective sense, the individual's rules are made fuzzier thereby.

In my hypothetical, I am left genuinely puzzled about what I can and cannot do. I am left surprised—*unfairly surprised*. And this is exactly the kind of “unfair surprise” that offends the aim (if not the prevailing letter) of the legality principle.²⁵ I have no sufficient way of knowing prospectively that my

²³ See *infra* notes 144–145 and accompanying text (discussing the concept of “acoustic separation”).

²⁴ See *infra* notes 142–145 and accompanying text.

²⁵ See PACKER, *supra* note 6, at 86–90 (observing that the principle of legality operates as a protection against “unfair surprise”); Jeffries, *supra* note 11, at 216 (same); see also RICHARD BONNIE ET AL., CRIMINAL LAW 81 (3d ed. 2010) (observing that the legality principle is designed to provide a “prophylaxis against the arbitrary and abusive exercise of discretion in the enforcement of the penal

partially concealed, open can of soda may excuse a state intrusion on my autonomy. I am not even expected to anticipate my own piecemeal exceptions to my own rules. How, then, am I expected to anticipate the *officer's* exceptions? To decipher that attenuated set of signals, I would need to know more than the underlying rules. I would need to understand meaningfully the psyche and motivations of the reasonable officer within his particular circumstances. That level of meaningful understanding should perhaps be the job of judges. But, in a liberal criminal justice system committed to giving the benefit of the doubt to the suspect or accused, it should not be made mine.²⁶

To put matters in economic terms, a piecemeal exception to the law of the police shifts information costs from the officer to me. It diminishes the clarity of my obligations and the quality of my rights. To know what I may do, I must discover not only the code law but also whatever professional police norms and practices a court may come to understand after the fact. The law is made cloudier for me. I must do more than guess at the blurry edges. I must divine the officer's good enough perceptions. I must read his abstract reasonable mind (and, likewise, the abstract reasonable mind of the accommodating judge). Comparatively, the law is made more accessible to the officer. Or, more accurately, he enjoys a lighter burden for law's ongoing imprecisions. When he navigates the blurry edges of permissible and impermissible conduct, he is given the benefit of his own reasonable (albeit potentially mistaken) perspective. From his standpoint, his good-enough

law"); William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1974, 2038-39 (2008) (indicating that the "premise" of the vagueness doctrine is to protect defendants and constrain the state).

Throughout this article, I use the terms *legality* and *rule of law* almost interchangeably. I recognize that the concepts may differ (depending upon definitions). But the common convention is to conflate. See Jeffries, *supra* note 11, at 212 (linking the rule of law to the legality principle); Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 10 (2008) ("It is, after all, an accident of usage that the particular phrase *the Rule of Law* is used for this ideal. Some theorists use the term *legality* or *principles of legality* instead."). If nothing else, the legality principle and the rule of law share the same liberal objectives. See Waldron, *supra*, at 6 (observing that the central premise of the rule of law is that "people in positions of authority" not be left to act upon "their own preferences, their own ideology, or their own individual sense of right and wrong"); see also RONALD A. CASS, *THE RULE OF LAW IN AMERICA* 17 (2001) (observing that the principal objective of the rule of law is to "help[] assure that the processes of government, rather than the predilections of the individual decisionmaker, govern"); Meir Dan-Cohen, *Decisions Rules & Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 668 (1983) ("[T]he rule of law is said to limit officials' discretion and thereby to curb their potential arbitrariness. The rule of law reduces the danger that officials may indulge their self-interest or give vent in their decisions to personal animosities or prejudices."); cf. Brian Z. Tamanaha, *The Dark Side of the Relationship Between the Rule of Law and Liberalism*, 3 N.Y.U. J. L. & LIBERTY 516, 519 (2008) ("Liberalism asserts that liberty from the encroachments of fellow citizens and from the arbitrary whims of government officials cannot exist without the rule of law.").

²⁶ See *supra* notes 5-7, *infra* notes 47, 50-53, 149-151, 172-175, 267, 376, and accompanying text (discussing the state's obligations to provide adequate notice, and examining the individual's corresponding duty to learn law and abide by it).

perceptions may bring the law's blurry edges into sharp-enough focus (even if he cannot know precisely which extenuating circumstances might qualify for a given set of exceptions in a given set of circumstances).

Asymmetric understanding operates along two dimensions. In the first instance, courts evaluate the perspective of the officer but not the individual. Moreover, courts consider only the particulars that benefit the state—the details that excuse otherwise impermissible intrusions. In either event, the prevailing asymmetric methodology operates to undermine notice asymmetrically. The individual is left in a precarious position whereby she cannot adequately plan—as a matter of right—a course of conduct free from state intrusion. With respect to the purposes of the legality principle, the implications are these: (1) the individual is less aware of the scope of police power, (2) she is less able to stand her ground, and (3) in the extreme, asymmetric understanding could even generate a vicious cycle. The very effort to exercise rights might trigger and excuse more substantial state intrusions, which, in turn, might serve to expand and obscure further the scope of police power.²⁷

This phenomenon potentially reaches well beyond criminal justice. Across a range of regulatory regimes (including, most obviously, administrative law), a fair claim could be made that the judicial effort to understand a government regulator's needs and perspective might produce unintended confusion for the regulated party. But my ambitions are more modest. For several reasons, I limit the focus to criminal procedure and order-maintenance policing. First, the concept of notice plays an outsized role in criminal justice precisely because the stakes of enforcement and punishment are atypically high.²⁸ Second, order-maintenance enforcement is likelier to produce confusion because public-order offenses proscribe conduct that is not intuitively blameworthy, and individuals lack even "lawyer's notice" of the kind that typifies white-collar criminal law and other regulatory regimes.²⁹ Third, police officers are likelier to break the rules of street encounters (excusably or otherwise), because "officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving".³⁰ Fourth, and perhaps most importantly, street encounters are

²⁷ See *infra* notes 176–178, 196–207, 251, 267 and accompanying text (describing the manner by which exercises of rights may invite and authorize state intrusions, and discussing the traffic stop and arrest of Sandra Bland).

²⁸ See PACKER, *supra* note 6, at 74 ([H]uman autonomy . . . is *a fortiori* important for that most coercive of legal instruments, the criminal law."); *supra* notes 8–11, *infra* notes 48–50, 173, 376–377, and accompanying text.

²⁹ Jeffries, *supra* note 11, at 216; *infra* notes 111–15 and accompanying text.

³⁰ *Graham v. Connor*, 490 U.S. 386, 396–97 (1989); *infra* notes 162–64, 178–81, 218–20, 223–24, 250, and accompanying text.

likelier to entail a particularly illiberal form of intrusion—that is, the imposition of rough justice, intentional or otherwise.

It may be tempting to distinguish order–maintenance street stops and arrests from post-conviction penalties. But rough justice is not limited to what happens at sentence. Lesser forms of coercion likewise might offend the legality principle.³¹ As Malcolm Feeley famously explained, when it comes to petty crime enforcement, “the process itself is the primary punishment.”³² Fast-paced encounters sometimes devolve rapidly—from menacing stop and humiliating arrest to violence or worse (followed, thereafter, by state pleas for understanding).³³ In my hypothetical, the officer might soon discover the error of his ways—that I am a normatively and legally innocent man, who possessed only a soft drink.³⁴ But, by that point, I might be in cuffs, on the ground with an arm around my neck and a taser to my back. If I try to protest, I might suffer worse. And, even if I try to comply, I might fail to do so in just the right way (at least, in the eyes of the reasonable officer).³⁵

Of course, my hypothetical poses no real-world problem. There is no authentic unfairness to a white, middle-aged law professor’s imagined confusion or putative disappointment at a fictional afternoon visit to the park spoiled by an officer bent on public ordering. The genuine problems are not made up. They are problems experienced routinely within communities and by populations inordinately made subjects of not only disorder but also order-maintenance enforcement.³⁶ They are problems that are exacerbated by (and that, in turn, may exacerbate) implicit bias and the too-short reach of the Equal Protection Clause.³⁷ They are problems for individuals who lawfully

³¹ PACKER, *supra* note 6, at 98 (describing the practice of arrest “for investigation” or “on suspicion” as offensive to the principle of legality).

³² MALCOLM FEELEY, *THE PROCESS IS THE PUNISHMENT* 199 (1979); *see also* JOSH BOWERS, *LEGALITY & ROUGH JUSTICE* (manuscript in progress) (on file with author) [hereinafter BOWERS, *ROUGH JUSTICE*]; *infra* notes 279–95 and accompanying text (describing arrest as a form of punishment and citing sources).

³³ *See* Utah v. Strieff, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) (describing the lasting toll of even peaceful stops and arrests); *infra* notes 40, 341, 430–32 and accompanying text (describing police-civilian interactions in majority-minority communities, and discussing the arrests and deaths of Eric Garner, Tamir Rice, and Philando Castile).

³⁴ *See infra* notes 124–126, 376–79, 402–406, and accompanying text (discussing the concept of normative innocence).

³⁵ *Cf.* PACKER, *supra* note 6, at 98 (explaining that the “ideal” of the legality principle is “flouted” when police officers arrest an individual whom they believe was merely “up to no good,” even if the individual is held in custody for “only a few minutes”).

³⁶ *See infra* notes 112–14, 204–07, 388, and accompanying text (describing a culture of fear in heavily policed communities).

³⁷ *See infra* notes 95–99 and accompanying text (describing the shortcomings of prevailing Equal Protection doctrine). I do not pretend that the legality question (here, as it relates to Fourth Amendment doctrine) is the only relevant question or even the principal question pertaining to official exercises of coercion. But it is a primary question that, in practice, also implicates other

resist the state only to find exercises of rights met by greater police intrusions still.³⁸ Most of all, they are problems for real people with real names, like Eric Garner and Philando Castile—people for whom low-level police intrusions are hardly trivial and anything but hypothetical.³⁹ These are the problems of order-maintenance policing—problems that likewise demand meaningful understanding.

This project is, itself, an effort at meaningful understanding. I hope to explore how a system so deeply committed to a formal conception of legality has come to tolerate so much rough punishment. In the process, I reiterate a normative proposition that has been a central tenet of my scholarship to date—the claim that particularistic judicial oversight of official exercises of coercion is entirely consistent with (and perhaps even necessary to) the rule of law as an effective buffer against sovereign prerogative.⁴⁰ To my thinking, there is much more to the legality principle, properly understood, than ever—more precisely defined rules. The legality principle also embodies a

primary questions, like discrimination and inequality. See Jeffries, *supra* note 11, at 213 (“[A]lthough there is no necessary connection between the formal requirements of the rule of law and any substantive notion of equality, in the context of contemporary American society the two are closely linked.”); see also Albert W. Alschuler, *Racial Profiling and the Constitution*, U. CHI. LEGAL F. 163, 193–94 (2002) (examining intersecting concerns of the Equal Protection Clause and the Fourth Amendment); Akhil R. Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 790 (1994) (“[I]t is far more sensible to try to read the Fourth in light of other norms that do embody our overall constitutional structure today—free speech, free press, privacy, equal protection, due process, and just compensation”); Akhil R. Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN’S L. REV. 1097, 1123–24 (1998) (noting that “issues of race . . . should be addressed in a comprehensive framework of constitutional reasonableness”). Perhaps a more rigorous Equal Protection or Due Process test could reach more effectively instances of arbitrary enforcement, but I have my doubts. In any event, the Fourth Amendment is the traditional mechanism by which the Supreme Court has regulated law enforcement. As such, I see it as the most logical site of constitutional interpretation, critique, and reform. I should recognize, however, that other scholars have offered alternative constitutional reforms, designed to achieve the same objectives. See, e.g., Donald A. Dripps, *At the Borders of the Fourth Amendment: Why a Real Due Process Test Should Replace Outrageous Government Conduct Defense*, 1993 U. ILL. L. REV. 261, 265–272 (1993) (endorsing a more vigorous due process test of fundamental fairness); Deborah Hellman, *Two Concepts of Discrimination* 102 VA. L. REV. 895, 933 (2016) (endorsing a “non-comparative [Equal Protection] right to rational governmental action,” which she defines, *inter alia*, as “a right not to have one’s liberty curtailed for no reason”).

³⁸ See *infra* notes 177–78, 196, 268, and accompanying text (examining cases where individuals’ assertions of rights provoke fresh state intrusions).

³⁹ See *infra* notes 421–32 and accompanying text (discussing these and other recent cases).

⁴⁰ See generally Bowers, *Legal Guilt, Normative Innocence*, *supra* note 1 (questioning judicial deference to prosecutors’ equitable charging decisions); Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a “Pointless Indignity”*, 66 STAN. L. REV. 987 (2014) [hereinafter Bowers, *Pointless Indignity*] (endorsing a “two-ply constitutional test” to comprehensively evaluate the legal and normative merits of arrests); BOWERS, ROUGH JUSTICE, *supra* note 32, *infra* notes 139–41, 319–28, accompanying text, and Section V.C. (endorsing a procedural conception of legality, administered judicially).

procedural dimension, capacious enough to accommodate context, perspective, voice, and narrative—considered and expressed bilaterally.

The Article proceeds in five parts. In Part I, I describe the dominant conception of the legality principle and its preference for precisely defined rules, which are thought to promote consistent and predictable law enforcement. In Part II, I revisit certain well-examined objections to the conventional formalistic approach—most notably, that an officer may exploit overbroad criminal codes to inflict rough punishment based upon little more than an inchoate hunch. In Parts III and IV, I transition from the officer’s manipulation of the rules to his enjoyment of the exceptions. I explain that Fourth Amendment rules are only *ostensibly* firm. And I discuss the asymmetric shift from legality to understanding once an officer has broken the rules. Specifically, I examine the doctrines whereby courts have accommodated the officer’s perspective—his reasonable *mistakes*, *fears*, and *needs*, shaped by his professional experiences. And I reveal the manner by which the individual is burdened in turn—that she may offer no competing claim that a court should also accommodate her reasonable perspective—her reasonable *mistakes*, *fears*, and *needs*, shaped by her lay experiences. In Part V, I analyze several case studies and respond to objections. I apply prevailing doctrines to two recent incidents—the traffic stops of Sandra Bland and John Felton. Both incidents have generated significant media and political attention as part of the legal and social justice movement, “Black Lives Matter.” But I focus on the events only to make a jurisprudential point—to show how easy the criminal justice system has made it for the officer to replace the law’s precise meaning with a hazy police-generated message. The new message is as inscrutable to the layperson as historically discarded vagrancy statutes.⁴¹ If it can be deciphered at all, it translates to just this—“*Annoy No Cop.*”

⁴¹ Compare *infra* notes 66–69 and accompanying text (discussing historical vagrancy and common law crimes), with *infra* notes 112–14, 267–71 (discussing modern application of contemporary vehicle and traffic laws); cf. Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972) (holding unconstitutional an ordinance that would allow “poor people, nonconformists, dissenters, [and] idlers . . . to stand on a public sidewalk only at the whim of [the] police officer,” who could use the ordinance as “a convenient tool for harsh and discriminatory enforcement . . . against . . . groups deemed to merit . . . displeasure”) (internal citations omitted); Mapp v. Ohio, 367 U.S. 643, 671 (1961) (Douglas, J., concurring) (remarking upon the “casual arrogance of those who have the untrammelled power . . . to seize one’s person”); BONNIE ET AL., *supra* note 2, at 94 (describing the due process implications of criminalizing mere “affronts to police authority” (internal citations omitted)); Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 YALE L.J. 2236, 2245 (2013) (examining the consequences of “allow[ing] the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution” (internal citations omitted)).

I. LEGALITY, AUTONOMY & AUTHORITY

There is no obvious answer to the question of when the state has criminalized too much, too hard. And, for present purposes, I leave that debate aside. I am not confident that the political branches are, in fact, particularly well situated to handle the substantive determination, but one fight at a time.⁴² For the sake of argument, then, I grant the Court's assumption that the judiciary is generally incompetent to determine when—morally or prudentially—the state has ordered to excess:

[W]e are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement. And even if we could identify such exorbitant codes, we do not know by what standard (or what right) we would decide . . . which particular provisions are sufficiently important to merit enforcement.⁴³

Instead, I turn to the processes by which our criminal justice system has regulated perceived arbitrary exercises of official coercion.⁴⁴

A. *Precision & Planning*

The touchstone is the principle of legality—what Herbert Packer once called “the first principle of criminal law.”⁴⁵ The animating idea is, first, that I am able to “predict and plan” my own life fairly and effectively only when I am given sufficient notice of the state's plans and, second, that legal precision

⁴² Cf. Josh Bowers, Lafler, Frye, and the *Subtle Art of Winning by Losing*, 25 FED. SENT'G REP. 26, 40 (2012) (“[T]he Court has adopted a tone of almost cheerful resignation, as if it were helpless—as opposed to merely unwilling—to constitutionally check the overinflated criminal codes The substantive law is what legislatures have made it and what the Court has permitted it to become.”).

⁴³ *Whren v. United States*, 517 U.S. 806, 818–19 (1996). Recently, Justice Kagan expressed more ambivalence but still concluded that the Court was unequipped to reign in criminal codes:

[T]he real issue [is] overcriminalization and excessive punishment [This statute] is a bad law—too broad and undifferentiated, with too-high maximum penalties, which give prosecutors too much leverage and sentencers too much discretion. And . . . [it] is unfortunately not an outlier, but an emblem of a deeper pathology in the federal criminal code. But whatever the wisdom or folly of [this statute], this Court does not get to rewrite the law If judges disagree with Congress's choice, we are perfectly entitled to say so—in lectures, in law review articles, and even in dicta. But we are not entitled to replace the statute[.]

Yates v. United States, 135 S. Ct. 1074, 1100–02 (2015) (Kagan, J., dissenting).

⁴⁴ See *BONNIE ET AL.*, *supra* note 25, at 78 (“The [positive] principle of legality does not speak to the question of what conduct should be declared criminal. Rather, it states a normative expectation regarding how that decision should be made.”).

⁴⁵ PACKER, *supra* note 6, at 79.

is the best mechanism to ensure that the state hews to its own plans.⁴⁶ Of course, the desire for precision and predictability extends even beyond criminal justice. Nevertheless, the premise is that there is an “especial need for certainty” in a domain in which the state commonly brands and restrains its citizens, warehousing (and sometimes even exterminating) their bodies.⁴⁷ The “law of crime” is said to be “special” precisely because criminal justice is especially coercive.⁴⁸ And, in such circumstances, the conventional wisdom is that only a formalistic approach may provide adequate protection against arbitrary exercises of state power.⁴⁹

⁴⁶ See H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 180-83 (1968) (explaining that criminal justice, appropriately designed, allows us “to predict and plan the future course of our lives within the coercive framework of the law . . . to foresee the times of law’s interference”); see also SCOTT SHAPIRO, LEGALITY 119 (2011); PACKER, *supra* note 6, at 84-85 (“[T]his is the first argument that is always advanced in support of the principle of legality: that people are entitled to fair notice of what the law requires so that they may plan their lives accordingly [The] more sophisticated rationale of the principle of legality . . . is that it is necessary in order to prevent abuses of official discretion.”); Dan-Cohen, *supra* note 25, at 673 (“[T]he importance of the rule of law [is to] guid[e] individual behavior.”); Joseph Raz, *The Rule of Law and Its Virtue*, in THE AUTHORITY OF LAW 223-24 (1979) (“[T]he law must be capable of being obeyed [I]t must be capable of guiding the behavior of its subjects. It must be such that they can find out what it is and act on it.”); *supra* notes 2-6 and accompanying text.

⁴⁷ Stephen R. Perry, *Judicial Obligation, Precedent, and the Common Law*, 7 OXFORD J. LEGAL STUD. 215, 256 (1987); see also H.L.A. HART, LEGAL RESPONSIBILITY AND EXCUSES, IN PUNISHMENT AND RESPONSIBILITY 28, 44-47 (2d ed. 1969); Kenneth I. Winston, *On Treating Like Cases Alike*, 62 CAL. L. REV. 1, 37 (1974) (discussing criminal law’s long tradition of “strict adherence to rules”); cf. Sherry F. Colb, *Freedom from Incarceration: Why is This Right Different from All Other Rights?*, 69 N.Y.U. L. REV. 781, 821 (1994) (explaining that criminal justice is different in kind from other forms of legal regulation and that “liberty from confinement cannot be relegated to the status of unprotected aspects of daily life”).

⁴⁸ Louis Michael Seidman, *Points of Intersection: Discontinuities at the Junction of Criminal Law and the Regulatory State*, 7 J. CONTEMP. LEGAL ISSUES 97, 97 (1996); see also Egon Bittner, *The Police on Skid-Row: A Study of Peace Keeping*, 32 AM. SOC. R. 699, 700 (1967) (“[C]rime belongs wholly to the law, and its treatment is exhaustively based on considerations of legality”).

⁴⁹ According to John Jeffries:

The rule of law signifies the constraint of arbitrariness in the exercise of government power [T]he agencies of official coercion should, to the extent feasible, be guided by rules . . . [as a means to promote] regularity and evenhandedness in the administration of justice and accountability in the use of government power.

Jeffries, *supra* note 11, at 201, 212 (explaining that “appeals to the ‘Rule of Law,’” as they apply to the penal law, tend to entail “the resort to legal formalism as a constraint against unbridled discretion”); see also PACKER, *supra* note 6, at 88-90 (describing how the principle of legality serves an important function in limiting arbitrary state action); Bowers, *Pointless Indignity*, *supra* note 40, at 1030 (describing a reason-giving requirement that would serve as a check on police discretion); see also DAVID DYZENHAUS, RECRAFTING THE RULE OF LAW: THE LIMITS OF LEGAL ORDER 179-80 (1999) (“[T]he rule of law . . . refer[s] to the idea that law should meet certain procedural requirements so that the individual is enabled to obey it [It must] be relatively certain, clearly expressed, open . . . adequately publicized . . . [and] prospective The practical effect . . . is to set limits to the discretion of legislators, administrators, judges and the police.”).

This formalistic conception of the legality principle provides the theoretical underpinnings for a “rule of law as a law of rules”⁵⁰—a positive and orthodox approach, grounded in “legal formalism.”⁵¹ According to David Dyzenhaus: “[L]aw must take the form of rules” so that people may take its requirements into account “when planning their affairs.”⁵² But this invites the question: What is so important about *planning affairs*? Surely, the legality principle does more than just promote day-to-day efforts to schedule and organize efficiently. Planning is also a tool for self-discovery and expression—for “self-ownership.”⁵³ In the words of John Christman: “[T]o be autonomous is to be one’s own person, to be directed by considerations, desires, conditions, and characteristics that are not simply imposed externally upon one, but are part of what can somehow be considered one’s authentic self.”⁵⁴ The ability to plan thereby implicates the metaphysical as much as the mundane. In a given setting, to know what the state *may not do* is to know not only what I *may do* but also to ponder and pursue who I *am* and what I *may become*.⁵⁵ Or, at least, that is the ostensible promise and hope of the legality principle as it relates to individual autonomy.

The preceding is just a rough sketch of several contested concepts. There is no settled definition of either individual autonomy or its relationship to the

50 Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1175 (1989).

51 Jeffries, *supra* note 11, at 201 (describing the “quite conventional” conception of the rule of law and the principle of legality).

52 DYZENHAUS, *supra* note 49, at 179-80; *see also* SCOTT SHAPIRO, LEGALITY 119 (2011) (“[T]he creation and persistence of the fundamental rules of law is grounded in the capacity that all individuals possess to adopt plans.”); Dan-Cohen, *supra* note 25, at 670 (“[T]he rule of law is . . . essential to one’s capacity to make and carry out life plans.”); Lawrence B. Solum, *Legal Theory Lexicon 083: Normativity, Morality, & Ethics*, LEGAL THEORY LEXICON (July 24, 2016), http://lsolum.typepad.com/legal_theory_lexicon/2004/01/legal_theory_le_3.html [<https://perma.cc/AFC6-7K4F>] (“One reason that the rule of law is important has to do with predictability and certainty.”).

53 Dan-Cohen, *supra* note 25, at 670 (“By enhancing the individual’s life-planning capacity, the rule of law expands freedom of action, secures a measure of individual liberty, and expresses respect for individual autonomy.”); Solum, *supra* note 52 (“The predictability and certainty of the law creates a sphere of autonomy within which individuals can act without fear of government interference.”). On self-ownership, *see generally* G.A. COHEN, SELF-OWNERSHIP, FREEDOM, AND EQUALITY (1995).

54 John Christman, *Autonomy in Moral and Political Philosophy*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY § 3.3 (Jan. 9, 2015), <http://plato.stanford.edu/entries/autonomy/-moral/> [<https://perma.cc/M84W-A96Q>] [hereinafter Christman, *Autonomy*]; *cf.* Jeremy Waldron, *Moral Autonomy and Personal Autonomy*, in AUTONOMY AND THE NEW CHALLENGES TO LIBERALISM 307 (2005) (“Talk of personal autonomy evokes the image of a person in charge of his life, not just following his desires but choosing which of his desires to follow.”); JOSEPH RAZ, THE MORALITY OF FREEDOM 369 (1986) (“The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.”).

55 Christopher Wellman, *Toward a Liberal Theory of Political Obligation*, 111 ETHICS 735, 738 (2001) (“Liberalism’s aversion to [state] paternalism implies that each autonomous individual has a right to decide which self-regarding benefits to pursue.”); Solum, *supra* note 52 (“What values are served by the rule of law? Why is the rule of law important? . . . The predictability and certainty of the law creates a sphere of autonomy within which individuals can act without fear of government interference.”).

legality principle and state coercion.⁵⁶ Other theorists invoke related values and principles to back the same or similar claims. For instance, Jeremy Waldron has argued that a rule-of-law system must demonstrate sufficient respect for citizens “as active centers of intelligence,” which Waldron rooted in a dignity principle. Likewise, Samuel Warren and Louis Brandeis famously championed a comprehensive privacy right “to be let alone”—to “enjoy life” and to “own” one’s own “inviolable personality.”⁵⁷ And Ronald Dworkin asserted that a state committed to the rule of law must treat its citizens with “equal concern and respect.”⁵⁸ These notions of dignity, privacy, and equality (and, of course, like notions of liberty and freedom) resonate with what I mean by individual autonomy. Simply, individual autonomy is no standalone liberal principle.⁵⁹ There are other overlapping principles that may interact with each other and also with the legality principle.⁶⁰ In any event, the exact

⁵⁶ For more on my conception of the principle of legality, see generally Bowers, *Pointless Indignity*, *supra* note 40; BOWERS, *ROUGH JUSTICE*, *supra* note 32; *infra* Section V.C. For more on my conception of state coercion, see generally Josh Bowers, *Plea Bargaining’s Baselines*, 57 WM. & MARY L. REV. 1083 (2016) [hereinafter Bowers, *Baselines*] (discussing “the Court’s unwillingness to take seriously the issue of coercion as it applies to plea bargaining”).

⁵⁷ See Louis Brandeis & Samuel Warren, *The Right to Privacy*, 4 HARV. L. REV. 193, 193-205 (1890); see also *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (describing “the right to be let alone . . . as against the Government” to be “the right most valued by civilized men”) *overruled in part by Katz v. United States*, 389 U.S. 347 (1967); *United States v. White*, 401 U.S. 745, 763-64 (1971) (Douglas, J., dissenting) (“Privacy is the basis of individuality. To be alone and be let alone . . . Personality develops from within . . . Invasions of privacy demean the individual . . . The practice is incompatible with a free society.”) (quoting Attorney General William R. Clark); cf. Christman, *Autonomy*, *supra* note 54 (“Examination of the concept of autonomy also figures centrally in debates over . . . the right to privacy.”).

⁵⁸ See RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 330 (2011) (“A political community has no moral power to create and enforce obligations against its members unless it treats them with equal concern and respect.”).

⁵⁹ I should make plain, however, that I do not believe that autonomy is synonymous with other liberal principles, including even freedom. Cf. Christman, *Autonomy*, *supra* note 54, at § 1.1 (“Some distinguish autonomy from freedom by insisting that freedom concerns particular acts while autonomy is a more global notion, referring to states of a person.”); see Scott Anderson, *Coercion*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Oct. 27, 2011), <https://plato.stanford.edu/entries/coercion/> [<https://perma.cc/ZG5U-YGA5>] (referring to autonomy as a “special type of freedom,” which “is used to refer to an inner state of orderly self-directedness”); Sophia Moreau, *Equality Rights and Stereotypes*, in *PHILOSOPHICAL FOUNDATIONS OF CONSTITUTIONAL LAW* 283, 294 (David Dyzenhaus & Malcolm Thorburn eds. 2016) (distinguishing between “‘negative freedom,’ or the ability to live without interference from external pressures” and “‘positive freedom’ or ‘autonomy,’ or a person’s ability to shape her own life in accordance with her own beliefs and values”).

⁶⁰ Indeed, I recently authored an article examining the manner by which the Court’s positive conception of legality underserves the moral philosophic concept of dignity. See generally Bowers, *Pointless Indignity*, *supra* note 40. And Paul Gowder has even argued persuasively that the preconditions of the rule of law—regularity, publicity, and generality—depend upon the state treating individuals equally. See Paul Gowder, *The Rule of Law and Equality*, 32 LAW & PHIL. 565, 567 (2013) (“When states achieve vertical equality, their legal institutions guard against *hubris*, officials’ use of their powers to claim certain kinds of superior status. They also guard against *terror*, the use of the state’s power to cow individuals into submissiveness.”); cf. Hellman, *supra* note 37, at 933 (describing how irrational laws implicate one conception of discrimination).

liberal principle is less important than my less controversial methodological claim: whatever the relevant concept (and however we may describe it), the criminal justice system has relied generally upon a “formalist world view” to express and advance it.⁶¹ A state actor is said to behave arbitrarily only when he has failed to follow established, precisely drawn rules.⁶²

In doctrinal terms, a hallmark of this formalistic conception of arbitrary state action is the rejection of common law criminality.⁶³ Crimes cannot be officer-made—or even judge-made—and they certainly cannot be crafted after the fact, no matter how reprehensible the conduct in question and no matter how well meaning the state effort. Crimes are to be legislated *ex ante* or not at all.⁶⁴ But, of course, it is not enough simply to demand that the legislature legislate. If it were, a clever representative could draft a comprehensive two sentence penal code: “*No one may behave in a morally wrongful or socially costly manner. Anyone who does so shall be punished as justice or public safety or order demands.*”⁶⁵ The example may seem fanciful, but it is only slightly more opaque and open-ended than the catchall vagrancy statutes that our criminal justice system historically used to maintain order.⁶⁶ But during the latter half of the last century, the Supreme Court systematically began to invalidate as unconstitutionally vague these relatively formless vagrancy offenses.⁶⁷ The Court determined that vague statutes offended the legality principle in the same manner as common law crimes: they neither provided effective notice to the public of the conduct criminally proscribed nor imposed adequate limits upon law enforcement.⁶⁸ By contrast, a precise

61 Seidman, *supra* note 48, at 103 (“[A]lthough realism’s lessons for criminal law seem obvious, formalism continues to dominate criminal jurisprudence.”).

62 One of the very few exceptions is Fourth Amendment doctrine pertaining to *extraordinary* uses of force—or what constitutional law calls “excessive force.” See *infra* notes 260–63, 292, 339–46 and accompanying text (discussing excessive force doctrine as applied in a variety of controversial cases).

63 Jeffries, *supra* note 11, at 190–91 (discussing common law crimes and concluding that “the legality ideal is an explicit and self-conscious rejection of the historic methodology of the common law”).

64 See *id.* (“[T]he categorical insistence on advance legislative crime definition is clearly a modern phenomenon.”); see also BONNIE ET AL., *supra* note 25, at 80–81; H.L.A. Hart, *Philosophy of Law, Problems of*, in 6 THE ENCYCLOPEDIA OF PHILOSOPHY 264, 273–74 (Paul Edwards ed., 1967) (“The requirements that the law . . . should not be retrospective in operation . . . [is one of] the principles of legality.”).

65 This is a version of another comprehensive criminal code, offered by Herbert Packer: “[W]hoever does anything bad shall be punished as justice may require.” PACKER, *supra* note 6, at 92.

66 See, e.g., Jacksonville Ordinance § 26-57 (1965) (invalidated by *Papachristou v. City of Jacksonville*, 405 U.S. 156, 156–57 (1972)) (criminalizing “[r]ogues and vagabonds, . . . lewd, wonton, and lascivious persons, . . . habitual loafers” and many other categories of people and conduct).

67 See generally RISA GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S* (2016).

68 See *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (“[A] penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”); *Papachristou*, 405 U.S. at 162 (“Living under a rule of law entails various suppositions, one of which

penal code was thought to announce its commands comprehensibly and comprehensively to both audiences—to the lay individuals who are the designated subjects of sufficiently precise criminal codes and to the law enforcers who are authorized to enforce these rules (and only these rules).

B. *Conduct Rules as Cop Rules*

At this point, it may be necessary to define our terms. We can distinguish between legal rules that are designed to guide behavior, which Meir Dan-Cohen famously dubbed “conduct rules,” and “decision rules” that direct legal officials to interpret and apply substantive criminal laws in particular ways.⁶⁹ From this starting point, it may be tempting to define the constitutional limits on law enforcement as “decision rules” only. Indeed, this would seem to be the conventional view. But it is too simplistic, if not inaccurate. Unlike the professional adjudicator, the professional law enforcer is not tasked principally with the obligation to interpret and thereafter apply law—to reach legal determinations as a means of resolving cases. To the contrary, his primary function is to take action—to *engage in conduct*.⁷⁰ To authorize state action, the officer depends in the first instance on the existence of the substantive criminal law and sufficient proof of its violation by another. The substantive criminal law thereby shapes the officer’s conduct, just as it shapes the conduct of the layperson. Conduct is controlled on each side of the coin. For the individual, the law defines what she cannot do. For the law enforcer, it defines what he can do.⁷¹

But the substantive criminal law describes only a single set of conduct rules (albeit a single set that reaches two audiences). The scope of an officer’s authority to engage in conduct is shaped also by rules of criminal procedure. And these rules—particularly, Fourth Amendment rules—may be characterized likewise as a set of *conduct rules for cops*. Indeed, several

is that all persons are entitled to be informed as to what the State commands or forbids.”) (internal quotation marks and alterations omitted); see also *BONNIE ET AL.*, *supra* note 2, at 45 (“[T]he vagueness doctrine independently protects principle of legality or rule of law values in situations where legislation does not adequately constrain the authority of police, prosecutors, and courts to engage in arbitrary, ad hoc decisionmaking.”).

⁶⁹ See Dan-Cohen, *supra* note 25, at 630 (“[T]he law necessarily contains two sets of messages. One set is directed at the general public and provides the guidelines for conduct. These guidelines are . . . ‘conduct rules.’ The other set of messages is directed at the officials and provides guidelines for their decisions. These are ‘decision rules.’”).

⁷⁰ I am not the first person to draw this distinction between the manner by which rules convey different messages to adjudicators and law enforcers. See, e.g., Thomas P. Crocker, *The Political Fourth Amendment*, 88 WASH. U. L. REV. 303, 319 n.90 (2010) (“Speaking for two bodies—the police and lower courts—means that Court opinions must provide both *decision rules to guide courts* and *conduct rules to guide police*.” (emphasis added)); see also *infra* note 72 (citing sources).

⁷¹ In this vein, it is no accident that the term *misconduct* (emphasis on the “conduct”) describes circumstances where a police officer oversteps.

commentators have done so already.⁷² There is no consensus over which exact doctrines of constitutional criminal procedure qualify as a cop's conduct rules, but at a minimum they would seem to include the Fourth Amendment's ostensible warrant and probable-cause requirements.⁷³ These baseline procedural requirements represent efforts to define constitutional reasonableness formalistically—efforts to rely upon hard proxies over imprecise and holistic considerations of so-called “general reasonableness.”⁷⁴ This is, of course, consistent with the dominant conception of the principle of legality and its preference for relatively firm limits on official coercion.⁷⁵

⁷² See Mary D. Fan, *Police Gamesmanship Dilemma in Criminal Procedure*, 44 U.C. DAVIS L. REV. 1407, 1439 (2011) (discussing “conduct rule gaming” by police); Wayne A. Logan, *Police Mistakes of Law*, 61 EMORY L.J. 69, 92 (2011) (noting how police rely on decision rules to circumvent conduct rules); John E. Taylor, *Using Suppression Hearing Testimony to Prove Good Faith Under United States v. Leon*, 54 U. KAN. L. REV. 155, 171 (2005) (“Although Dan-Cohen developed [his] model in the context of discussing substantive criminal law and its conduct rules addressing the general public, the model can be easily extended to the context of criminal procedure.”); see also Crocker, *supra* note 70, at 318 (“In order to protect privacy, the Supreme Court must fashion conduct rules to regulate police behavior.”); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2471 (1996) (“The Warren Court established and embellished conduct rules governing police practices under three main constitutional rubrics: the Fourth Amendment’s prohibition of unreasonable searches and seizures, the Fifth Amendment’s privilege against compelled self-incrimination, and the Sixth Amendment’s guarantee of assistance of counsel in all criminal cases.”); cf. Malcolm Thorburn, *A Liberal Criminal Law Cannot be Reduced to These Two Types of Rules*, in CRIMINAL LAW CONVERSATIONS 22, 23 (Paul H. Robinson, Stephen Garvey, & Kimberly K. Ferzan eds., 2011) (“So is ‘arrest with a warrant’ a conduct rule or a decision rule? It seems that it is, instead, a conduct rule that issues from the exercise of a decision rule.”).

⁷³ See, e.g., Taylor, *supra* note 72, at 171 (describing the warrant and probable cause requirements as “conduct rules telling police officers how they should conduct criminal investigations.”); see also Steiker, *supra* note 72, at 2472.

⁷⁴ See Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 255 (1984) (describing the Supreme Court’s unwillingness to define “reasonableness” precisely); Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment “Reasonableness”*, 98 COLUM. L. REV. 1642, 1644 (1998) (“[T]ypically (and formalistically), . . . the Court considers the legality of a search to turn exclusively on whether there is a warrant supported by probable cause to believe that evidence of a criminal offense is present in a given location.”); Dan M. Kahan, David A. Hoffman, & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 887-88 (2009) (“Fourth Amendment doctrine is replete with rule-like presumptions of reasonableness for generically defined fact patterns.”); see also Virginia v. Moore, 553 U.S. 164, 175 (2008) (“In determining what is reasonable under the Fourth Amendment, we have given great weight to . . . the need for a bright-line constitutional standard”); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1471 (1985) (providing a comparison of “bright line” versus “no lines” approaches to interpreting the Fourth Amendment). See generally Bowers, *Pointless Indignity*, *supra* note 40; Silas J. Wasserstrom, *The Court’s Turn Toward a General Reasonableness Interpretation of the Fourth Amendment*, 27 AM. CRIM. L. REV. 119, 129 (1989) (noting the Supreme Court’s turn towards “general reasonableness.”).

⁷⁵ Unsurprisingly, left-liberal proponents of a formalistic legality principle have used almost identical language to describe both sets of conduct rules for cops. Without precisely defined crimes, the officer may exercise “dictatorial power over the streets;” without structured search-and-seizure rules, the officer may act “despotically and capriciously.” Compare Anthony G. Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police*

Thus, we may draw a straight line between the Court's prevailing substantive and procedural approaches. In each context, the prospective evil remains the same—"petty tyranny" or worse.⁷⁶ And precision is thought to prevent it.⁷⁷ Moreover, the two sets of conduct rules for cops are designed to operate compatibly. Consider, again, the officer who intends to arrest me. According to his substantive conduct rules, he may not make up a crime. According to his procedural conduct rules, he may not arrest on an inchoate hunch. His authority arises out of the interplay between his conduct rules.

C. Dynamic Conduct Rules

But, as we shall see, formalism's aspirations ring hollow in practice. It is not so easy to maintain precisely drawn conduct rules. Even the brightest rules may have their fuzzy edges—in application and even in formulation. In this vein, John Jeffries has described the vagueness doctrine as "evaluative."⁷⁸ And the Court has made plain that it will not demand "meticulous specificity" or "impractical" standards of statutory clarity.⁷⁹ Likewise, probable cause is "a practical, common sense [standard] . . . given all the circumstances," not a "hypertechnical" rule.⁸⁰ Still, the officer's contemporary conduct rules are designed to concentrate the analysis upon a single and relatively formal question—technical guilt accuracy. In this way, the modern criminal statute speaks to people in terms more exact than the common law offense, which sought to proscribe only "general moral blameworthiness."⁸¹ Likewise, the

Officers, and the Like, CRIM. L. BULL. 3, no.4, at 222-24 (1967), with Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 411 (1974) [hereinafter Amsterdam, *Perspectives*] ("[I]ndiscriminate searches and seizures are conducted at the discretion of executive officials, who may act despotically and capriciously in the exercise of the power to search and seizures.").

⁷⁶ Amsterdam, *Perspectives*, *supra* note 75, at 411.

⁷⁷ *Katz v. United States*, 389 U.S. 347, 356-58 (1967) (discussing dangers of "after-the-event justification" and emphasizing importance of compelling law enforcement to "observe precise limits established in advance").

⁷⁸ Jeffries, *supra* note 11 at 196; *see also* Low & Johnson, *supra* note 11, at 2052 (describing the indefiniteness of prevailing vagueness doctrine).

⁷⁹ *United States v. Petrillo*, 332 U.S. 1, 7-8 (1948); *see also* *Kolender v. Lawson*, 461 U.S. 352, 352 (1983) ("due process does not require 'impossible standards of clarity.'"); *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) ("[W]e can never expect mathematical certainty from our language. The words of the ordinance are marked by flexibility and reasonable breadth, rather than meticulous specificity." (internal quotation marks omitted)); *Winters v. New York*, 333 U.S. 507, 524 (1948) (Frankfurter, J., dissenting) (observing that unconstitutional indefiniteness "is itself an indefinite concept").

⁸⁰ *Illinois v. Gates*, 462 U.S. 213, 236-38 (1983); *see also infra* note 165 and accompanying text (discussing probable cause as a somewhat uncertain and epistemic question).

⁸¹ *See* Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 994 (1932) (observing that, historically, the measure of culpability was "general moral blameworthiness"); *see also* William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 910 (1978) (explaining that eighteenth-century juries were considered to be "good judges of the common law of the land" and were instructed "to do justice between the parties not

prevailing requirements of warrant and probable cause depend upon “quantitative” measures of legal guilt as compared to alternative “qualitative” considerations.⁸² This is all to say that formalism describes a spectrum, and it may be that no real-world conduct rule has ever landed squarely at either endpoint. Ironically, then, the best measure of formalism may be contextual—to evaluate the question relationally by contrasting one legal rule against alternative historical, conceptual, or positive analogues.⁸³

Moreover, the realist knows that conduct rules change with time. One conduct rule unintentionally might reshape another. Or a conduct rule inadvertently might deliver multiple messages to multiple audiences. And, significantly, the more precisely defined the rule, the more readily the wrong audience eventually might overhear it. Probable cause offers a nice illustration. Members of the public might not know precisely what the standard demands, but they understand that the Fourth Amendment is said to require it.⁸⁴ In turn, an individual might come—accurately or not—to read her own conduct rules as modified by probable cause. Thereafter, she might no longer construe a particular statutory offense as it was meant to be construed—as commanding simply “do not do X.” Instead, she might read it to declare: “do not give an officer probable cause to believe that you have done X.” The claim, here, is that conduct rules are products of more than ex ante design. They are products of what is read and understood and by whom. They are products of the bleed between overlapping conduct rules and even perceptible norms and practices.⁸⁵

by any quirks of the law . . . but by common sense as between man and man” (quoting Letter from James Sullivan to Elbridge Gerry (Dec. 25, 1779)).

⁸² On the distinction between “general reasonableness” and more formal Fourth Amendment tests, see Colb, *supra* note 74, at 1644 (describing “probable cause” as a quantitative standard of confidence, as compared to a qualitative approach to reasonableness); Bradley, *supra* note 74, at 1471 (describing two distinct models of Fourth Amendment adjudication); see generally Bowers, *Pointless Indignity*, *supra* note 40; Wasserstrom, *supra* note 74; *infra* notes 308–11 and accompanying text (endorsing a two-ply test, incorporating both models of Fourth Amendment adjudication).

⁸³ In this vein, Bill Stuntz has described probable cause as a test of “formal legality,” notwithstanding its fuzzier margins. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 258 (2011). Likewise, even though vagueness doctrine entails a somewhat evaluative standard, Mark Kelman has observed that it still resonates in the more formalistic “rule-respecting liberal tradition.” Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, in *CRIMINAL LAW CONVERSATIONS* 207, 212 (Paul H. Robinson, Stephen Garvey, & Kimberly K. Ferzan eds., 2011).

⁸⁴ Indeed, the *idea* of probable cause has even become something of a cultural artifact—inspiring songs, fiction, and movies. See, e.g., BRAND NUBIAN, *Probable Cause*, on FOUNDATION (Arista Records 1998) (“You don’t have to break no laws/They just say probable cause.”); RIDLEY PEARSON, *PROBABLE CAUSE* (1990); *PROBABLE CAUSE* (Pacific Victory Pictures 1994).

⁸⁵ By way of further example, motorists commonly read vehicle-and-traffic conduct rules in light of prevailing enforcement norms. For instance, a speed limit may be taken to permit the driver to go up to nine miles faster than the posted figure. See Frederick Schauer, *Legal Realism Untamed*, 91 *TEX. L. REV.* 749, 767 (2013) (describing “the real rule [as] a speed limit of 74 and not 65”); cf. Taylor, *supra* note 72, at 172 (explaining that conduct rules are meaningful only to the extent they are enforced).

The legality principle (as currently construed) may command relatively precise rules, but our understanding of those rules and their reach responds likewise to forces on the ground and to other legal and extralegal impulses—to what police officers know and do with their (and our) conduct rules; to what we know and do about what police officers know and do; to what police officers know and do about what we know and do; and to what courts know and do to accommodate (or not) the multitude of dynamic forces and conditions. Simply put, conduct rules are what we make of them. And, as I examine in the next three Parts, what we make of them is far from clear-cut or easy to anticipate.

II. LEGALITY & SOVEREIGNTY

The Supreme Court has held repeatedly that a police officer's subjective motivation is irrelevant to Fourth Amendment analysis.⁸⁶ In a system committed to formal legality, inquiries into good or bad reasons are thought to be just too woolly. Consider, again, the officer's arrest authority. Technical guilt accuracy is the categorical measure of constitutional reasonableness. Concretely, the police officer needs only probable cause to believe the arrestee has committed an offense—any offense, including even a noncriminal violation.⁸⁷ This last point is subtle but profoundly important. We are a nation of petty rule breakers—low-level speeders, creators of trivial disorder.⁸⁸ Indeed, the overwhelming majority of motorists break vehicle and traffic laws on an almost daily basis.⁸⁹ To do so is customary—a matter of

⁸⁶ See *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006).

⁸⁷ See *Virginia v. Moore*, 553 U.S. 164, 175 (2008) (holding that the probable cause “rule extends even to minor misdemeanors”); *Atwater v. Lago Vista*, 532 U.S. 318, 354 (2001) (applying the probable cause rule “to all arrests”); see also Wayne A. Logan, *After the Cheering Stopped: Decriminalization and Legalism's Limits*, 24 CORNELL J. L. & PUB. POL'Y 319, 339 (2014) (collecting cases); Bowers, *Pointless Indignity*, *supra* note 1, at 998–1004, 1019–21; see, e.g., *Arkansas v. Sullivan*, 532 U.S. 769, 771–72 (2001) (per curiam) (affirming constitutionality of full-custodial arrest for noncriminal traffic violation); *Thomas v. City of Peoria*, 580 F.3d 633, 637–38 (7th Cir. 2009) (“[A]rrests for violations of purely civil laws are common enough.”); *United States v. Scopo*, 19 F.3d 777, 781 (2d Cir. 1994) (affirming arrest for failure to signal lane change); *Miller v. City of Portland*, No. 3:11-cv-01509-JE, 2014 WL 320555, at *8 (D. Or. Jan. 29, 2014) (affirming full-custodial arrest for noncriminal jaywalking and observing that it is “immaterial to the scope of the Fourth Amendment” whether the state “has denominated this particular offense a ‘violation’ rather than a ‘crime’”).

⁸⁸ Ian Weinstein, *The Adjudication of Minor Offenses in New York City*, 31 FORDHAM URB. L.J. 1157, 1163–64 (2004) (“American criminal justice is founded on overcriminalization and discretion Minor crimes absorb the bulk of our ordinary, local enforcement efforts and there is an endless supply of minor crime which may be pursued Many, if not most Americans repeatedly violate our substantive laws everyday, exposing themselves to police intrusion”). See generally Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 VAND. L. REV. 1497 (2007) (examining the manner by which void-for-vagueness doctrine has failed adequately to limit discretionary enforcement of vehicle and traffic laws).

⁸⁹ See e.g., Fred Mannering, *An Empirical Analysis of Driver Perceptions of The Relationship Between Speed Limits and Safety*, Transportation Research Part F, <https://engineering.purdue.edu/>

course, almost. But, once a pedestrian or motorist has violated some frequently flouted traffic or public-order law, her unexceptional conduct exposes her to the exceptional intrusion of a full-custodial arrest.⁹⁰

Of course, she may predict accurately that no officer would likely treat her trivial offense so harshly. But her guess is only a statistical expectation of “sovereign grace.”⁹¹ Her plans for unmolested passage are empirical and sociological, not legal. Legal entitlement belongs to the officer. He may rely upon byzantine vehicle and traffic law as a license to intrude.

Observe, then, the manner by which precision has empowered. With well-defined substantive conduct rules, the officer can easily identify a violation. The carefully drawn statute thereby grants the officer tremendous discretion to determine, practically, the offender and, likewise, the implications of the offense—to pick and choose which motorist should receive a warning, a ticket, or a trip to central booking.⁹² It is a choice that tends to turn on administrative or equitable considerations, not legal guilt.⁹³ The Fourth Amendment disregards the questions that most matter: against whom will police enforce a public-order offense, and for what reason?

~film/CE361_files/Mannering-TRF-o8.pdf [https://perma.cc/GPN3-KHUC] (“[O]bserved data show that only about 5% of drivers operate at or below speed limits on interstate highway segments posted at 55 mph, and that as few as 23% of drivers operate at or below the posted speed limit on non-freeway facilities.”); Forde-Mazrui, *supra* note 88, at 1520 (citing data to show that traffic laws are set by safety engineers with the assumption that some or even most motorists will speed).

⁹⁰ Weinstein, *supra* note 88, at 1164 (“[I]t is almost impossible to drive a car in America without giving the police a legally valid reason to stop and arrest you. Walking down the street, or sitting on a stoop, is little better . . . [in light of] proscriptions against disorderly conduct [and other public-order offenses].”).

⁹¹ Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 L. & SOC. INQUIRY 387, 413 (2008) (“[T]he rule of law is replete with . . . places where law runs up against sovereign prerogative. In those places, law runs out . . . [The] law authorizes the exercise of a power that it does not regulate.”).

⁹² Logan, *supra* note 87, at 331 (“[P]olice officers . . . wield near-total discretion to execute arrests for low-level social-disorder offenses.”); Forde-Mazrui, *supra* note 88, at 1503 n.38 (“[T]raffic laws confer virtually unlimited discretion on police to investigate whichever motorist they wish.”).

⁹³ Weinstein, *supra* note 88, at 1163-64 (“Anywhere in America today, if a practical and experienced police officer decides to impose some constraint, . . . she can often do so with almost certain impunity Police resources, not minor offenders, limit the number of arrests for minor offenses.”); *see also* FEELEY, *supra* note 32, at 284 (observing that decisionmaking in petty cases “are based on a host of considerations other than the strength of the evidence and applicable law,” including “assessments of the ‘real’ trouble”); *id.* at 159-61 (“I think the legal factors probably come into play in about one in every twenty-five cases [M]ost of the appeals are sort of common-sense assessments of the situation.”) (quoting prosecutor); Roscoe Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case*, 35 N.Y.U. L. REV. 925, 929 (1960) (noting equitable considerations predominate “for petty causes where expense of protracted investigation is out of proportion to the advantage of wholly assured [legal] result”); Bowers, *Legal Guilt, Normative Innocence*, *supra* note 1, at 1662 n.21 (explaining that in petty cases “equitable considerations tend to predominate” over questions of legal guilt). *See generally id.* (describing three strands of analysis and three corresponding types of abuse: the legal, the administrative, and the equitable).

A. *Reasons & Reasonableness*

The obvious fear is that the officer's reasons and choices may have more to do with implicit (or even explicit) race bias than with public safety or order.⁹⁴ On this score, we may hope that the Equal Protection Clause might take up some of the slack. But, absent a frank admission of a discriminatory purpose, such claims are practical nonstarters.⁹⁵ As a police union president recently conceded: "If an officer has probable cause to make a stop, there's absolutely no way you can prove racial profiling unless you get into that officer's head."⁹⁶

In any event, an officer may behave arbitrarily without implicating race or ethnicity.⁹⁷ Invidious discrimination is just one of the most reprehensible versions of arbitrary state action, but not the only version.⁹⁸ Consider the

⁹⁴ *Supra* notes 22, 37-40 and *infra* notes 112-15, 122, 204-08, 421-30 and accompanying text.

⁹⁵ *See, e.g.,* *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (rejecting an equal protection claim— notwithstanding a rigorous statistical showing of discriminatory charging and sentencing effects— where no discriminatory purpose could be demonstrated in the immediate case); *see also* *Chavez v. Illinois State Police*, 251 F.3d. 612, 645, 648 (7th Cir. 2001) (finding no discriminatory purpose despite statistical showing of racial disparities in traffic stops); PBS, *Bryan Stevenson and Michelle Alexander*, BILL MOYERS JOURNAL (Apr. 2, 2010), <http://www.pbs.org/moyers/journal/04022010/watch.html> [<https://perma.cc/982G-MWRG>] ("McClesky [sic] versus Kemp has immunized the criminal justice system from judicial scrutiny for racial bias. It has made it virtually impossible to challenge . . . for racial bias in the absence of proof of intentional discrimination . . . [which] is almost impossible to come by in the absence of some kind of admission."); *Sarat & Clarke, supra* note 91, at 395 ("Even a cursory glance at the [equal protection] case law reveals the extent to which judges . . . have abandoned oversight.").

⁹⁶ Matt Ferner, *New California Law Aims to Curb Racial Profiling by Police*, HUFFINGTON POST (Oct. 5, 2015), http://www.huffingtonpost.com/entry/california-law-police-racial-profiling_us_5612fd05e4b0368a1a60c3ff [<https://perma.cc/EK56-PSQN>]; *see also* Bowers, *Pointless Indignity, supra* note 40, at 1037 ("[P]lenty of room for mischief (unconscious or otherwise) remains between the limits of the Fourth Amendment and equal protection—between the requirement that an arresting officer possess probable cause and the requirement that an arrest have a nondiscriminatory purpose."). Even without race bias, order-maintenance enforcement may remain localized to distressed majority-minority neighborhoods. Disorder correlates with urban poverty and urban poverty correlates with race. Thus, normatively dubious arrests pool in historically disadvantaged communities. *See* Bowers, *Legal Guilt, Normative Innocence, supra* note 1, at 1699 ("[T]he most persuasive explanation for why authorities target poor and minority communities for order maintenance policing is that disorder is disproportionately found there, and resources being finite, enforcement dollars are best spent on geographically targeted policing . . . even if public order crime is, to some degree, everywhere."); William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1820-22 (1998) ("Looking in poor neighborhoods tends to be both successful and cheap Street stops can go forward with little or no advance investigation [T]he stops themselves consume little time, so the police have no strong incentive to ration them carefully.").

⁹⁷ *See infra* notes 295, 302-05, 369-73, 378-79, 382-85 and accompanying text (discussing a broader conception of arbitrariness, and examining Justice Sotomayor's dissent in *Utah v. Strieff*, 136 S. Ct. 2056 (2016)).

⁹⁸ *See* Jeffries, *supra* note 11, at 213 (observing that the "worst case" scenario for the rule of law is "hidden bias and prejudice"); *see also* Bowers, *Pointless Indignity, supra* note 40, at 1003 ("[E]qual protection is designed to regulate out of existence certain *always*-bad moral reasons. When it comes

facts of *Atwater v. Lago Vista*. An officer arrested a white “soccer mom” for the non-jailable offense of failing to buckle seatbelts.⁹⁹ According to one commentator, the officer was a “jerk, acting out of seemingly personal pique.”¹⁰⁰ And, remarkably, the Court agreed. It castigated the officer for subjecting the motorist to the “gratuitous humiliations” of a full custodial arrest, and it spoke reverently of her trampled-upon “claim to live free of pointless indignity and confinement.”¹⁰¹ In short, even the Court considered the arrest arbitrary by any folk measure.

Nevertheless, the majority held the intrusion constitutionally reasonable because—to put it in our terms—*the officer had satisfied his conduct rules*. It did not matter that the officer had “behaved badly,” as the majority conceded.¹⁰² The motorist had violated vehicle and traffic law. That was enough. Thereafter, the officer was entitled to indulge whatever “nonlegal impetus” drove him to respond so inequitably and nonsensically.¹⁰³ With probable cause, he was “authorized . . . to make a custodial arrest.”¹⁰⁴ More to the point, he was “authorized [but] *not required*” to make the arrest.¹⁰⁵ His conduct rules were “power-directing.”¹⁰⁶ They served primarily as “means of insulating” the arrest from constitutional challenge.¹⁰⁷ They described a safe harbor within which he could plan and carry out exercises of official coercion.¹⁰⁸ Within that safe harbor, he needed no genuine or even manufactured good reason.¹⁰⁹

to *sometimes*-bad reasons (like the decision to arrest for morally neutral petty crime), . . . [t]he Court has opted to regulate not at all.”)

⁹⁹ *Atwater v. Lago Vista*, 532 U.S. 318, 324 (2001); see also Kathryn R. Urbonya, *Four on the Fourth: High Court Gets Several Chances to Elaborate on Standards for Searches and Seizures*, 86 ABA J. 4, 32 (2000) (describing the arrestee as a “soccer mom”). See generally Bowers, *supra* note 1 (examining *Atwater* in great detail).

¹⁰⁰ Wayne A. Logan, *Florence v. Board of Chosen Freeholders: Police Power Takes a More Intrusive Turn*, 46 AKRON L. REV. 413, 429 (2013) [hereinafter Logan, *Florence v. Board*].

¹⁰¹ *Atwater*, 532 U.S. at 346-47.

¹⁰² See *id.* (“[The] police officer . . . was (at best) exercising extremely poor judgment.”).

¹⁰³ See Schauer, *infra* note 139, at 429 (defining a “nonlegal impetus” as, *inter alia*, an “idiosyncratic reaction to . . . the very particular facts of the case”).

¹⁰⁴ *Atwater*, 532 U.S. at 354.

¹⁰⁵ See *id.* (emphasis added).

¹⁰⁶ See Eric J. Miller, *Are There Two Types of Decision Rules?*, in CRIMINAL LAW CONVERSATIONS 20, 21 (Paul H. Robinson, Stephen Garvey, & Kimberly K. Ferzan eds., 2009) (defining “power-directing” conduct rules).

¹⁰⁷ *California v. Acevedo*, 500 U.S. 565, 581 (1991) (Scalia, J., concurring).

¹⁰⁸ See *infra* Section II.B (describing the manner by which rules, counterintuitively, produce discretion and opportunities for sovereign choice); cf. *infra* note 146 and accompanying text (discussing opportunities for legal professionals to game rules).

¹⁰⁹ See *Atwater*, 532 U.S. at 353-54 (“[H]is subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause.” (quoting *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004))); Weinstein, *supra* note 88, at 1163-64 (“This state of affairs runs counter to the notion that official power is constrained . . . that law enforcement must have a reason under the Fourth Amendment.” (emphasis added)).

The formalist might respond that probable cause, as a metric of legal guilt, constitutes its own persuasive reason or justification. But technical guilt accuracy is ultimately insufficient for discretionary order–maintenance arrests (though it might be the right measure for serious offenses for which categorical arrest is anticipated).¹¹⁰ In petty public-order cases, probable cause merely translates to a troubling form of “constitutional carte blanche”¹¹¹—a plenary authority to harass and humiliate, to constrain and coerce, to behave in a manner antithetical to the purpose of the legality principle “as an important prophylaxis against the arbitrary and abusive exercise of discretion in the enforcement of the penal law.”¹¹² John Jeffries has written that order–maintenance enforcement “invite[s] manipulation.”¹¹³ As he saw it, the problem was the failure of courts to adjudicate the actions of legal officials in a class of cases that almost never proceed to trial.¹¹⁴ But, even as to the public-order cases that do get litigated, judges never resolve the normative matters that matter most, instead asking and answering only relatively off-topic questions of whether officers violated formal conduct rules, like the requirement of probable cause.

B. Precision & Pretext

An officer may also pick between offenses. He may substitute one demonstrable offense for a roughly suspected other.¹¹⁵ In the process, the principle of legality loses grip. At the extreme, an expansive penal code

¹¹⁰ See Bowers, *Legal Guilt, Normative Innocence*, *supra* note 1, at 1658 (“Most people anticipate something approximating categorical enforcement of very serious felonies but anticipate nonenforcement of some nontrivial number of petty crime incidents.”).

¹¹¹ *Atwater*, 532 U.S. at 366 (O’Connor, J., dissenting). The *Atwater* majority insisted that low-level, order–maintenance arrests are vanishingly rare. See *Atwater*, 532 U.S. at 321, 353 (majority opinion) (disclaiming an “epidemic of unnecessary minor-offense arrests,” and noting the “dearth of [*Atwater*-like] horrors demanding redress”). But it is not obvious that they are so uncommon—at least in certain communities. See *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) (noting that “people of color are disproportionate[ly] victims” of “suspicionless stop[s]”); Logan, *supra* note 87, at 336 nn.128–29 (cataloguing cases and studies of full-custodial arrests for traffic and other non-jailable public-order offenses); Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 *FORDHAM URB. L.J.* 1043, 1064 (2013) (describing the practice of “making a full-custodial arrest for [non-criminal] marijuana possession”); see also Bowers, *Pointless Indignity*, *supra* note 40, at 993; see, e.g., *infra* notes 392–93 and accompanying text (discussing cognitive and institutional biases in favor of arrest, and describing the arrest of Sandra Bland, following traffic stop for failure to signal a lane change).

¹¹² BONNIE ET AL., *supra* note 25, at 81; see also Rachel Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 *HARV. L. REV.* 1332, 1333–35 (2008) (“[O]ur legal culture has come to view unreviewable discretion . . . as the very definition of lawlessness.”); see *supra* notes 4–5, 26, 41–42, *infra* notes 127, 250, 295, 385, 421–32, and accompanying text.

¹¹³ Jeffries, *supra* note 11, at 197.

¹¹⁴ *Id.*

¹¹⁵ *Supra* Section II.A.

resembles a “menu of options” more than a set of effective constraints.¹¹⁶ Law enforcement becomes a matter of “picking the man and then searching the law books . . . to pin some offense on him.”¹¹⁷ This, then, is what Richard McAdams meant when he suggested that pretextual arrests and charges may “fail on rule of law grounds.”¹¹⁸ Constructively, the state’s evidentiary burden diminishes as to the genuine object crime.¹¹⁹

Consider, for instance, *United States v. Whren*.¹²⁰ Vice squad officers observed a vehicle occupied by several young African-American men. The officers harbored an inarticulable suspicion that the occupants were narcotics traffickers (based on what, we may wonder?).¹²¹ But, of course, their educated guess could not authorize a vehicle stop. So they waited. In short order, the officers observed the motorist commit two low level traffic infractions. They stopped the vehicle and recovered cocaine. The reason for the stop was obviously pretext. Vice squad officers do not care about the enforcement of traffic laws. And, even if we disregard the racial subtext,¹²² we still may see the case for what it was—an intrusion motivated by rough hunch. The officers

116 See Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 932-34 (2006) (arguing that criminal laws create “a menu of options” for police and prosecutors to decide whether to arrest and charge); see also STUNTZ, *supra* note 83, at 509, 521 (“Broad criminal codes ensure inconsistency. Broad codes cannot be enforced as written; thus, the definition of the law-on-the-street necessarily differs, and may differ a lot, from the law-on-the-books.”); Stuntz, *supra* note 96, at 3-4, 36 (“Law enforcers . . . define the laws they enforce . . . Too much law amounts to no law at all.”); Richard H. McAdams, *The Political Economy of Criminal Law and Procedures: The Pessimists’ View*, in CRIMINAL LAW CONVERSATIONS, 517, 521 (Paul H. Robinson, Stephen Garvey, & Kimberly K. Ferzan eds., 2011).

117 See Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUD. SOC’Y 18, 19 (1940); see also RONALD JAY ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 609, 621 (2d ed. 2005) (“[P]olice may employ commonly violated but relatively clear laws to pick and choose among the violators they will stop.”).

118 See Richard H. McAdams, *The Entrapment Defense Defended*, in CRIMINAL LAW CONVERSATIONS 509, 519-20 (Paul H. Robinson, Stephen Garvey, & Kimberly K. Ferzan eds., 2011) (describing use of pretext as a state of affairs that “stands on its head the distinctive criminal law idea of the principle of legality”).

119 See *id.*; see also *Papachristou v. City of Jacksonville*, 405 U.S. 156, 169 (1972) (describing how a prosecution “may be merely the cloak for a conviction that could not be obtained on the real but undisclosed grounds for the arrest”); *id.* at 170 (remarking that it “would be in the highest degree unfortunate” if law enforcement “should entertain, connive at or coquette with the idea” to punish an individual by pretext “in a case where there is not enough evidence” for the object crime) (quoting Gordon Hewart); cf. STUNTZ, *supra* note 83, at 301 (explaining the way in which legal officials may rely upon pretext to escape accountability).

120 53 F.3d 371 (D.C. Cir. 1995), *aff’d*, 517 U.S. 806 (1996).

121 Cf. *Florida v. Bostick*, 501 U.S. 429, 441-42 n.1 (1991) (Marshall, J., dissenting) (observing that when officers act in the absence of individualized suspicion their motivation is “less likely to be inarticulable than unspeakable” (emphasis omitted)).

122 See Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2005-09 (1998) (examining the overlap between pretext and discriminatory traffic stops).

were confident that the young men were bad guys, up to no good.¹²³ And they were empowered to act on that estimation of poor character—that perception of what I have called “normative guilt.”¹²⁴ It was irrelevant that the officers were unable to satisfy their drug–law conduct rules; the officers satisfied their traffic–law conduct rules, and those rules were ready substitutes.¹²⁵

Thus, we discover the limits of the dominant conception of the legality principle. It is too cramped to account for pretext or its implications. The officers were free to behave in a manner that would have been arbitrary (according to even the Court’s formal legal definition) *but for* the happenstance of other available legal tools. And, as to vice squad officers, the array of vehicle and traffic law is just that—happenstance, a happy expedient that gave the officers “the same kind of authority . . . [as] old-style vagrancy and loitering laws.”¹²⁶

III. EXCEPTIONS TO CONDUCT RULES. EXCEPTIONS AS CONDUCT RULES?

But our rule of law is not entirely lawless. The officer still must satisfy his conduct rules, right? Not quite. As it happens, even if he is not legally authorized, he may be equitably excused. This is nothing new. Criminal procedure students learn early on that baseline Fourth Amendment conduct rules are replete with exceptions. Warrants and probable cause are hardly “per

¹²³ See Christopher Slobogin, *Let’s Not Bury Terry: A Call for Rejuvenation of the Proportionality Principle*, 72 ST. JOHN’S L. REV. 1053, 1067–68 (1998) (explaining that many traffic and public-order offenses may be “designed to give police probable cause for arresting those suspected of being up to no good”).

¹²⁴ See Bowers, *Legal Guilt, Normative Innocence*, *supra* note 1, at 1678–79 (describing the concept of normative guilt and contrasting it with legal guilt).

¹²⁵ Significantly, there was a time when the Court was much more skeptical about the use of pretext. See GOLUBOFF, *supra* note 67, at 189 (discussing early constitutional efforts to regulate vagrancy statutes and observing that the “[Supreme] Court as a whole had sporadically hinted that [these] uses of vagrancy laws in the service of more serious crime control goals might be problematic.” (citing *Preston v. United States*, 376 U.S. 364 (1964))); see also *Roaden v. Kentucky*, 413 U.S. 496, 501 (1973) (“A seizure reasonable . . . in one setting may be unreasonable in a different setting.”); *supra* notes 225–42 and accompanying text.

¹²⁶ William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 853–54 (2001); see also Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 618 (1997) (“[B]road and overinclusive rules enhance police discretion, and . . . a plethora of narrow rules may not meaningfully constrain it.”). As Wayne LaFave explained a half-century ago, one of the principal problems with vague statutes is that officers may manipulate them “to justify detention and interrogation of persons suspected of more serious crimes.” WAYNE R. LAFAVE, *ARREST; THE DECISION TO TAKE A SUSPECT INTO CUSTODY: THE REPORT OF THE AMERICAN BAR FOUNDATION’S SURVEY OF THE ADMINISTRATION OF CRIMINAL JUSTICE IN THE UNITED STATES* 87–88 (1965). And this is how officers now use minor traffic and public-order offenses. Mazrui, *supra* note 88, at 1502 n.32 (“[W]hen courts invalidate ‘vague’ laws, ironically they often invite greater degrees of police discretion.”); *supra* notes 42, 66–68, 89–94, *infra* notes 233–36, and accompanying text.

se” requirements, notwithstanding the Court’s assurances.¹²⁷ To the contrary, the Court has adopted a number of bright line exceptions, justified typically by pressing circumstance.¹²⁸ Thus, a police officer needs no warrant to search a vehicle, which is considered inherently mobile.¹²⁹ Following the same logic, the officer may conduct a warrantless arrest outside the home and, thereafter, may search the person.¹³⁰ And, because traffic stops are thought to be especially dangerous, an officer is given “unquestioned command of the situation” to minimize the risk of harm.¹³¹ This means that he may remove drivers and passengers and may even secure and frisk them on the roadside without individualized suspicion, much less a warrant or probable cause.¹³²

In carving out these bright line exceptions, the Court has tempered the conventional conduct rules with a methodology of understanding—specifically, an understanding of the officer and his predicament. But even though the *bright line* exception is a product of understanding, it naturally constitutes a rigid and recognizable pronouncement. In this way, it remains entirely consistent with legality’s conventional formal approach with its preference for precisely drawn conduct rules. The more obvious challenge to the dominant conception of the legality principle is the *piecemeal* exception—which is the principal subject of the rest of this Article.

A. *Understanding the Methodology*

The piecemeal exception entails an all-things-considered and ex post form of evaluation. The exception is designed to meet persuasive moral and prudential demands in domains where, under the particular circumstances, “law runs out.”¹³³ The methodology has more in common with Max Weber’s preferred mode of sociological inquiry, called *verstehen*, whereby we

¹²⁷ See *Katz v. United States*, 389 U.S. 347, 357 (1967) (emphasizing that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment”).

¹²⁸ Indeed, immediately after the *Katz* Court declared warrantless searches “per se unreasonable,” it acknowledged “a few specifically established and well-delineated exceptions.” *Id.* at 357.

¹²⁹ *Carroll v. United States*, 267 U.S. 132, 155-62 (1925).

¹³⁰ See *United States v. Watson*, 423 U.S. 411, 424 (1976) (holding constitutional warrantless arrests outside the home); *United States v. Robinson*, 414 U.S. 218, 236-37 (1973) (holding constitutional warrantless searches incident to lawful arrests); see also *infra* note 391 (discussing *Robinson*).

¹³¹ *Arizona v. Johnson*, 555 U.S. 323, 324 (1999) (internal citations and quotation marks omitted).

¹³² See *Pennsylvania v. Mimms*, 434 U.S. 106, 109-10 (1977) (per curiam) (granting officers the categorical authority to remove drivers from vehicles “as a matter of course”); see also *Maryland v. Wilson*, 519 U.S. 408, 410 (1997) (extending the *Mimms* rule to passengers); *Mimms*, 434 U.S. at 113 (Marshall, J., dissenting) (“In the instant case, the officer did not have even the slightest hint, prior to ordering respondent out of the car, that respondent might have a gun The car was stopped for the most routine of police procedures, the issuance of a summons for an expired license plate.”).

¹³³ See *Sarat & Clarke*, *supra* note 91, at 413 (“[T]he rule of law is replete with gaps, fissures, and failures In those places, law runs out.”); see also *infra* notes 139, 182, and accompanying text.

understand “the nature of the situation” by “projecting ourselves” into it.¹³⁴ To a degree, juries may do this when they evaluate situational excuses, and judges may do this when they contemplate Fourth Amendment exceptions.¹³⁵ Judges evaluate the Fourth Amendment question of constitutional reasonableness from the perspective of the officer and ask whether his failure to follow the prevailing conduct rules was reasonably explicable and thereby excusable, in light of sometimes delicate, evolving, and even dangerous extenuating circumstances.¹³⁶ It is a matter of understanding an officer’s objectively good reasons for falling short in “circumstances of emergency, high pressure, and emotion.”¹³⁷

The analogue to this mode of legal reasoning is *particularism*, a moral philosophy that rejects generally applicable rules and instead prioritizes the exercise of human intuition and practical deliberation as applied to concrete cases.¹³⁸ The premise is that the “bivalence” of a rule may be competent to produce only a boxy and fictive representation of fine-grained reality.¹³⁹ Comparatively, the *ambivalence* of a particularistic approach allows the adjudicator to get to the bottom of a complicated story.¹⁴⁰ On this reading,

¹³⁴ See William T. Tucker, *Max Weber’s “Verstehen”*, 6 SOC. Q. 157, 158, 161-63 (1965) (explaining that sociologically meaningful understanding “comes about only as the individual orients himself with reference to the conduct of others”)

¹³⁵ See *infra* Section V.D (discussing situational excuses and other affirmative defenses).

¹³⁶ See *infra* Part V.

¹³⁷ Dan-Cohen, *supra* note 25, at 639.

¹³⁸ Solum, *supra* note 52, at 98; see also JOHN KEKES, *HOW SHOULD WE LIVE? A PRACTICAL APPROACH TO EVERYDAY MORALITY* 47 (2014) (expressing the strong particularist account that “moral judgment can get along perfectly well without any appeal to principles” (quoting Jonathan Dancy)); cf. DAVIS, *infra* note 140, at 20 (noting it is “through case-to-case consideration, where the human mind is often at its best,” not in formulation or application of generally applicable rules).

¹³⁹ Frederick Schauer, *Analogy in the Supreme Court: Lozman v. City of Riviera Beach, Florida*, 2013 SUP. CT. REV. 405, 405-06 (describing the “bivalence” of rules and their inability to demand “some of this and some of that”).

¹⁴⁰ Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83, 93, 96 (1993) (“[T]he ‘matter of the practical’ can be grasped only crudely by rules given in advance, and adequately only by a flexible judgment suited to the complexities of the case The point of the rule of law is to bring us as close as possible But no such rules can be precise or sensitive enough.”); Roscoe Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 802, 816 (1923) (“The times call insistently for results in actual cases, not merely for abstractly just general rules.”); Sarat & Clarke, *supra* note 91, at 406 (“[I]n certain circumstances, the rule of law is not enough.”); Solum, *supra* note 52, at 206 (“[T]here will always be cases in which the problem is not that the rule was not given its optimal formulation. Rather, the problem is that the infinite variety and complexity of particular fact situations outruns our capacity to formulate general rules.”); R. George Wright, *Dreams and Formulas: The Roles of Particularism and Principlism in the Law*, 37 HOFSTRA L. REV. 195, 214 (2008) (noting that formal law can become “insensitive, mechanical, morally blind, or ‘rule fetishist.’”); cf. KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 21 (1976) (“[A] needed . . . escape from rigid rules [is] a far cry from the proposition that where law ends tyranny begins.”).

This is, of course, the rules–standards debate—that rules may be clearer and easier to administer, but that standards respond better to context. See generally FREDERICK SCHAUER,

the piecemeal exception is defensible. It is animated by the admirable human impulse to understand meaningfully just how hard it often is to follow the rules.

B. Understanding the Exception

Meaningful understanding of this kind does not fit well within legality's typical playbook. Nevertheless, it need not offend the principle, even according to legality's prevailing formulation. According to Dan-Cohen, "no one is likely to complain about the frustration of an expectation" when a particularistic doctrine of excuse is "more lenient than the relevant conduct rules."¹⁴¹ In other words, the rule of law abides pleasant surprises because such surprises do not affect the individual's opportunities to plan conduct in the shadow of law.¹⁴² Dan-Cohen further suggested that a criminal justice system might even strive to keep the prospective beneficiary unaware of a potentially

PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 557 (1992). I have picked sides in the debate. See Bowers, *Pointless Indignity*, *supra* note 40, at 1024-25 (describing the virtues of standards); see also Bowers, *Baselines*, *supra* note 56, at 1114-15 (questioning the criminal justice system's widespread dependence upon bright-line rules); Josh Bowers, *The Normative Case for Normative Grand Juries*, 47 WAKE FOREST L. REV. 319, 355 (2012) [hereinafter Bowers, *Normative Grand Juries*] (expressing concern that "the Court has come to rely too heavily on bright-line rules"); Bowers, *Legal Guilt, Normative Innocence*, *supra* note 1, at 1672 ("Complete justice demands both the simple justice that arises from fair and virtuous treatment and the legal justice that arises from the application of legal rules."). And I have my allies. See, e.g., Alschuler, *supra* note 74, at 231 (describing the manner by which bright line Fourth Amendment rules, as applied, may produce a "disregard of values"); cf. Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214, 1222 (2010) ("[O]ne virtue of standards is that their lack of precision induces moral deliberation."); Jeremy Waldron, *Inhuman and Degrading Treatment: The Words Themselves*, 23 CAN. J. L. & JURIS. 269, 273-74 (2010) (observing that less-structured legal standards may improve the "quality of moral argument" by leading individuals "to reflect upon . . . a given practice"). But I am not insensitive to countervailing claims concerning rules' virtue and value. I am just skeptical of the great promise ascribed to formal rules by their proponents and, more to the point, by the dominant conception of the legality principle. See *infra* Sections V.B-C (endorsing a procedural conception of the legality principle, and proposing evaluative approaches to certain Fourth Amendment questions).

¹⁴¹ See Dan-Cohen, *supra* note 25, at 634, 671 (explaining that, with respect to leniency, "no one is likely to feel 'entrapped' by the law" in a manner that might offend the rule of law); Shiffrin, *supra* note 140, at 1240 (discussing the affirmative defense of self-defense, and concluding that "[t]he use of a standard in this circumstance operates less as a 'blind,' trapping those who might otherwise steer clear of danger . . . because the standard here operates as a defense in response to a conduct norm.").

¹⁴² See Dan-Cohen, *supra* note 25, at 673 ("[B]y definition, conduct rules are all one needs to know in order to obey the law."); see also Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, in CRIMINAL LAW CONVERSATIONS 3, 10-11 (Paul H. Robinson, Stephen Garvey, & Kimberly K. Ferzan eds., 2011) ("[T]he rule of law allegedly promotes liberty or autonomy by increasing predictability. But the need for security of individual expectations is not a great obstacle . . . when decision rules are more lenient than conduct rules would lead people to expect. In such cases no one is likely to complain of frustrated expectations.").

available piecemeal exception. “Acoustic separation,” as Dan-Cohen dubbed it, prevents the individual from feigning situational excuses like duress, which tend to be genuinely felt only when they are unplanned.¹⁴³ Comparatively, an individual who designs his conduct to fit a particular exception to a conduct rule is probably playing games—concocting extenuating circumstances (or, at least, not experiencing them genuinely).

But “acoustic separation” (or a lack thereof) is not my principal concern.¹⁴⁴ My focus is a practical point about timing—specifically, that a judge is not permitted to implement a methodology of meaningful understanding *until after* conduct rules are broken. Put differently, the dominant conception of the legality principle allows a judge to consider the whole story only as a means to excuse, not as a means to condemn. The logic may seem obvious—*no one ought to be penalized just for following the rules*. Indeed, this assertion is really just a restatement of legality’s keystone—“*nulla poena sine lege*” or “*there is no penalty without law*.”¹⁴⁵ By this reasoning, a layperson may act immorally or destructively—without fear of judicial interference—unless and until a

¹⁴³ See Dan-Cohen, *supra* note 25, at 641 (“The typical situation that gives rise to a defense of duress or necessity involves an actor of no special legal sophistication caught in circumstances of emergency, high pressure, and emotion. The likelihood that the actor is aware of the defense or able to act on such awareness is in these circumstances at its lowest.”); see also Anne M. Coughlin, *Of Decision Rules and Conduct Rules, or Doing the Police in Different Voices*, in CRIMINAL LAW CONVERSATIONS 15, 16 (Paul H. Robinson, Stephen Garvey, & Kimberly K. Ferzan eds., 2011) (“What does the lawbreaker have to whine about? The fact that she thought she was going to be punished, but lo and behold, duress provides an escape hatch? That would be goofy, to say the very least.”); cf. Kyron Huigens, *Virtue and Inculcation*, 108 HARV. L. REV. 1423, 1439 (1995) (“[Affirmative] defenses are legislated only in bare outline.”). Acoustic separation could create other problems, however. Anne Coughlin observed that victims of crime are entitled to know when a criminal justice system might excuse offenders, particularly with respect to crimes that traditionally have been under-enforced, like sexual assault. Coughlin, *supra*, at 16 (“The women interpret this conduct rule to mean . . . [no] non-consensual sex . . . [Thus, when women are] told, nope, sorry, that was not rape, . . . [it] may produce uncertainty, insecurity, a loss of autonomy, and a loss of faith in the rule of law.”).

¹⁴⁴ Still, a lack of acoustic separation is a concern, as it pertains to the police. Without acoustic separation, officers may more readily manipulate exceptions to conduct rules to inflict rough punishment. Fan, *supra* note 72, at 1418 (noting that “[police] are sensitive to shifts in the law—even subtle and less publicized decision rule shifts that limit remedies for constitutional violations—and can adjust behavior accordingly”); Steiker, *supra* note 72, at 2471 (“The law enforcement community’s easy access to decision rules should create concerns that sophisticated law enforcement agents will see some incentives to violate conduct rules when no court-imposed sanction will follow.”); cf. Shiffrin, *supra* note 140, at 1242 n.82 (explaining that “rules [may] facilitate gaming behavior”); *supra* note 73 and accompanying text. See generally Bibas, *supra* note 116 (distinguishing between professional criminal-justice “insiders” and lay “outsiders”). Although manipulation is not my focus, I touch on the problem in places. See, e.g., *infra* notes 225–31 and accompanying text.

¹⁴⁵ See, e.g., Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165, 186–89 (1937) (describing development of the principle).

statutory rule proscribes her conduct.¹⁴⁶ And an officer may likewise behave badly without fear of judicial interference—unless and until a Fourth Amendment rule proscribes his conduct.¹⁴⁷

There is a snag, however. The legality principle's bedrock proposition—that a rule follower is free to go about his business—disregards the way in which the business of the rule-following layperson is categorically different from the business of the rule-following cop. The layperson plans a law-abiding life. In contrast, the officer plans law-abiding intrusions into the lives of laypeople. Their plans intersect, and when they intersect, the officer's piecemeal exception may become the layperson's piecemeal burden. But, of course, the premise and promise of the legality principle is that a layperson's burdens—her conduct rules—are not meant to be piecemeal. Her burdens are supposed to always remain precise.¹⁴⁸

The result is a doctrinal asymmetry that I call the *sword/shield distinction*. An officer may be granted a qualitative excuse—a particularistic shield—once he has failed to follow Fourth Amendment conduct rules. But the layperson has no particularistic sword with which to challenge the legally authorized, yet morally problematic, intrusion. Extralegal arguments are only available to forgive police conduct that otherwise would have been legally arbitrary. In comparison, a legally authorized intrusion *just is* constitutional, even if it is obviously arbitrary for extralegal reasons. Put differently, the officer may invoke a normative conception of reasonableness to ground his excuse, but the individual may invoke no normative conception of *unreasonableness* to ground her constitutional claim. The consequent asymmetry puts the individual in a pinch. She cannot adequately learn the law in practice where the law is a product of police practices (and a court's understanding of those practices).¹⁴⁹ Nor may she ask a court for meaningful understanding of her own predicament.¹⁵⁰ In the process, her conduct rules are defined not only by a penal code's precise rules, but also by the flexible and fuzzy exceptions that benefit law enforcement at her expense.

¹⁴⁶ See *infra* notes 269–71 and accompanying text (discussing the conduct requirement).

¹⁴⁷ Cf. *infra* notes 100–11 (discussing *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001)).

¹⁴⁸ See *supra* notes 5, 26, 47, 50–53, 113 and accompanying text (discussing the legality principle's purpose as a buffer against arbitrary coercion).

¹⁴⁹ Cf. *State v. Pomianek*, 110 A.3d 841, 843–46 (N.J. 2015) (holding unconstitutionally vague a purported mens rea provision that “impose[d] criminal liability based solely on the *victim's perception* of the underlying crime, regardless of the defendant's intent”) (emphasis added). In essence, the *Pomianek* Court held that a defendant could not be required to read a victim's abstract mind. *Id.*

¹⁵⁰ See *infra* notes 159–64, 179, 181–220, 240–53 and accompanying text (discussing doctrine and hypotheticals).

IV. UNDERSTANDING THE POLICE

In this Part, I examine the doctrines that exemplify the Supreme Court’s asymmetric methodology of understanding. Specifically, I analyze and interpret the opinions by which the Court has accommodated the officer’s reasonable perspective—*his mistakes, his needs, his fears*—even as it has demanded that the individual make her constitutional pitch according to rules or not at all.

A. *Mistake*

Consider, for a moment, the Fourth Amendment doctrine of consent. With voluntary consent, the officer may search without a warrant or probable cause (or, for that matter, individualized suspicion of any kind).¹⁵¹ Again, his search *just is* reasonable—categorically. In this way, the doctrine of *actual* consent is not piecemeal; it describes a bright-line exception that reshapes the officer’s baseline conduct rules in a relatively precise fashion. Thereafter, his modified conduct rules may be summarized to read: “an officer needs (i) a warrant and probable cause as to a valid offense, or, alternatively, he needs (ii) actual voluntary consent.”

But the consent inquiry does not always end there. Even if an officer has failed to secure *actual* consent, he still may rely upon so-called *apparent* consent—a piecemeal exception to the officer’s (already tempered) baseline conduct rules. As the Court observed in *Illinois v. Rodriguez*: “[W]hat is generally demanded of . . . agents of the government . . . is not that they always be correct, but that they always be reasonable [S]ufficient probability, not certainty, is the touchstone of reasonableness.”¹⁵² In *Rodriguez*, the Court credited the officers’ reasonable (albeit erroneous) perspective that a home’s occupant had authority to consent to a search. The Court thereby reached two steps beyond the conventional legalistic framework—from the purported requirements of warrant and probable cause, to a categorical alternative of actual consent, to a piecemeal exception of apparent consent.¹⁵³

At that degree of remove, the constitutionality of the police intrusion no longer relied principally upon facts about the world, but on an epistemological inquiry into whether the officers’ mistake was an

¹⁵¹ See, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (involving a consent search of a car after the vehicle was pulled over for a broken headlight and license plate light).

¹⁵² See 497 U.S. 177, 185-86, 188 (1990) (emphasis added) (indicating that the relevant inquiry was whether “the facts available to the officer at the moment . . . warrant a man of reasonable caution in the belief” that his actions were lawful (internal quotation marks and alterations omitted)).

¹⁵³ See *Fernandez v. California*, 134 S. Ct. 1126, 1139 (2014) (Ginsburg, J., dissenting) (indicating that, pursuant to prevailing consent doctrine, “[i]nstead of adhering to the warrant requirement . . . police . . . may dodge it”).

“understandable and . . . reasonable response to the situation.”¹⁵⁴ And this question turned on the officer’s reasonable beliefs—his good reasons for his failure to follow the law. The complication is that, by making the law a product of police perspective, the Court “significantly expand[ed]” police power, as Justice Sotomayor observed in a related dissent.¹⁵⁵ If the resident had wished to keep the state at bay, he had to do more than identify and assert his rights; he also had to block unauthorized others from his front door, thereby preventing them from undermining his legal position by looking enough like authorized occupants to reasonable cops.

To get to this point, the *Rodriguez* Court endorsed a mode of particularistic evaluation that it had rejected in more legalistic decisions, like *Whren v. United States*.¹⁵⁶ The *Whren* Court held that the constitutionality of an arrest was “not in doubt” as long as it was supported by probable cause.¹⁵⁷ In doing so, the Court declined to adopt the defendant’s alternative qualitative test: “[whether] a reasonable officer in the same circumstances would not have made the stop for the reasons given.”¹⁵⁸ The Court determined that any constitutional test oriented around a reasonable officer’s perspective would be unpredictable and thereby incompatible with the legality principle. It would compel judges “to plumb the collective consciousness of law enforcement in order to determine whether a ‘reasonable officer’ would have been moved to act.”¹⁵⁹

But, of course, this is the very same test of constitutional reasonableness that the *Rodriguez* Court endorsed. Notably, *Rodriguez* was a decision authored by the very same Supreme Court Justice, Antonin Scalia. Then, why did Justice Scalia conclude that an evaluation of reasonable perspective constituted an exercise in “virtual subjectivity” in one context but not in the

¹⁵⁴ *Rodriguez*, 497 U.S. at 185 (emphasis added); see also *Hill v. California*, 401 U.S. 797, 803–04 (1971) (asking whether an officer’s mistake “was understandable” given “the situation facing him at the time.”).

¹⁵⁵ See *Heien v. North Carolina*, 135 S. Ct. 530, 543 (2014) (Sotomayor, J., dissenting) (“Giving officers license to effect seizures so long as they can attach to their reasonable view of the facts some reasonable legal interpretation (or misinterpretation) . . . significantly expands [police] authority.”); *Logan*, *supra* note 72, at 93 (noting that when courts credit such mistakes, “[t]he public is not freed from the grip of state control but rather is subjected to it”); *infra* notes 166–78, 272, 281, 286, 299–300, and accompanying text.

¹⁵⁶ See 517 U.S. 806, 819 (1996) (“[T]he officers had probable cause to believe that petitioners had violated the traffic code. That rendered the stop reasonable under the Fourth Amendment”); see also *Colb*, *supra* note 74, at 1654 (describing *Whren* as turning on “the formal legal status . . . of [the driver’s] specific conduct under the traffic laws”); *supra* Part II (discussing legalistic decisions).

¹⁵⁷ *Whren*, 517 U.S. at 817.

¹⁵⁸ *Id.* at 814; cf. *Bowers*, *Pointless Indignity*, *supra* note 40, at 1044–48 (endorsing and defending this alternative Fourth Amendment test).

¹⁵⁹ *Whren*, 517 U.S. at 815.

other?¹⁶⁰ The dominant conception of legality provides the basis for the difference. Whereas *Whren* established a baseline conduct rule (that an arrest requires probable cause), *Rodriguez* provided for a piecemeal exception (that a search may be excused by reasonable mistake). By now, the underlying rationale ought to be apparent: positive legality allows courts to adopt a particularistic methodology only as to exceptions.¹⁶¹ This is the *sword/shield* distinction in a nutshell. In *Rodriguez*, the officers possessed a viable equitable *shield* of reasonable perspective after their understandable mistakes led them to deviate from their bright-line conduct rules. But, in *Whren*, the defendant had no equitable *sword* with which to challenge a pretextual (but rule-bound) traffic stop. The rule-bound stop was constitutionally reasonable categorically (even in the face of a persuasive argument that the particular exercise of pretext was unreasonable in the folk sense of the word).¹⁶²

* * *

There is nothing new to the Court's willingness to accommodate some police errors. Indeed, the Fourth Amendment has long tolerated reasonable mistakes of fact—for instance, mistakes about the facts that support a finding of probable cause.¹⁶³ But, recently, the Court excused even an officer's reasonable misinterpretation of code law. In *Heien v. North Carolina*, a police sergeant observed a “very stiff and nervous” driver, whom he proceeded to tail and ultimately stop for operating a vehicle with a broken taillight.¹⁶⁴ But,

¹⁶⁰ *Id.*

¹⁶¹ *Supra* Section III.B and accompanying text; cf. Logan, *supra* note 72, at 74 (describing mistake doctrine as a form of “[j]udicial forgiveness” (emphasis added)).

¹⁶² See *supra* note 87 and accompanying text (discussing *Atwater v. Lago Vista*, 532 U.S. 318 (2001)); see also Bowers, *Pointless Indignity*, *supra* note 40, at 1010-13 (examining the normative implications of *Atwater* in greater detail).

¹⁶³ See *Hill v. California*, 401 U.S. 797, 803-04 (1971) (“The upshot was that the officers in good faith believed Miller was Hill and arrested him. They were quite wrong as it turned out, . . . [but] the arrest [was] a reasonable response.”); see also *Saucier v. Katz*, 533 U.S. 194, 206 (2001) (“Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause . . .”). An obvious response to my critique of a decision like *Saucier* is that I am making a mountain of a molehill. Probable cause is, by its very nature, a probabilistic and sometimes inaccurate measure. As Holmes observed: “[I]f the law is to punish at all, it must . . . go on probabilities.” OLIVER WENDEL HOLMES, JR., *THE COMMON LAW* 72 (1881); see also *supra* notes 81-84 and accompanying text (discussing the imprecision of probable cause). Thus, when we say that there *is* probable cause, we actually mean only that an adjudicator—a magistrate or judge—has declared it so. The question remains epistemic, and the final arbiter necessarily brings her own perspective to bear. Nevertheless, we may recognize the inevitable role of uncertainty in criminal justice without accepting uncritically all efforts to stack probabilities upon probabilities. We should acknowledge that we compound endemic uncertainties when we allow an officer to make reasonable mistakes about what a final arbiter will decide.

¹⁶⁴ 135 S. Ct. 530, 534 (2014).

in fact, the sergeant had the traffic law wrong. North Carolina motorists permissibly may drive a car with just one working taillight. Nevertheless, the Court held the stop (and a subsequent consent search) constitutional because it deemed the sergeant's mistake reasonable.¹⁶⁵

Notice the manner by which the *Heien* decision intersects with *Whren v. United States*.¹⁶⁶ After *Heien*, an officer may engage in pretextual stops *premised on no law*. This was what so troubled Justice Sotomayor in her *Heien* dissent: “[W]e assumed in *Whren* that when an officer acts on pretext, at least that pretext would be the violation of an actual law.”¹⁶⁷ But, for the majority, it did not matter that the sergeant's conduct fell “outside the scope of the law.”¹⁶⁸ The determinative criteria were police perspective and practice.¹⁶⁹ Understanding trumped legality, notwithstanding the traditional rule that individuals are presumed to know the law and are strictly liable for their errors.¹⁷⁰

It is a bit ironic, to say the least, that the Court would excuse the legal mistakes of a trained official (a sergeant, no less).¹⁷¹ Still, I am unconvinced that the Court was wholly misguided. To the contrary, I subscribe to the premise that an excuse of mistake of law should be available to anyone (even the sergeant, here), particularly as to *mala prohibita* public-order offenses.¹⁷² But we cannot ignore the implications for the dominant conception of the legality principle, which is grounded on the idea that the criminal law must remain immutable and impervious to perspective or any other particularistic influence.¹⁷³ It is on those formalistic terms that the *Heien* decision fails, not on my own comparatively functional terms. The entrenched view, articulated

¹⁶⁵ *Id.*

¹⁶⁶ 517 U.S. 806 (1996).

¹⁶⁷ *Heien*, 135 S. Ct. at 543 (Sotomayor, J., dissenting).

¹⁶⁸ *Id.* at 536.

¹⁶⁹ *See id.* (explaining that allowing reasonable mistakes of both law and fact gives officers “fair leeway for enforcing the law in the community's protection”).

¹⁷⁰ *See, e.g., State v. Striggles*, 202 Iowa 137, 138 (1926) (refusing to recognize a defense of mistake of law notwithstanding the existence of lower-court precedent supporting the erroneous reading).

¹⁷¹ *See Heien*, 135 S. Ct. at 546 (Sotomayor, J., dissenting) (“One is left to wonder . . . why an innocent citizen should be made to shoulder the burden of being seized whenever the law may be susceptible to an interpretive question.”).

¹⁷² *Cf. Dan M. Kahan, Ignorance of Law is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 133, 152 (1997) (endorsing a negligence standard for reasonable mistakes of law); *see also BONNIE ET AL.*, *supra* note 25, at 207 (“Not surprisingly, it is precisely in the context of modern regulatory offenses that plausible claims of ignorance of the law most commonly arise. In such cases, the policy of *ignorantia legis* must be explained as something other than an attempt to describe reality.”). And it appears the sergeant's mistake was reasonable. As the *Heien* Court observed, the statute in question was “genuinely ambiguous” and posed “a quite difficult question of interpretation,” such that one court could read the “statute's conflicting signals in one way” while another court “could easily take the officer's view.” *Heien*, 135 S. Ct. at 541-42.

¹⁷³ As Justice Sotomayor remarked in dissent: “[T]he notion that the law is definite and knowable sits at the foundation of our legal system.” *Heien*, 135 S. Ct. at 543.

by Jerome Hall more than half a century ago, was to keep mistake from bending or upending law:

[A] doctrine [of mistake of law] would contradict the essential requisites of a legal system, the implications of the principle of legality. To permit an individual to plead successfully that he had a different . . . interpretation of the law would contradict the . . . postulates of a legal order . . . [T]he consequence would be: Whenever a defendant in a criminal case thought the law was thus and so, he is to be treated as though the law were thus and so, i.e., *the law actually is thus and so*.¹⁷⁴

The *Heien* Court endorsed an alternative conception of law as a manifestation of belief and practice. Naturally, an officer is bound to have a better grasp over this body of “practice law,” since it is *his* beliefs that matter.¹⁷⁵ To divine the operative law’s shape, the officer may rely upon his own perspective and norms as a lens to draw blurry lines into sharper focus. This amounts to a procedural form of notice.¹⁷⁶ The officer might not know precisely which types of mistakes are reasonable enough, but he knows enough to realize that he enjoys the benefit of the doubt. Comparatively, the individual can no longer bank on even positive legality’s foundational guarantee, which Justice Scalia once described as “an admirable belief that *the law is the law*.”¹⁷⁷ The individual is left to pay two prices for the officer’s errors: the quality of her rights diminishes, as the clarity of her obligations gets obscured. And she suffers these twin penalties pursuant to a dictum that reads as almost arbitrary—“*ignorance or mistake of law is no excuse, unless you have a badge (and wear it well enough)*.”

¹⁷⁴ JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 380-83 (2d ed. 1960); *see also* Logan, *supra* note 72, at 91-92, 95 (“When courts forgive mistaken police constructions of laws, a problem akin to that attending judicial approval of vague laws arises; a ‘potent message’ is broadcast to law enforcement that ‘the limits of official coercion are not fixed; the suggestion box is always open.’” (quoting Jeffries, *supra* note 11, at 223)).

¹⁷⁵ *See* Josh Bowers, *Two Rights to Counsel*, 70 WASH. & LEE L. REV. 1133, 1154-55 (2013) (describing “practice law,” as defined by legal officials’ norms, perspectives, and actions).

¹⁷⁶ *See infra* notes 330-34 and accompanying text (discussing concept of procedural notice).

¹⁷⁷ *Lafler v. Cooper*, 132 S. Ct. 1376, 1397 (2012) (Scalia, J., dissenting) (internal quotation marks omitted) (emphasis added); *see also* *Rogers v. Tennessee*, 532 U.S. 451, 480 (2001) (Scalia, J., dissenting) (“[T]he only ‘fair warning’ discussed in our precedents . . . is fair warning of *what the law is*. That warning . . . safeguards [defendants] against *changes in the law after the fact*.”); *cf.* *Heien*, 135 S. Ct. at 543 (Sotomayor, J., dissenting) (“[T]he meaning of the law is not probabilistic in the same way that factual determinations are. Rather, ‘the notion that the law is definite and knowable’ sits at the foundation of our legal system.”) (quoting *Cheek v. United States*, 498 U.S. 192, 199 (1991)).

B. Fear

Just as the Supreme Court has forgiven reasonable police mistakes, so too it has sought to understand the distinct and very real fears of the cop on the beat. Indeed, we may fairly describe much of Fourth Amendment exigency doctrine as a judicial effort to prioritize officer safety over a strict application of the usual conduct rules. And, here again, the Court has evaluated all-things-considered claims of exigent circumstances “from the perspective of a reasonable officer.”¹⁷⁸

Consider the Court’s recent decision in *Ryburn v. Huff*.¹⁷⁹ Officers went to the home of a juvenile who allegedly had threatened to “shoot up” his school. The officers repeatedly banged on the front door until the boy’s mother emerged. When an officer demanded to know whether there were guns inside, the mother retreated into the home. The officer would later claim that this “extremely unusual” behavior “scared” him—that he “didn’t know what was in that house” and had “seen too many officers killed.”¹⁸⁰ But, of course, the mother had no legal obligation to cooperate, as even the Court acknowledged.¹⁸¹ Thus, the officers’ *extralegal* fears ran up against the mother’s attempt to exercise her *legal* rights. And her legal rights came up short. Again, asymmetric understanding trumped legality, because, as the Court put it, even “lawful conduct may portend imminent violence.”¹⁸²

It does not follow that the Court got it wrong. A blind fidelity to Fourth Amendment conduct rules might have left the officers in an untenably tight

¹⁷⁸ See *Ryburn v. Huff*, 132 S. Ct. 987, 992 (2012) (evaluating constitutionality of warrantless entry, premised on exigency of officer safety, based upon “the perspective of a reasonable [police] officer”); see also *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990) (“The Constitution is no more violated when officers enter without a warrant because they reasonably (though erroneously) believe that the person who has consented to their entry is a resident of the premises, than it is violated when they enter without a warrant because they reasonably (though erroneously) believe they are in pursuit of a violent felon who is about to escape.”); cf. *Missouri v. McNeely*, 133 S. Ct. 1552, 1556 (2013) (“[E]xigency . . . must be determined case by case based on the totality of the circumstances.”).

¹⁷⁹ 132 S. Ct. at 987 (2012).

¹⁸⁰ *Id.* at 988-89.

¹⁸¹ See *id.* at 990 (observing that the mother had “merely asserted her right to end her conversation with the officers and returned to her home”).

¹⁸² *Id.* at 991; see also *Riley v. California*, 134 S. Ct. 2473, 2486 (2014) (“The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others.” (quoting *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 298-99 (1967))). Admittedly, *Ryburn* was a qualified immunity case and not a case squarely about constitutional reasonableness. “The Court’s analysis strongly suggests, however, that the Justices believed the officers’ conduct was lawful.” RONALD JAY ALLEN ET AL., *COMPREHENSIVE CRIMINAL PROCEDURE: 2014 SUPPLEMENT* 91-92 (2014); see also *Ryburn*, 132 S. Ct. at 990 (“No decision of this Court has found a Fourth Amendment violation on facts even roughly comparable to those present in this case.”); *id.* (“[T]he Fourth Amendment permits an officer to enter a residence if the officer has a reasonable basis for concluding that there is an imminent threat of violence.” (citing *Brigham City v. Stuart*, 547 U.S. 398, 400 (2006))).

spot. More generally, a rule-bound approach would prove insufficient to “cover all exigencies, especially . . . in situations of emergency or extreme peril.”¹⁸³ In the real world, exceptions must be carved out. The difficulty, however, is that there is no such thing as a *singular* real world. To the contrary, the officer and the individual interact at the intersection of their “two separate worlds,” defined by their separate “lived experiences.”¹⁸⁴ The individual cannot be expected to know and understand the officer’s world any more than the officer can be expected to know and understand the individual’s world. It follows that the individual should not be obligated to anticipate what reasonably might pique the officer’s fears—particularly when those fears are evaluated always from the officer’s perspective. Indeed, the very premise of the dominant conception of the legality principle is that, in order to plan a law-abiding life, an individual should be required to anticipate only her own law as it applies to her own world—her own rights and obligations, designated by her own precisely drawn conduct rules. In *Ryburn*, however, the Court used a methodology of asymmetric understanding to unintentionally destabilize that premise. The mother could not assert her rights without compromising them. Nor could she accurately comprehend her obligations. As her information costs rose, she was made to bear the burden of the officers’ fears. She too was put in a tight spot. But she had no opportunity to articulate her predicament—to ask for her worldview to count also in the balance of reasons.

On the same score, consider *Kentucky v. King*, a case in which the Supreme Court held that police officers purposefully could create exigent circumstances by loudly announcing their presence at the door of a home to see how occupants might react.¹⁸⁵ Here, as in *Ryburn*, the Court framed the qualitative question asymmetrically only—simply, whether the officer reasonably believed exigent circumstances existed to excuse entry *at the moment of entry*, independent of the actions taken by the officer to produce the belief or circumstances in the first instance.¹⁸⁶ For his part, the defendant had two other qualitative questions in mind—two alternative constitutional tests—neither of which the Court was willing to entertain. Pursuant to the first alternative test, the Court would have asked whether the officers “engage[d] in conduct that would cause a reasonable person to believe that entry was imminent and inevitable.”¹⁸⁷ With this test, the Court would have transitioned to a methodology of understanding oriented around the

¹⁸³ See Sarat & Clarke, *supra* note 91, at 408 (explaining that, under such circumstances, a legal official may come to act “both inside and outside the law”).

¹⁸⁴ Tracey L. Meares et al., *Lawful or Fair? How Cops and Laypeople Perceive Good Policing*, 105 J. CRIM L. & CRIMINOLOGY 297, 297 (2016).

¹⁸⁵ 563 U.S. 452, 468 (2011).

¹⁸⁶ *Id.* at 465-66.

¹⁸⁷ *Id.* at 453 (emphasis added).

reasonable perspective of the occupants, not the police officers. But, tellingly, the Court dismissed this test as too “nebulous and impractical,”¹⁸⁸ just as it had rejected the defendant’s proposed test in *Whren* as an exercise in “virtual subjectivity.”¹⁸⁹ Again, we discover that the dominant conception of the legality principle permits evaluation of only the perspectives of the *intended subjects* of a conduct rule (and only in circumstances in which those perspectives might operate *to excuse* rule violations—here, the officers’ failure to secure a warrant before entering the home).¹⁹⁰ Only some perspectives matter some of the time, and the layperson’s perspective is not one.

Pursuant to the defendant’s second alternative test, the *King* Court would have asked whether the officers had behaved in a manner wholly “contrary to standard or good law enforcement practices (or to the policies or practices of their jurisdictions).”¹⁹¹ In other words, the defendant wanted the Court to consider the officers’ potentially *bad reasons*—here, the normatively dubious practice of manufacturing exigent circumstances. But this test was rejected on like logic—namely, that a conduct rule should not be piecemeal, pursuant to the dominant conception of the legality principle. By the *King* Court’s reasoning, an evaluation of unreasonable reasons would subject officers to an imprecise constitutional obligation and thereby “fails to provide clear guidance for law enforcement officers.”¹⁹² Ultimately, then, it did not matter what motivated the officers to bang loudly. It also did not matter whether they wished only to circumvent their conduct rules by engineering exigent circumstances.¹⁹³ It did not even matter that other reasonable officers might not have banged so loudly or at all.¹⁹⁴ Post-*King*, the incentives are troubling but also eminently clear. It is cheap and easy for officers to shout forcefully and take things from there—to shake the tree and see what falls. They are free to take advantage of the investigative tactic known as “knock and talk” (or, more accurately, “*bang and yell*”) to circumvent legality’s costlier conduct

¹⁸⁸ *Id.* at 469.

¹⁸⁹ *Whren v. United States*, 517 U.S. 806, 815 (1996).

¹⁹⁰ *See King*, 563 U.S. at 459 (“It is a basic principle of Fourth Amendment law . . . that searches and seizures inside a home without a warrant are presumptively unreasonable But we have also recognized that this presumption may be overcome in some circumstances because the ultimate touchstone of the Fourth Amendment is reasonableness.” (internal citations omitted)); *see also supra* Section III.B (describing the relationship between the dominant conception of legality and particularistic methodologies).

¹⁹¹ *King*, 563 U.S. at 467 (internal quotation marks omitted).

¹⁹² *Id.*

¹⁹³ *See supra* note 145, *infra* notes 217–19, and accompanying text (discussing the manner by which criminal justice professionals may manipulate conduct rules and exceptions).

¹⁹⁴ Indeed, the officers admitted frankly that they “banged on the door as loud as [they] could,” shouting “[p]olice, police, police.” *King*, 563 U.S. at 471.

rules and exact a bit of rough justice.¹⁹⁵ And, in response, a home's inhabitants cannot be heard to complain.

By now, the complication ought to be apparent. Individuals cannot predictably or credibly decipher or rely upon legality's purported conduct rules and corresponding rights against intrusion. Consider the *King* Court's admonishment: "Occupants who choose not to stand on their constitutional rights but instead elect to attempt to destroy evidence have only themselves to blame for the warrantless exigent circumstances search that may ensue."¹⁹⁶ But, in fact, these occupants were not obviously "attempt[ing] to destroy evidence."¹⁹⁷ To the contrary, they were quite possibly *trying* to exercise their rights. The officers testified only that "[i]t sounded as [though] things were being moved inside the apartment," and that they "could hear people inside moving."¹⁹⁸ These sounds reasonably might have signaled exigent circumstances, but the sounds also might have signaled a lawful course of action. Significantly, home occupants enjoy constitutional rights "to prepare . . . for the entry of the police," which is why officers are typically required to announce their presence.¹⁹⁹ And it is hard to imagine how these occupants might have composed themselves without moving their bodies and personal belongings.²⁰⁰ Simply put, the officers might have been wrong. The occupants might have been asserting rights—assertions that served only to trigger and excuse a quicker and more forceful intrusion. In any event, we know already that the *King* officers *were wrong* in at least one meaningful respect. The officers were pursuing a particular suspect, but he was not there.²⁰¹ Likewise, in *Ryburn*, the officers believed that there were guns in the home, but none were found.²⁰² Thus, we discover that there is the potential for overlap between doctrines of understanding—here, fear and mistake.

The result of overlapping doctrines of asymmetric understanding is to further undermine the clarity of the individual's obligations and the quality of her rights. In the face of ambiguity, civilians may be left to act at their own peril—a frightening prospect made readily apparent to the residents of majority-minority high-crime communities. Eventually, these residents may even come to conclude, somewhat hopelessly, that there is no practical alternative but to teach children to tread lightly, as Justice Sotomayor noted:

¹⁹⁵ See *infra* notes 279–96 and accompanying text (describing arrest as a form of rough punishment).

¹⁹⁶ *King*, 563 U.S. at 470.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 456.

¹⁹⁹ *Hudson v. Michigan*, 547 U.S. 586, 594 (2006).

²⁰⁰ See *id.* ("[T]he knock-and-announce rule protects those elements of privacy and dignity that can be destroyed by a sudden entrance. It gives . . . the opportunity to collect oneself before answering the door . . . to pull on clothes or get out of bed." (internal quotation marks omitted)).

²⁰¹ *King*, 563 U.S. at 455–57.

²⁰² *Ryburn v. Huff*, 565 U.S. 469, 471–72 (2012).

For generations, black and brown parents have given their children “the talk”—instructing them never to run down the street; always keep your hands where they can be seen; do not even think about talking back to a stranger—all out of fear of how an officer with a gun will react to them.²⁰³

And Ta-Nehisi Coates echoed the sentiment in a warning to his own son: “One must be without error out here. Walk in single file. Work quietly. Pack an extra number 2 pencil.”²⁰⁴

No proponent of the rule of law should prize “the talk.” Its substance is not the autonomous life, but a compelled form of cowering survival. More to the point, it reveals the universality of fear. In his harrowing and provocative memoir, Coates described a childhood in Baltimore “blindfolded by fear”—fear of the criminals (who were, in turn, “dangerously afraid”) and fear of the officers authorized to turn their own fears and misunderstandings into “destruction”:

It does not matter if the destruction is the result of an unfortunate overreaction. It does not matter if it originates in a misunderstanding
Sell cigarettes without the proper authority and your body can be destroyed.
Resent the people trying to entrap your body and it can be destroyed.”²⁰⁵

Ultimately, there is plenty of fear to go around. The police officer has no monopoly on the sentiment. And, in dangerous situations, any party may be prone to mistake. But only the officer may rely upon his emotions and errors to claim an *ex post* excuse.²⁰⁶ This, then, is what Coates meant when he concluded that “our errors always cost us more.”²⁰⁷

²⁰³ Utah v. Strieff, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting); see, e.g., TALIB KWELI, *The Proud, on QUALITY* (Rawkus Records 2002) (“[W]hat the fuck do I tell my son?/I want him livin’ right, livin’ good, respect the rules . . . /How do I break the news that when he gets some size/He’ll be perceived as a threat or see the fear in they eyes/It’s in they job description to terminate the threat/So forty-one shots to the body is what he can expect.”).

²⁰⁴ COATES, *supra* note 21, at 95 (emphasis added); see also *id.* at 82 (describing members of high-crime communities “who are made to fear not just the criminals among them but the police who lord over them.”).

²⁰⁵ *Id.* at 9 (emphasis added); see also *id.* at 14 (“When I was your age the only people I knew were black, and all of them were powerfully, adamantly, dangerously afraid . . . I think back on those boys now and all I see is fear.”); *id.* at 126 (“[M]y eyes were made in Baltimore . . . [M]y eyes were blindfolded by fear.”); *id.* at 75-76 (describing the “terror” he felt during a traffic stop); *id.* at 16 (“Everyone had lost a child, somehow, to the streets, to jail, to drugs, to guns”). See generally ELIJAH ANDERSON, *CODE OF THE STREET: DECENCY, VIOLENCE, AND THE MORAL LIFE OF THE INNER CITY* (1999).

²⁰⁶ See COATES, *supra* note 21, at 71 (“[T]he policeman who cracks you with a nightstick will quickly find his excuse in your furtive movements.”).

²⁰⁷ See *id.* at 95-96 (“Make no mistakes . . . the story of a black body’s destruction must always begin with his or her error, real or imagined.”).

* * *

Before we leave fear and mistake, consider a hypothetical based partially on a pair of recent decisions. Imagine an upstanding and competent officer who reasonably believes in the existence of an outstanding arrest warrant. As it turns out, the officer has failed on two separate scores to satisfy his conduct rules. First, the warrant is stale. Second, the statute supporting the warrant is invalid. But, in the midst of a fast-paced street encounter “fraught with danger,” he reasonably neglects to do everything he might have done to double check and discover his errors.²⁰⁸ Still, he may rely upon his reasonable fears and mistakes—factual and legal—to excuse his otherwise unlawful seizure.²⁰⁹ Now, imagine a disreputable and incompetent officer—a bully and a brute—who knows nothing of a valid, outstanding arrest warrant (for, say, a “small [but genuine] traffic” offense).²¹⁰ This bad actor may want only to subject the motorist to “an arrogant and unnecessary display of authority.”²¹¹ Nevertheless, he may rely upon the existence of the valid arrest warrant (of which he was unaware) to authorize his seizure post hoc—to figuratively and literally *paper over* his otherwise unlawful conduct.²¹²

Our hypothetical officers enjoy two very real constitutional hooks based on two distinct constitutional methodologies—first, a methodology of understanding to excuse good-but-flawed police work; and, second, a methodology of legality to authorize bad-and-flawed police work that just so happened to be made legal by the coincidence of the valid warrant.²¹³ Consistent with the dominant conception of the legality principle, both officers retain “clear and crisp instructions,” instructing them on how they

²⁰⁸ *Arizona v. Johnson*, 555 U.S. 323, 330 (2009) (describing when street stops are permitted because of “justifiable suspicion . . . that criminal activity is afoot”).

²⁰⁹ The Court has made clear that, pursuant to the good faith mistake doctrine, the exclusionary rule does not apply to reasonable errors about the existence of warrants. *See, e.g., Herring v. United States*, 555 U.S. 135, 136-37 (2009).

²¹⁰ *Utah v. Strieff*, 136 S. Ct. 2056, 2065 (2016) (Sotomayor, J., dissenting).

²¹¹ *Pennsylvania v. Mimms*, 434 U.S. 106, 121 (1977) (Stevens, J., dissenting).

²¹² *See Strieff*, 136 S. Ct. at 2063 (“While [the] decision to initiate the stop was mistaken, his conduct thereafter was lawful.”). The *Strieff* Court held that the existence of a valid warrant was sufficient to attenuate the unconstitutional stop from the arrest and search of the person. Accordingly, the exclusionary rule did not apply to the seizure of evidence. *See id.* at 2060, 2063 (acknowledging that even “the prosecutor conceded that [the officer] lacked reasonable suspicion,” but describing the stop as “an isolated instance of negligence”).

²¹³ *See id.* at 2067 (Sotomayor, J., dissenting) (“The mere existence of a warrant not only gives an officer legal cause to arrest and search a person, it also forgives an officer who, with no knowledge of the warrant at all, unlawfully stops that person on a whim or hunch.”). Consider also *Murray v. United States*, 487 U.S. 533 (1988). There, the officers likewise *papered over* an unconstitutional search. *Id.* at 535-36. They broke into a warehouse without a warrant or any applicable warrant exception. *Id.* Finding drugs, they exited immediately and sought a warrant, alleging only facts known to them before the illegal entry. *Id.* The Court refused to apply the exclusionary rule. *Id.* at 541-44.

lawfully might proceed.²¹⁴ But, if either officer slips up, he may turn to alternative justifications or excuses—here, the justification of the preexisting warrant or the excuses of reasonable fear and mistake.²¹⁵ The officer’s surprises are all pleasant surprises. He may not be able to predict the particulars of the given surprise, but still he may learn to *expect* one—like a kid waiting for Christmas.²¹⁶ At a minimum, he will come to recognize that judges will strive to understand him. Likewise, he will know that there are millions of open warrants nationwide, authorizing the arrests of the majority of residents of certain heavily policed communities, such as Ferguson, Missouri.²¹⁷ The consequent opportunities for rough punishment are “staggering.”²¹⁸

The officer may indulge his fears, whereas the layperson remains paralyzed by hers. She may do all she can to learn (and live by) her conduct rules. All the same, she may be made to suffer at the officer’s whim.²¹⁹

C. Need

A police officer is not simply a law enforcer. He is a peacekeeper and a community caretaker—a manager of crowds, a mediator of disputes, and a first responder to the sick and injured.²²⁰ In recognition that these so-called

²¹⁴ Frederick Schauer, *Response & Rejoinder: The Miranda Warning*, 88 WASH. L. REV. 155, 170 (2013); see also *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2197 (2016) (Thomas, J., concurring in part and dissenting in part) (“[L]aw enforcement officers . . . depend on predictable rules to do their job.”); *Mullenix v. Luna*, 136 S. Ct. 305, 314 (2015) (Sotomayor, J., dissenting) (discussing officers’ interest in “‘fair notice’ that they are acting unconstitutionally”) (quoting *Hope v. Pelzer*, 536 U. S. 730, 739 (2002)); *Virginia v. Moore*, 553 U.S. 164, 175 (2008) (describing the system’s “essential interest in readily administrable rules”).

²¹⁵ Cf. *infra* notes 398–403 and accompanying text (distinguishing justifications and excuses as they relate to officers’ conduct rules).

²¹⁶ See *supra* notes 144, 193, and accompanying text (discussing lack of “acoustic separation” and consequent opportunities for police officers to manipulate known conduct rules and exceptions therefrom); cf. HARCOURT, *supra* note 1, at 10 (“Every [petty misdemeanor] arrest [i]s like opening a box of Cracker Jack. What kind of toy am I going to get? Got a gun? Got a knife? Got a warrant? . . . It [i]s exhilarating for the cops.” (quoting William Bratton, NYPD police commissioner)).

²¹⁷ *Strieff*, 136 S. Ct. at 2068 (Sotomayor, J., dissenting) (citing studies and statistics and noting that “in the town of Ferguson, Missouri—with a population of 21,000—16,000 people had outstanding warrants against them.”).

²¹⁸ See *id.* at 2073 (discussing implications of “staggering” numbers of open arrest warrants for trivial offenses and unpaid fines).

²¹⁹ See *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965) (“[T]his ordinance says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstration. It ‘does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat.’”); *supra* notes 41, 111 and accompanying text (discussing vagueness doctrine and untrammelled police discretion).

²²⁰ See *Bowers*, *Pointless Indignity*, *supra* note 40, at 1005. As Justice Thomas once observed: “Police officers are not, and have never been, simply enforcers of the criminal law. They wear other hats—importantly, they have long been vested with the responsibility for preserving the public

“special needs” cases transcend “the normal need for law enforcement,” the Court has developed an alternative “free form” jurisprudence, called “general reasonableness.”²²¹ As Egon Bittner explained: “The procedures employed in keeping the peace are not determined by legal mandates but are, instead, responses to certain demand conditions.”²²² In other words, peacekeeping and community caretaking constitute forms of exigency where the pressing circumstances are, at least plausibly, unrelated to law-enforcement objectives.²²³

But the Court has drawn no crisp line between law enforcement and purported special need.²²⁴ Consider *Brigham City v. Stuart*.²²⁵ With neither probable cause nor a warrant, officers entered a home to break up a boisterous party. They did more than just keep the peace, however. They made arrests. They parlayed one source of Fourth Amendment power into another type of Fourth Amendment intrusion. And, just as officers may use one offense as pretext for another,²²⁶ so too they may use “special needs” as pretexts to investigate: “It . . . does not matter here—even if their subjective motivations could be so neatly unraveled—whether the officers entered the kitchen to arrest respondents and gather evidence against them or to assist the injured

peace.” *City of Chicago v. Morales*, 527 U.S. 41, 106 (1999) (Thomas, J., dissenting); *see also Terry v. Ohio*, 392 U.S. 1, 13 (1968) (“Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime.”).

²²¹ *Camara v. Mun. Ct. of City & County of S.F.*, 387 U.S. 523, 535, 536-37, 539 (1967); *see also Maryland v. King*, 133 S. Ct. 1958, 1982 (2013) (Scalia, J., dissenting) (“It is only when a governmental purpose aside from crime-solving is at stake that [the Court may] engage in the free-form reasonableness inquiry”); Colb, *supra* note 74, at 1656 (“[R]easonableness balancing doctrine ordinarily operates as a mechanism that permits searches and seizures when the government lacks individualized probable cause.”). *See generally* Wasserstrom, *supra* note 74. Notably, such an unstructured approach may be consistent with historical practice. *See* Jessica K. Lowe, *A Separate Peace? The Politics of Localized Law in the Post-Revolutionary Era*, 36 LAW & SOC. INQUIRY 788, 793 (2011) (discussing, but not endorsing, the historical perspective that “keeping the peace [at common law] . . . was not about applying a particular set of rules”).

²²² Egon Bittner, *The Police on Skid-Row: A Study of Peace Keeping*, 32 AM. SOCIO. REV. 699, 714 (1967); *see also Terry v. Ohio*, 392 U.S. 1, 10 (1968) (“[I]n dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess.”).

²²³ *See Camara*, 387 U.S. at 535-37 (“Unlike the search pursuant to a criminal investigation . . . there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.”); *see also Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 619 (1989) (applying a Fourth Amendment balancing test); *Cady v. Dombrowski*, 413 U.S. 433, 448 (1973) (applying general unreasonableness standard to an administrative search); Seidman, *Points of Intersection*, *supra* note 48, at 158 (indicating that legal tests “are no longer fixed” when “the government’s interests do not relate to law enforcement”).

²²⁴ *See* Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. CHI. LEG. F. 261, 302 (“Law enforcement and community caretaking goals are often entangled.”); *see also* Bittner, *supra* note 48, at 714 (“[P]atrolmen do not act alternatively as one or the other [P]eace keeping occasionally acquires the external aspects of law enforcement.”).

²²⁵ 547 U.S. 398 (2006).

²²⁶ *See supra* Part II (discussing overcriminalization and pretextual stops and arrests).

and prevent further violence.”²²⁷ The only relevant inquiry was whether reasonable officers could have believed that a special need existed within the home, not whether *these particular* officers subjectively believed it (or ever aimed to address it).

Thus, an officer may come to the aid of an injured person when his genuine intention is only to enforce criminal law.²²⁸ Or he may make an arrest when his genuine intention is only to keep order.²²⁹ Either way, the state may subsequently argue in the alternative. It may pivot to whichever conception of reasonableness is most permissive under the circumstances, because an intrusion considered reasonable for one purpose is considered reasonable for all purposes.²³⁰

Moreover, when it comes to maintaining order, we may expect an officer’s peacekeeping and law-enforcement purposes to correspond with fair frequency. The goals of peacekeeping and misdemeanor law enforcement are substantially the same—quality of life and social control.²³¹ Indeed, this overlap might explain why historical courts held fast for so long to common law offenses concerning “the public health of the nation.”²³² Generations after most other crimes had come to be defined by statute, public-order common law offenses continued to be recognized as flexible means to promote the perceived common good.²³³ Ultimately, the dominant conception of the

²²⁷ *Stuart*, 547 U.S. at 405.

²²⁸ *Cf.* *Thompson v. Louisiana*, 469 U.S. 17, 22 (1984) (noting that police were entitled to “seiz[e] evidence under the plain-view doctrine while they were in petitioner’s house to offer her assistance”); *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (“[T]he police may seize any evidence that is in plain view during the course of their legitimate emergency activities.”).

²²⁹ *See Bittner*, *supra* note 48, at 710 (“[P]atrolmen encounter certain matters they attend to by means of coercive action, . . . called ‘preventative arrests.’”); *id.* (“[P]atrolmen . . . use [the law] as a resource to solve certain pressing practical problems in keeping the peace.”).

²³⁰ *See Bowers*, *Pointless Indignity*, *supra* note 40, at 1008 (“[T]he Court—by refusing to consider an officer’s subjective reasons for action—has failed to draw a line between peacekeeping and law enforcement objectives when an officer’s motives are mixed. That is, police officers may exploit their peacekeeping authority to build criminal cases . . .”).

²³¹ *See Natapoff*, *supra* note 112, at 1087-88 (“At its best, order maintenance policing aims to do what zoning, nuisance law, and other urban development policies do: improve the livability, safety, and economic value of shared urban spaces. Those are laudable goals, but they are not centrally about evidence and culpability.”); *see also* Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 614 (2014) (concluding that the modern criminal justice system has taken on a role “largely organized around the supervision and regulation of the population . . .”).

²³² 2 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS, book 4 at 439 (George Sharswood ed., 1866); *see, e.g.*, *Shaw v. Director of Public Prosecutions*, [1962] AC 220 (Eng.); *Rex v. Manley*, [1932] 29 AC 574, 575 (KB) (Eng.) (recognizing the validity of the common law crime of “effect[ing] a public mischief”).

²³³ *See Commonwealth v. Taylor*, 5 Binn. 277, 281 (Pa. 1812) (“The malicious ingenuity of mankind is constantly producing new inventions in the art of disturbing their neighbours. To this invention must be opposed general principles [and common law crimes], calculated to meet and punish them.”); *see also Shaw*, [1962] AC at 267 (claiming that it is the duty of courts to “guard . . . against attacks which may be the more insidious because they are novel and unprepared for”).

legality principle won out, and the criminal justice system transitioned to precisely drawn public-order statutes.²³⁴ But peacekeeping endures as a “residual power to enforce . . . safety and order”—a stopgap that officers may manipulate to fight crime.²³⁵

Look no further than the *Terry* stop-and-frisk. In its initial iteration, the practice was intended to serve peacekeeping needs only—particularly, the need for officer and public safety.²³⁶ But officers are well aware that stop-and-frisks also may turn up evidence of crime, which makes the practice quite useful in settings where conventional Fourth Amendment conduct rules would prohibit searches. Unsurprisingly, then, the stop-and-frisk has evolved (or devolved) over time from a peacekeeping measure to a law-enforcement expedient.²³⁷ Nevertheless, peacekeeping still provides the operative test—a fluid evaluation of “common sense and ordinary human experience” over the “rigid criteria” of warrants and probable cause.²³⁸ But whose “common sense” matters? Whose “ordinary human experience”? Only the “inferences” of the reasonable officer.²³⁹ The individual is left with no comparable opportunity to tell her own story arising out of her own lived experiences.²⁴⁰ In this way, flexibility goes only so far. The “rich . . . diversity” of street encounters does not account for the rich diversity of reasonable perspectives regarding these encounters.²⁴¹

Consider, for instance, the pedestrian who flees at an officer’s approach. He cannot be heard to explain that he ran because he too had seen “too many . . . killed,” that he too was scared.²⁴² To the contrary, in *Illinois v. Wardlow*, the Supreme Court used the very fact of a suspect’s “headlong” flight as a reason to excuse a subsequent stop and frisk. The Court accepted uncritically the

²³⁴ *Supra* Section I.A and notes 73-76.

²³⁵ BLACKSTONE, *supra* note 232, at 439.

²³⁶ See *Terry v. Ohio*, 392 U.S. 1, 22-23 (1968) (observing that general “crime prevention and detention” are not appropriate bases for a stop-and-frisk); see also Seidman, *supra* note 48, at 154 (“[T]he commentators have missed a significant aspect of *Terry* that has not expanded at all: For almost thirty years, the Court has steadfastly refused to permit *Terry* frisks designed to uncover evidence of crime. Instead, the frisk is permissible only to protect the officer from the threat of violence.”)

²³⁷ See generally Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457 (2000); Tracey Maclin, *Terry v. Ohio’s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN’S L. REV. 1271, 1277-79 (1998); cf. *supra* notes 73, 109, 145 and accompanying text (discussing police manipulation of known conduct rules and exceptions therefrom).

²³⁸ *United States v. Sharpe*, 470 U.S. 675, 685 (1985).

²³⁹ *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) (observing that reasonableness should be evaluated according to the reasonable officer’s “inferences about human behavior”).

²⁴⁰ See *supra* notes 157-163, *infra* notes 243-52, and accompanying text.

²⁴¹ *Terry*, 392 U.S. at 13 (describing street encounters as “incredibly rich in diversity”); see also *infra* notes 355-59 and accompanying text (discussing studies of “cultural cognition”).

²⁴² See *supra* note 178 and accompanying text (discussing *Ryburn*).

state's narrative that flight is "the consummate act" of culpable "evasion."²⁴³ And it wholly disregarded what else pedestrians might try to evade. There are, in fact, many "innocent and understandable" reasons why a person might "quit the vicinity with all speed," as the *Wardlow* dissent made plain.²⁴⁴ Look no further than the recent shootings of civilians by police and of police by civilians.²⁴⁵ Street encounters are dangerous. Once engaged, a pedestrian might understandably perceive that her safest course of action is to run.²⁴⁶

More to the point, pedestrians have every right to flee—that is, unless and until officers have satisfied their conduct rules.²⁴⁷ In *Wardlow*, the suspect ran after officers approached on a blind hunch (but perhaps not a colorblind hunch).²⁴⁸ And the dominant conception of the legality principle promises that the pedestrian should be allowed to leave in the face of inchoate suspicion.²⁴⁹ Here, however, the exercise of that right did not function as a directive to the officers to stand down. To the contrary, the pedestrian's right of flight was self-defeating.²⁵⁰ It provoked pursuit and empowered seizure. The lesson is not lost on either officers or pedestrians: it is cheap, easy, and effective for police to approach a hot spot with sirens blaring—to create fear,

²⁴³ See *Wardlow*, 528 U.S. at 124 ("Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such."). *But cf. id.* at 129, n.3 (Stevens, J., dissenting in part) (rejecting the Biblical proverb that "the wicked flee when no man pursueth").

²⁴⁴ *Id.* at 131 (Stevens, J., dissenting in part) ("[A] reasonable person may conclude that an officer's sudden appearance indicates nearby criminal activity . . . [and] a substantial element of danger—either from the criminal or from a confrontation between the criminal and the police.").

²⁴⁵ See *infra* notes 342, 386–87, 423 and accompanying text (describing tragic deaths of civilians and police officers).

²⁴⁶ See *Wardlow*, 528 U.S. at 132–33 (Stevens, J., dissenting) ("Among . . . minorities and those residing in high crime areas, there is also the . . . belie[f] that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence. For such a person, unprovoked flight is neither 'aberrant' nor 'abnormal.'"); see also *supra* notes 202–11 and accompanying text (describing encounters "fraught with danger" (quoting *Arizona v. Johnson*, 555 U.S. 323 (1999))).

²⁴⁷ *Supra* Section I.B, notes 147–149, and accompanying text.

²⁴⁸ The majority in *Wardlow* failed to consider the frequency or danger of racially motivated stops. *Cf.* 528 U.S. at 132 & n.7 (Stevens, J., dissenting) ("Among some citizens, particularly minorities and those residing in high crime areas, there is also the possibility that the fleeing person is entirely innocent, but . . . believes that contact with the police can itself be dangerous."); *supra* notes 156–162 and accompanying text (describing pretextual traffic stop of a group of young African-American men in *Whren v. United States*).

²⁴⁹ See *supra* Part I (defining the relationship between legality, personal autonomy, and state authority); see also Jeremy Waldron, *How the Law Protects Dignity*, 71 CAMBRIDGE L.J. 200, 206 (2012) (describing as lawless a system that would leave "people . . . waiting for coercive intervention from the state").

²⁵⁰ *Cf. supra* notes 178–90 and accompanying text (discussing *Ryburn v. Huff* and *Kentucky v. King*).

see who runs, give chase, and capture.²⁵¹ And pedestrians face an unenviable choice: stay or go at peril.

This is not to say that it is inappropriate to allow police officers to undertake reasonable peacekeeping measures. But there are countervailing moral questions. Most obviously, there is the question of whether it was constitutionally reasonable in the first instance to make a criminal case out of a search or seizure that was constitutionally reasonable for peacekeeping reasons only. That question is never asked and answered. An individual has no chance to argue that the law enforcer and peacekeeper are not similarly situated—that, under certain circumstances, deference to the peacekeeper ought not extend to the law enforcer (whether or not he is one and the same person wearing two different hats).²⁵² Comparatively, officers are empowered by overlapping jurisprudential approaches: a law-enforcement approach, designed deliberately and deliberately and crafted with precision; and a peacekeeping approach, cobbled together *post hoc* to meet extralegal needs. Officers may repurpose, without explanation, these multiple strands of constitutional power.²⁵³ They may slide readily between peacekeeping and law-enforcement roles to pursue prerogatives antithetical to the purpose of the legality principle.

V. UNDERSTANDING PROCEDURAL LEGALITY

On the afternoon of July 10, 2015, Officer Brian Encinia pulled over a twenty-eight-year-old woman, Sandra Bland, for failure to signal a lane change, which she initiated after Encinia's squad car approached close behind her vehicle. A dashboard video camera captured the infraction and much of what happened next.²⁵⁴ It appears that Encinia was going to let Bland off with a warning. But then he asked a question. And, from there, the situation deteriorated rapidly. The written word cannot capture the parties' tones nor the mood of the exchange. Nevertheless, I pick up from the pivotal moment, with emphasis added to key passages:

²⁵¹ Significantly, in *California v. Hodari D.*, the Court held that a mere show of authority—no matter how forceful—is not a seizure. 499 U.S. 621, 626 (1991). Fourth Amendment scrutiny is not triggered until officers apply physical force or compel the suspect to submit to the show of authority. *Id.*

²⁵² See *infra* note 312 and accompanying text (proposing a “special exclusionary rule” that might exclude evidence or bar charges that were products of a peacekeeping search or seizure).

²⁵³ See *supra* Part II (examining the constitutional irrelevance of subjective motivation and the corresponding ability of officers to manipulate their conduct rules and exceptions).

²⁵⁴ A recording of the dashcam footage is publicly available. See TEXAS DEPARTMENT OF PUBLIC SAFETY, *Sandra Bland Traffic Stop*, YOUTUBE (July 22, 2015), <https://www.youtube.com/watch?v=CaW09Ymr2BA> [<https://perma.cc/4QSQ-LU5F>]. The entire written transcript is also available. See Ryan Grim, *The Transcript of Sandra Bland's Arrest Is as Revealing as the Video* HUFFINGTON POST (July 23, 2014), http://www.huffingtonpost.com/entry/sandra-bland-arrest-transcript_us_55b03a88e4bo9b94853b1fi [<https://perma.cc/496M-Q44H>] [hereinafter *Bland Transcript*].

- Encinia: Okay, ma'am. (Pause.) You okay?
- Bland: I'm waiting on you. This is your job. I'm waiting on you. When're you going to let me go?
- Encinia: I don't know. You seem very really irritated.
- Bland: I am. I really am. I feel like it's crap what I'm getting a ticket for. I was getting out of your way. You were speeding up, tailing me, so I move over and you stop me. So, yeah, I am a little irritated, but that doesn't stop you from giving me a ticket, so [inaudible] ticket.
- Encinia: Are you done?
- Bland: You asked me what was wrong, now I told you.
- Encinia: Okay.
- Bland: So now I'm done, yeah.
- Encinia: *You mind putting out your cigarette, please? If you don't mind?*
- Bland: *I'm in my car, why do I have to put out my cigarette?*
- Encinia: *Well you can step on out now.*
- Bland: *I don't have to step out of my car.*
- Encinia: Step out of the car.
- Bland: Why am I . . .
- Encinia: *Step out of the car!*
- Bland: *No, you don't have the right. No, you don't have the right.*
- Encinia: Step out of the car.
- Bland: You do not have the right. You do not have the right to do this.
- Encinia: *I do have the right, now step out or I will remove you.*
- Bland: *I refuse to talk to you other than to identify myself. [crosstalk] I am getting removed for a failure to signal?*
- Encinia: Step out or I will remove you. *I'm giving you a lawful order. Get out of the car now or I'm going to remove you.*
- Bland: *And I'm calling my lawyer.*
- Encinia: *I'm going to yank you out of here.* (Reaches inside the car.)
- Bland: OK, you're going to yank me out of my car? OK, alright.

Encinia: (Calling in backup): 2547.

Bland: Let's do this.

Encinia: Yeah, we're going to. (Grabs for Bland.)

Bland: Don't touch me!

Encinia: Get out of the car!

Bland: *Don't touch me. Don't touch me! I'm not under arrest - You don't have the right to take me out of the car.*

Encinia: *You are under arrest!*

Bland: *I'm under arrest? For what? For what? For what?*

Encinia (To Dispatch.) 2547 county FM 1098 [inaudible] send me another unit. (To Bland) Get out of the car! Get out of the car now!

Bland: *Why am I being apprehended? You're trying to give me a ticket for failure . . .*

Encinia: I said get out of the car!

Bland: *Why am I being apprehended? You just opened my -*

Encinia: *I'm giving you a lawful order. I'm going to drag you out of here.*

Bland: So you're threatening to drag me out of my own car?

Encinia: Get out of the car!

Bland: And then you're going to [crosstalk] me?

Encinia: *I will light you up! Get out! Now!* (Draws stun gun and points it at Bland.)

Bland: *Wow. Wow.* (Exiting car.)

Encinia: Get out. Now. Get out of the car!

Bland: For a failure to signal? You're doing all of this for a failure to signal?

Encinia: Get over there.

Bland: Right. Yeah, *let's take this to court*, let's do this.

All it took was two minutes for things to fall apart. The confrontation continued thereafter with Encinia struggling off-screen to cuff Bland. At one point, a brief physical altercation can be heard, after which Bland cried out: "You just slammed me, knocked my head into the ground. I got epilepsy, you

motherfucker!” Encinia replied: “Good. Good.”²⁵⁵ Subsequently, prosecutors charged Bland with assaulting a public servant. A court held her on \$5000 bail. Three days later, she was dead—an apparent jailhouse suicide by asphyxiation.

A. Legality, Understanding & Rough Justice

What do we know? We know that Officer Encinia was not a good cop. He may not have been quite a bully, but he displayed a stunning lack of professionalism.²⁵⁶ And, ultimately, he was fired for his bad behavior.²⁵⁷ The problem was not only that Encinia failed to control his anger and irritation, but also that he used his emotions as reasons for action. He had no moral or prudential basis to arrest Bland or even to order her out of the vehicle. At several turns, he escalated.²⁵⁸ Even his initial question could be read as a provocation, asking whether she was “okay” in an obviously less-than-concerned tone. There was no need to pressure her to extinguish her cigarette. There was no need to threaten to “yank her out.” There was no need for verbal abuse. And there was no need—at least initially—for physical contact.²⁵⁹ One might respond that there was also no need for Bland to lash out—that she mocked him, just as he mocked her. But only one of them was a professional. More to the point, only one of them had the law at his back.

And Encinia *did* have the law at his back. Encinia was right on the constitutional law, and Bland was wrong.²⁶⁰ As we know, in the course of a valid traffic stop, officers enjoy categorical authority (a blanket exception from the conventional conduct rules) to order motorists and passengers out of vehicles.²⁶¹ And we know also that his subjective motivation was irrelevant to the analysis.²⁶² Thus, he could indulge his annoyance by removing her for

²⁵⁵ *Bland Transcript*, *supra* note 254.

²⁵⁶ According to Seth Stoughton, a former police officer and current law professor, Encinia was more interested in “demanding that [Bland] recognize his dominance” than he was in good policing. Seth Stoughton, *Cop Expert: Why Sandra Bland’s Arrest Was Legal but not Good Policing*, TALKING POINTS MEMO (July 24, 2015), <http://talkingpointsmemo.com/cafesandra-bland-video-legal-but-not-good-policing> [<https://perma.cc/E5P4-M5E9>].

²⁵⁷ Tina Burnside & Joshua Berlinger, *Trooper Who Arrested Sandra Bland Formally Fired*, CNN (Mar. 3, 2016) <http://www.cnn.com/2016/03/03/us/sandra-bland-officer/fired/index.html> [<https://perma.cc/LZ6N-UAGD>]; *see also infra* notes 393–94 and accompanying text (discussing promise of political and institutional checks on inequitable policing and arbitrary exercises of official coercion).

²⁵⁸ *See* Stoughton, *supra* note 256 (“[Encinia’s] words send a powerful signal: ‘What you said does not matter.’”).

²⁵⁹ *See infra* notes 337–48 and accompanying text (discussing excessive force doctrine).

²⁶⁰ *See* Stoughton, *supra* note 256 (“Encinia had the authority to order Bland to exit her vehicle.”).

²⁶¹ *Supra* note 132 and accompanying text.

²⁶² *Supra* note 86 accompanying text. We know also that Encinia was entitled to lay hands on Bland and use some physical force—at least, once Bland refused Encinia’s lawful order to leave the vehicle. *See infra* notes 337–48 and accompanying text (discussing excessive force doctrine). We cannot

her disobedience. Indeed, he taunted her with this very reality: “You were getting a warning . . . now you’re going to jail.”²⁶³ And, although constitutionally, he had no need to explain himself, he could not help but reveal his *real* reasons to dispatch:

She gave me her driver’s license. I came back to the car . . . to complete [the stop] and tell her what’s she receiving and what to do and so forth. At that time, she’s still very much irritated and so forth . . . She wouldn’t even look at me. She’s looking straight ahead, just mad.²⁶⁴

There’s the rub. Bland’s real offense, in Encinia’s estimation, was *disrespect*. And Encinia was entitled constitutionally not only to pull her from her car for that manufactured offense, but also to arrest her. Indeed, pursuant to *Atwater v. Lago Vista*, he could have arrested her from the outset based solely upon the traffic infraction—that is, even before she refused his lawful (but awful) orders.²⁶⁵

Bland’s problem was formal guilt—the fact that she *actually had* committed the traffic offense. Her mistake was to think that her rights reached beyond legal guilt—to silly stops and inequitable intrusions. She knew that she had the legal right to smoke a cigarette in her own car. She knew that she had the legal right to express simmering annoyance at a trivial traffic stop. And she knew even that she had the legal right to annoy a traffic cop. Her error was to suppose that these legal rights were meaningful under the immediate circumstances. In this way, she bought into the empty promise of the dominant conception of the legality principle. She thought that the formal rules would protect her from official acts of intimidation and harassment, normatively defined. She believed that the criminal justice system would not tolerate illiberal commands. And she paid the price for her confusion.²⁶⁶ She was surprised—*unfairly surprised*—to discover that Encinia

know precisely how a court might have decided the question of excessive force with respect to whatever transpired between Encinia and Bland off-screen. But that is beyond the scope of this Article.

²⁶³ *Bland Transcript*, *supra* note 254.

²⁶⁴ *Id.*

²⁶⁵ See 532 U.S. 318, 323 (2001); *supra* notes 99–111 and accompanying text (discussing *Atwater*).

²⁶⁶ Notably, Encinia may come to pay a legal price, too. But, here, the exception may prove the rule. Encinia was arrested and charged with perjury, because a grand jury “did not believe [his] statement that he removed Bland from the car . . . so he could conduct a safer traffic investigation.” *Burnside & Berlinger*, *supra* note 257. Legally, Encinia would have been better served acknowledging his subjective reason—that he removed Bland merely for her disobedience. Even if that reason is unpopular, it is not unconstitutional, pursuant to prevailing doctrine. See *supra* Sections II.A-B (describing doctrinal proposition that subjective motivation is irrelevant to Fourth Amendment analyses). Ironically, then, Encinia now faces the rough justice of a pretextual prosecution. The prosecuted crime is perjury, but the extralegal offense is bad policing, as determined by a grand jury. *Cf.* Stoughton, *supra* note 256 (commenting on Bland’s arrest and concluding that “even though it was lawful, it was not good policing”). See Bowers, *Normative Grand Juries*, *supra* note 140, at 330 (observing that grand juries may reach decisions based on equitable considerations).

could impose upon her a whole new set of conduct rules, entirely of his own design: *Extinguish your cigarette or else. Don't talk back or else. Get out of the car or else.*²⁶⁷

The temptation is to respond that, in due course, individuals like Sandra Bland may learn the shape of police authority. With experience comes knowledge—knowledge of the breadth of an officer's *real* conduct rules in application. But, if that form of notice were to be deemed sufficient, then legality's premise would ring hollow indeed.²⁶⁸ Little would remain of even the bedrock liberal proscription against status crimes.²⁶⁹ When everyday activities—like walking and driving—call down official exercises of coercion, then the minimally social existence is proscribed at the officer's will. In such circumstances, the *informed* individual is no better off than the *dumbfounded*. He lives as either a hermit or at peril. Anytime the officer does “not like the cut of his jib,” he may be subjected to intrusion—a state of affairs that Justice Douglas once described as “a long step down the totalitarian path.”²⁷⁰

And asymmetric understanding has made worse the prevailing pathologies of pretext and overcriminalization. Imagine that Officer Encinia had the law or facts wrong—that he had misconstrued a lawful lane change for an illegal one. The arrest would still be constitutional as long as his error was reasonable.²⁷¹ Worse still, if Bland—like millions of Americans—had an outstanding “small traffic” warrant for a previously unpaid (or unpayable) fine, her arrest would be constitutional whether Encinia's mistake was reasonable or not.²⁷²

²⁶⁷ *Supra* notes 254–60. On this score, consider the observation of hip-hop impresario and entrepreneur, Jay-Z (who was once Shawn Carter, a young man of limited means, coming of age in the Bedford-Stuyvesant neighborhood of Brooklyn):

And I heard: “Son do you know why I'm stoppin' you for?”/ Cause I'm young, and I'm black,
and my hat's real low?/ Do I look like a mind reader, sir? I don't know./ Am I under arrest,
or should I guess some more?/ “Well you was doin' fifty-five in a fifty-four.”

JAY Z, *99 Problems*, on THE BLACK ALBUM (Roc-A-Fella Records 2004).

²⁶⁸ *Cf.* *Betancourt v. Bloomberg*, 448 F.3d 547, 559 (2d Cir. 2006) (Calabresi, J., dissenting) (noting that there is nothing “comforting” about a court interpreting the meaning of a statute based on the way it is used).

²⁶⁹ PACKER, *supra* note 6, at 74 (“It is important, especially in a society that likes to describe itself as ‘free’ and ‘open,’ that a government should be empowered to coerce people only for what they do and not for what they are.”); *see also* *Robinson v. California*, 370 U.S. 660, 667 (1962) (holding status crimes unconstitutional).

²⁷⁰ *Terry*, 392 U.S. at 38–39 (Douglas, J., dissenting).

²⁷¹ *See* *Heien v. North Carolina*, 135 S. Ct. 530, 540 (2014) (finding no Fourth Amendment violation when an otherwise illegal stop was effectuated because of a reasonable mistake of law); *supra* note 155 and accompanying text.

²⁷² *See* *Utah v. Strieff*, 136 S.Ct. 2056, 2068 (2016) (Sotomayor, J., dissenting) (“Outstanding warrants are surprisingly common . . . The States and Federal Government maintain databases with over 7.8 million outstanding warrants, the vast majority of which appear to be for minor offenses.”); *see also supra* notes 34, 112, 204, *infra* notes 424–30, and accompanying text (discussing *Strieff*).

* * *

By way of final example, consider the traffic stop of John Felton, an African-American motorist, pulled over outside his mother's home in Dayton, Ohio. Felton used his cellphone to record the stop and demanded to know the officer's reasons for stopping him. At first, the officer provided only the legal explanation—that Felton had failed to signal his turn early enough: “I am acknowledging that *you did signal* . . . you just didn't do it one hundred feet prior to your turn.”²⁷³ In other words, Felton had *almost* complied with the law—but not quite. The triviality of this legalistic (but obviously pretextual) reason was not lost on Felton, who surmised the truth: “You just needed a [legalistic] reason to pull me over, sir.”²⁷⁴ While the officer checked the licenses of Felton and his passenger, Felton expressed his frustration to his camera:

He needed a reason to pull me over He followed me for almost two miles. And then when I get to my mom's house, he want to put on his lights. I'm keeping this shit recording. *He ain't about to Sandra Bland me* I didn't do shit He just needed a reason.²⁷⁵

The statement is telling. Felton *is the informed individual*. He knew what happened to Sandra Bland. He knew the broad scope of the officer's authority. He knew that the officer might act for extralegal reasons. He knew that the law would not adequately protect him from the officer. And he knew that his cellphone camera was a better bet than a constitutional claim.²⁷⁶ He knew the state of play, but he could do nothing with his information. He could only guess at the officer's real reasons.

Courageously, he tried one final time: “Sir, you trailed me for how long? . . . I'm not doing nothing [W]hy were you trailing me?” And, somewhat astonishingly, the officer came clean: “Because you made direct eye contact with me and held onto it when I was passing you.” The officer revealed his ready-made conduct rule—*Don't look at me or else. Don't make me wonder about you or else.*²⁷⁷

* * *

²⁷³ *John Felton Stopped for Eye Contact*, YOUTUBE (Aug. 31, 2015) <https://www.youtube.com/watch?v=UeJBAo-M5Eg> [<https://perma.cc/YKS6-2RGN>] (emphasis added).

²⁷⁴ According to Felton: “This is so childish.” *Id.*

²⁷⁵ *Id.* (emphasis added).

²⁷⁶ See *infra* notes 396–97 and accompanying text (discussing the promise of political and institutional checks).

²⁷⁷ Cf. *Strieff*, 136 S. Ct. at 2069 (Sotomayor, J., dissenting) (suggesting that pretextual stops are especially “degrading”).

It may be tempting to downplay the traffic stop or even the arrest—to claim, for instance, that John Felton suffered only “inconvenience,” not the kind of coercion that ought to implicate heightened concerns about precision and notice.²⁷⁸ Indeed, the dominant conception of the legality principle is built around a formal distinction between law-enforcement intrusions and criminal punishments. On this reading, only criminal punishments are serious enough to merit the full complement of constitutional protections typically associated with the legality principle. Punishment is thought to be a product of criminal conviction only—not of searches, seizures, or even more serious intrusions, like full-custodial arrests or preventative detention.²⁷⁹ Indeed, the Supreme Court relied on this formal distinction to distinguish its holding in *Heien v. North Carolina* from the conventional rule that mistakes of law are impermissible: “[J]ust because [police] mistakes of law cannot justify . . . the imposition or the avoidance of criminal liability, it does not follow that they cannot justify an investigatory stop.”²⁸⁰

But moral philosophers have long endorsed a more functional definition of punishment. The prevailing philosophic conception is that punishment is a brand of coercion that entails *hard treatment* and *stigma*.²⁸¹ And arrests would seem readily to satisfy this description, as even certain Supreme Court Justices have acknowledged. Justice Powell, for instance, called arrests “a serious personal intrusion.”²⁸² Likewise, Justice Stevens emphasized the potential stigmatic consequences when he referenced the “odium of . . . arrest.”²⁸³ Even a majority of the Court once labeled the arrest “a public act that may seriously interfere with the defendant’s liberty . . . disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family, and his friends.”²⁸⁴ We may extend these

²⁷⁸ See, e.g., *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977) (per curiam) (“[A] mere inconvenience cannot prevail when balanced against legitimate concerns for the officer’s safety.”).

²⁷⁹ See, e.g., *United States v. Salerno*, 481 U.S. 739, 747 (1987) (holding that pretrial detention is regulation, not punishment); see also Carol S. Steiker, *The Limits of the Preventative State*, 88 J. CRIM. L. & CRIMINOLOGY 771, 777 (1998) (“Courts and commentators often tend to conclude, too quickly, that if some policy or practice is not ‘really’ punishment, then there is nothing wrong with it.”).

²⁸⁰ See 135 S. Ct. 530, 540 (2014) (explaining that the government still “cannot impose criminal liability based on a mistaken understanding of the law”).

²⁸¹ See, e.g., Joel Feinberg, *The Expressive Function of Punishment*, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 75, 89, 98 (1970) (“Both the ‘hard treatment’ aspect of punishment and its reprobative function must be part of the definition of legal punishment.”).

²⁸² *United States v. Watson*, 423 U.S. 411, 428 (1976) (Powell, J., concurring).

²⁸³ *Illinois v. Wardlow*, 528 U.S. 119, 131 (2000) (Stevens, J., dissenting in part) (quoting *Alberty v. United States*, 162 U.S. 449, 511 (1896)).

²⁸⁴ *United States v. Marion*, 404 U.S. 307, 320 (1971); see also Logan, *Florence v. Board*, *supra* note 100, at 413 (“[W]hen it comes to minor offense arrestees, the taxing, delay-ridden and confusing adjudicatory process itself is punitive, very often dwarfing the personal consequences of *de jure* punishment levied by the state.”); cf. Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 826-44

observations likewise to street stops, which Justice Sotomayor dubbed “invasive, frightening, and humiliating encounters”²⁸⁵ that “have severe consequences much greater than the inconvenience suggested by the name.”²⁸⁶

Sotomayor understood that we must consider also what civilians think and feel—that stops “risk treating members of our communities as second-class citizens.”²⁸⁷ Social science has shown that pedestrians and motorists typically experience police treatment as meaningfully harsh and stigmatizing—perceptions that are shared by others in heavily policed communities.²⁸⁸ Even police officers and prosecutors may come to view stops and low-level arrests as forms of rough punishment (and often, punishment enough).²⁸⁹ Moreover,

(2015) (examining the collateral consequences of arrest); *supra* notes 33–40 (discussing collateral consequences of stops and arrests).

²⁸⁵ *Heien v. North Carolina*, 135 S. Ct. 530, 544 (2014) (Sotomayor, J., dissenting).

²⁸⁶ *Utah v. Strieff*, 136 S. Ct. 2056, 2069, 2070 (2016) (Sotomayor, J., dissenting) (describing stops as “degrading” and “humiliations”); *see also* *Maryland v. Wilson*, 519 U.S. 408, 422 (1997) (Kennedy, J., dissenting) (“When an officer commands passengers . . . to leave the vehicle and stand by the side of the road in full view of the public, the seizure is serious, not trivial.”); *id.* at 419 (Stevens, J., dissenting) (“[C]itizens who cherish individual liberty and are offended, embarrassed, and sometimes provoked by arbitrary official commands may well consider the burden [of being ordered out of a vehicle] to be significant. In all events, the aggregation of thousands upon thousands of petty indignities has an impact on freedom that I would characterize as substantial”); *id.* at 420 (Stevens, J., dissenting) (“To order passengers about during the course of a traffic stop . . . can hardly be classified as a *de minimis* intrusion.”); *see, e.g., infra* notes 100–11, 255–73, 423–31 and accompanying text (discussing cases and incidents).

²⁸⁷ *Strieff*, 135 S. Ct. at 2069 (Sotomayor, J., dissenting).

²⁸⁸ *See* Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159, 175 (2015) (“The fact that racial minorities in cities disproportionately encounter police in both constitutional and unconstitutional contexts fuels [their] perceptions of illegitimacy of the police.”); *see also* Josh Bowers, *Grassroots Plea Bargaining*, 91 MARQ. L. REV. 85, 98–99 (2007) (describing the “fallout of . . . highly localized police enforcement”); Bowers & Robinson, *supra* note 1, at 246 (examining popular perceptions of order-maintenance policing); Rod K. Brunson, “Police Don’t Like Black People”: *African-American Young Men’s Accumulated Police Experiences*, 6 CRIMINOLOGY & PUB. POL’Y 71, 85 (2007) (finding that minority members of “distressed communities” harbor expectations of disrespectful treatment by police officers); Jacinta M. Gau & Rod K. Brunson, *Procedural Justice and Order Maintenance Policing: A Study of Inner-City Young Men’s Perceptions of Police Legitimacy*, 27 JUST. Q. 255, 266 (2010) (“Respondents felt that their neighborhoods had been besieged by police”); *infra* notes 374–75, 423, and accompanying text (discussing “procedural justice”); *see also, e.g.,* BRAND NUBIAN, *Probable Cause, on* FOUNDATION (Arista Records 1998) (“Couldn’t believe it when he took me in/Threw me and my man up in the van, a seven-hour stand/ . . . Now Giuliani wanna talk about the ‘quality of life’/Think he got the right to follow me at night/ . . . Up in central booking . . . people looking.”).

²⁸⁹ FEELEY, *supra* note 32, at 161 (“Traditional police practice encourages officers to administer rough justice on the street in lieu of arrest, but modern police professionalism dictates that an arrest should be made whenever there is any basis for doing so.”); *see also* ALLEN ET AL., *supra* note 21, at 351 (“[O]fficers will often . . . [search or seize] to harass or inconvenience suspects, or to ‘send a message.’”); Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1, 7 (2000) (describing certain arrests as “ends unto themselves”); *cf.* PETER MOSKOS, *COP IN THE HOOD: MY YEAR POLICING BALTIMORE’S EASTERN DISTRICT* 119–20, 155 (2008) (describing how police use arrest, *inter alia*, “to assert authority” and impose rough justice). Elsewhere I examine

because the Supreme Court has refused to constitutionalize either respectful policing or subjective intent, bad officers may use even ordinary force as means to degrade and terrify, with no moral explanation for inequitable conduct.²⁹⁰ Worse still, there are much rougher forms of punishment that are not only serious but also permanent. Of course, misdirected police violence is typically unintended, but the consequences remain the same. One false move (and a bit of bad luck) could describe the boundary between life and death—a killing that might be excused, after the fact, as an erroneous but understandable reaction to the officer’s reasonable perceptions of danger.²⁹¹ And, even once the risk of violence subsides, the burdens of case processing continue.²⁹² In the face of these “process costs,” some petty crime defendants

the phenomenon of rough punishment in more detail. See Bowers, *Legal Guilt, Normative Innocence*, *supra* note 1, at 1698-99 (discussing unintended implications of professional and legalistic policing); BOWERS, *ROUGH JUSTICE*, *supra* note 32.

²⁹⁰ See Meares et al., *supra* note 184, at 123, 141 (“The constitutional criminal procedure as it is written has no capacity to tell police *how* to arrest or stop someone in a way that will tend to support procedural fairness Nothing about constitutional law prohibits a police officer from being rude, and very little . . . promotes the kinds of dignity concerns that people tend to care about.”); see also Bowers, *Pointless Indignity*, *supra* note 40, at 989 (“[T]he Constitution provides no protection against obdurate jerks and mean-spirited bullies.”); Stoughton, *supra* note 256 (“[T]here is no law that requires officers to meaningfully engage with people.”); see, e.g., *Pennsylvania v. Mimms*, 434 U.S. 106, 121 (1977) (Stevens, J., dissenting) (observing that civilians “may regard the police command as nothing more than an arrogant and unnecessary display of authority”); *supra* notes 99–109 (discussing *Atwater v. Lago Vista*).

²⁹¹ See *supra* Part IV, *infra* notes 339, 388, 422–30, and accompanying text (discussing doctrines of mistake, fear, and excessive force and describing potentially lethal consequences of civilian missteps); see also COATES, *supra* note 21, at 9 (“Turn into a dark stairwell and your body can be destroyed.”). In some cases, a civilian might make all the right moves and still be unsafe. See, e.g., Francisco Alvarado et al., *North Miami Police Shoot Black Man Who Said His Hands Were Raised While He Tried to Help Autistic Group-Home Resident*, WASH. POST (July 21, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/07/21/fla-police-shoot-black-man-with-his-hands-up-as-he-tries-to-help-autistic-patient/?utm_term=.95c16dd2e166 [<https://perma.cc/FD55-S93K>]. Coates put it simply: “Each time a police officer engages us, death, injury, maiming is possible.” COATES, *supra* note 21, at 131. The list of dead bodies is long and growing. See, e.g., *List of Killings by Law Enforcement Officers in the United States*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_killings_by_law_enforcement_officers_in_the_United_States [<https://perma.cc/5N4U-D8MY>] (collecting incidents of individuals killed by police officers).

With respect to John Felton, it is frightening to imagine what might have happened to him had he followed through on his misguided plan to resist his traffic stop: “I swear to God, if he need anything, I’m getting out of the car, rolling my windows up and I walk into the house, telling him he can call his backup and everything. But I’m sitting in my mom’s house, because I didn’t do shit.” See Tommy Christopher, *Black Man Pulled Over for “Eye Contact” Lucky to be Alive*, *MEDIATE.COM* (Aug. 30, 2015), <http://www.mediaite.com/online/black-man-pulled-over-for-eye-contact-is-lucky-to-be-alive/> [<https://perma.cc/9NSL-NZHA>] (“[T]he risk of escalation would have increased dramatically had he decided to exit his car and walk into his mother’s house.”).

²⁹² Cf. FEELEY, *supra* note 32, at 293 (“In the lower courts a great many appearances are ritualistic terminations of problems that for all practical purposes were resolved with the arrest itself.”); Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 117, 132 (2008) (discussing process as punishment).

have come to view criminal convictions as welcome exits *from punishment*—opportunities to just “get it over with.”²⁹³

In any event, analogies to punishment should not be determinative. The genuine purpose of the legality principle, appropriately expressed, is to protect against *any* arbitrary state command, whatever form it might take—whether, for instance, arbitrary treatment manifests as an unsubstantiated final sentence or only as an initial barked order to freeze and put your hands up.²⁹⁴ It is the job of judges to protect against the “fundamental unfairness” of inequitable policing, just as it is their job to protect against the “inaccuracy” of false criminal convictions.²⁹⁵

B. *Understanding & Narrative*

The risk of arbitrary treatment is endemic to any state that uses penal law as a principal mechanism to maintain order. The criminal justice system cannot excise the threat, but it is obliged to try. Many of the most problematic cases I have examined entailed too-quick police decisions and actions, for reasons that were unexplained, mistaken, or obviously inequitable. The response of the left-liberal formalist might be to layer on ever-more precisely defined conduct rules—for instance, rules categorically prohibiting pretext, error, or even full-custodial arrest (at least as to some low-level offenses).²⁹⁶ But even if such bright-line reforms were feasible, they likely would prove inadvisable. The temptation is just too great (and too often normatively appropriate) to carve piecemeal exceptions. Life outstrips law.²⁹⁷ Inevitably, an officer will “confront a situation in the field” as to which the facts and law

²⁹³ See MILTON HEUMANN, *PLEA BARGAINING* 69-70 (1978) (“Contrary to what the newcomer expects, defendants are often eager to plead guilty . . . [T]hey contrast the relative ease with which they can plead guilty with the costs in time and effort required to fight a case.”); Bowers, *supra* note 292, at 1136 (describing “process pleas,” like pretrial detention, and discussing circumstances where “conviction may counterintuitively inaugurate freedom”).

²⁹⁴ See *supra* note 98, *infra* notes 302–05, 422–30, and accompanying text (describing different types of arbitrary state treatment in different contexts).

²⁹⁵ Josh Bowers, *Fundamental Fairness and the Path from Santobello to Padilla: A Response to Professor Bibas*, 2 CAL. L. REV. CIR. 52, 53 (2011) (distinguishing between two Due Process approaches—one informed by “fundamental fairness,” the other by “accuracy”—and describing the criminal justice system’s preference for accuracy); see also *infra* notes 375–81 and accompanying text (describing the legality principle as the judge’s domain).

²⁹⁶ See, e.g., Logan, *supra* note 72, at 95 (“[F]ealty to the rule of law compels that police mistakes of law resulting in affirmative deprivations of liberty should not be tolerated.”); *supra* notes 75–76 and accompanying text (describing Anthony Amsterdam’s left-liberal formalist approach to the Fourth Amendment).

²⁹⁷ See Nussbaum, *supra* note 140, at 98 (“[G]eneral ethical or legal rules are . . . useful as outlines, but [are] no substitute for a resourceful confrontation with all the circumstances of the case.”); Bowers, *Legal Guilt, Normative Innocence*, *supra* note 1, at 1691 (endorsing evaluative standards over mechanistic rules); *supra* notes 139–41, *infra* notes 360–61, and accompanying text.

are unclear.²⁹⁸ And it may well be appropriate to consider, when an officer is called upon to act “on the fly,” how conditions might have appeared to the average officer in the moment.²⁹⁹ In some extraordinary circumstances, even pretext might provide a good enough reason for state action.³⁰⁰

But there are countervailing good reasons to invalidate certain morally problematic exercises of official coercion—even exercises that otherwise complied with prevailing conduct rules. Thus, Justice O’Connor would have held unconstitutional the “pointless” arrest in *Atwater v. Lago Vista*, notwithstanding the indisputable presence of probable cause as to the applicable seatbelt offense.³⁰¹ O’Connor urged the Court, instead, to undertake a “realistic assessment of the interests” as a means to promote the “principles that lie at the core of the Fourth Amendment.”³⁰² And, in another case, Justice Stevens saw a like need to balance an “officer’s interest” against “the citizen’s interest in not being required to obey an arbitrary command.”³⁰³ O’Connor and Stevens both understood that bright-line rules are incompetent to reach arbitrariness in its varied forms. As Stevens observed, there are “millions” of street encounters that “are not fungible,” and attention to these differences should compel us to evaluate each and every police intrusion from each and every relevant “standpoint.”³⁰⁴ This is the lesson of *verstehen*—that we may comprehend a complex phenomenon only by “identify[ing] its meaning as this meaning is understood by the actors.”³⁰⁵

But how do we operationalize a bilateral approach to understanding? To some degree, the effort is self-defeating. The very act of prescribing a legal test undercuts a core objective of particularism, which is to abandon the kinds of predesigned structures that exclude relevant considerations and

²⁹⁸ See *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014) (“To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them fair leeway for enforcing the law in the community’s protection The limit is that the mistakes must be those of reasonable men.” (internal quotation marks omitted)); see also *Maryland v. Garrison*, 480 U.S. 79, 87 (1987) (“[T]he Court has also recognized the need to allow some latitude for . . . mistakes that are made by officers in the dangerous and difficult process of making arrests and executing warrants.”).

²⁹⁹ *Heien*, 135 S. Ct. at 539.

³⁰⁰ See, e.g., *United States v. Costello*, 350 U.S. 359, 359 (1956) (involving tax prosecution of organized crime boss); Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435, 1442-45 (2009) (discussing pretextual arrest and prosecution of Al Capone for tax evasion); *supra* note 266 (referencing pretextual perjury prosecution of Brian Encinia, the officer who arrested Sandra Bland).

³⁰¹ 532 U.S. at 360 (O’Connor, J., dissenting).

³⁰² *Id.* at 362-63.

³⁰³ *Pennsylvania v. Mimms*, 434 U.S. 106, 121-23 (1977) (Stevens, J., dissenting).

³⁰⁴ *Id.* at 121.

³⁰⁵ Guy Oakes, *The Verstehen Thesis and the Foundations of Max Weber’s Methodology*, 16 HIST. & THEORY 11, 22 (1977); *supra* notes 20, 135, and accompanying text.

preclude thoughtful deliberation.³⁰⁶ Perhaps the best we may hope for is the common law method, which Jeremy Waldron described as a loose framework for moving “from general evaluative ideas to more specific but still evaluative ideas.”³⁰⁷ Building off Waldron’s endorsement, I have championed a “two-ply” approach to Fourth Amendment reasonableness that would use the common law method to cultivate, organically, a reason-giving requirement of the sort familiar to administrative law.³⁰⁸ As a means to get beyond the conduct rules, judges would demand explanations of the real reasons for action. For present purposes, I plan to sketch and defend two specific iterations of this incremental approach—two *rebuttable presumptions*. Judges could *presume* unreasonable any obviously pretextual search or seizure, as well as any full-custodial arrest for a nonviolent misdemeanor or noncriminal violation. These are modest and uncomplicated reforms. To trigger bilateral understanding, an individual would first need to make a threshold showing of obvious pretext or low-level arrest.³⁰⁹ And the great virtue of a presumption is that it is just a presumption. The state could rebut it by offering good enough reasons for police intrusions—reasons that might be contradicted, in turn, by an individual’s countervailing moral claims.

³⁰⁶ See Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 274, 363 (1996) (arguing that overly mechanistic legal tests “disguise contentious moral issues” and “drive those assessments underground,” producing arbitrary decisionmaking); see also *supra* notes 139–41, 298, and accompanying text (discussing particularism and the rules–standards debate).

³⁰⁷ See Bowers, *Pointless Indignity*, *supra* note 40, at 1024 (“[T]he crux of my prescription is not a call for dyed-in-the-wool particularism but for trust in the common law method—a method that, in its ‘elaboration of a standard,’ allows for a healthy degree of ‘movement from general evaluative ideas to more specific but still evaluative ideas.’” (quoting Jeremy Waldron)); see also Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN’S L. REV. 1149, 1197–1200 (1998) (describing the Fourth Amendment as a “grown” system of incremental development); cf. Shiffrin, *supra* note 140, at 1222 (celebrating the deliberative “virtues” of evaluative standards). On a common law approach to constitutional interpretation, see generally David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1 (2015) and David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

³⁰⁸ See Bowers, *Pointless Indignity*, *supra* note 40, at 1030 (drawing analogies to administrative law and defending a “two-ply” conception of reasonableness as comparatively “more law-bound”); cf. Allen & Rosenberg, *supra* note 307, at 1197–1200 (describing certain Fourth Amendment doctrines as “grown” orders, produced without central coordination, through “cautious, incremental change, with a sensitive awareness of the need for close monitoring and adjustment . . . as the common law demonstrates so well”).

³⁰⁹ Cf. ALLEN ET AL., *supra* note 21, at 514 (“The alternative to the [*Atwater*] Court’s bright-line rule is . . . a standard: Officers should behave reasonably, considering all the circumstances . . . Arrests are presumptively reasonable when the crime is serious; not so when the crime isn’t. That seems to be, roughly, what Justice O’Connor’s dissent argues for. Why, precisely, would that be unadministrable? . . . [T]he Court seems to believe [that] police *uniquely* need clear rules to do their jobs. Perhaps they do But perhaps they don’t”).

Conceptually, we might describe these rebuttable presumptions as just another set of conduct rules. Here, the rules would read—*no pretext, no low-level arrest*. But, because a rebuttable presumption is a soft rule that might bend to persuasive enough reasons, the state would not be allowed to rest exclusively on insincere legalistic justifications and asymmetric equitable excuses. Instead, the giving of reasons would contribute to the judge's understanding of the complete story. The animating idea is that narrative might come to constitute a loose type of legal standard—that stories might “complement” legality's conventional rule-bound baselines.³¹⁰

The knottier question is remedy. One possibility is simply to suppress the fruits of inexcusable pretext or arrest. As I suggested already, just because a search or seizure is reasonable for one purpose, it does not follow that it should be held reasonable for all purposes.³¹¹ Consider, for instance, the officer who would use a peacekeeping search or seizure to build a criminal case. A “special exclusionary rule” would allow the peacekeeper to meet his reasonable “special needs” without also unreasonably exploiting the effort.³¹² Or consider the vice officer who would stop a speeder on a rough hunch that she was transporting drugs. A “special exclusionary rule” would prevent him from unreasonably using traffic law as pretext for narcotics crime.³¹³ But, significantly, suppression would not overdeter by leading good-but-skittish officers to act too passively in the face of potential civil or criminal liability.³¹⁴ As Bill Stuntz wrote of the conventional exclusionary rule: “[S]uppressing evidence looks like a godsend. Suppression is restitutionary . . . deter[ring] without overdeter[ring].”³¹⁵ But, admittedly, suppression is imperfect. Most notably, it would fail to remedy the worst normative abuses—the inequitable misdeeds of bad officers who intend to impose only rough justice without

³¹⁰ See Shiffrin, *supra* note 140, at 1221 (“[R]ules without clear methods of application may require standards as complements”); see also Kelman, *supra* note 83, at 212 (examining how a standard may overlay and supplement a rule).

³¹¹ Notably, the Court once suggested a more nuanced approach with respect to seizures: “A seizure reasonable . . . in one setting may be unreasonable in a different setting.” *Roaden v. Kentucky*, 413 U.S. 496, 501 (1973); see also *supra* notes 125, 225–42, and accompanying text.

³¹² See Michael R. Dimino, Sr., *Police Paternalism: Community Caretaking, Assistance Searches, and Fourth Amendment Reasonableness*, 66 WASH. & LEE L. REV. 1485, 1557 (2009) (“Some commentators . . . have argued for the application of a prophylactic exclusionary rule for evidence found during community-caretaking searches, but have balked at discouraging the searches themselves.”); *supra* Section V.C (discussing “special needs” doctrine).

³¹³ Cf. *supra* notes 166–69 and accompanying text (discussing *Whren* and pretextual stops).

³¹⁴ Cf. William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL'Y, 443, 446 (1997) (“Just as a government faced with large damages liability for running a municipal pool . . . may simply close the pool, a government faced with large damages liability for the police may simply reduce the police presence in areas likeliest to give rise to lawsuits.”).

³¹⁵ *Id.*; see also *id.* at 445 (“The social costs of this overdeterrence are surely high: they can be measured by murders and rapes and drug deals that would not have happened if their perpetrators had been put away.”).

building criminal cases.³¹⁶ This, however, is nothing new. These tradeoffs are familiar to prevailing Fourth Amendment doctrines of suppression and qualified immunity.³¹⁷ That is to say, the details of test and remedy may be worked out incrementally.³¹⁸

* * *

My more ambitious normative claim is to defend the proposition that a particularized approach to constitutional reasonableness does not offend the rule of law. Rather, by surfacing the kinds of contextual questions that are often buried by conduct rules, narrative may promote a “richer conception” of legality.³¹⁹ In this vein, Jeremy Waldron has identified a distinct rule-of-law “aspect”—a “procedural aspect” as compared to a “substantive aspect.”³²⁰ The more conventional substantive aspect “emphasizes rules” and determinacy, whereas the procedural emphasizes “practices and modes of argumentation.”³²¹ Waldron recognized the systemic preference for the substantive aspect.³²² But he argued that, without procedure as supplement, we produce “an impoverished account of the Rule of Law, which treats everything besides the determinacy of the rules as though it did not matter.”³²³ On this reading, narrative is no extravagance to be tolerated as long as it does not impede with the real work of the rule of law; narrative is part and parcel of the real work.³²⁴ This, then, explains where

³¹⁶ Cf. *supra* notes 99–111 and accompanying text (discussing *Atwater v. Lago Vista*, and observing that police sometimes consider rough justice an end rather than a means to produce criminal prosecutions and convictions); see also ALLEN ET AL., *supra* note 21, at 351 (“[O]fficers will often care little about evidence to be used in formal adjudications; rather they will search in order to seize . . . or to harass or inconvenience suspects, or to ‘send a message’ to gang members on the street, or for some other reason having nothing to do with criminal prosecution.”).

³¹⁷ See Stuntz, *supra* note 314, at 445–446 (discussing possibility that civil damages and criminal punishment may overdeter appropriate policing). At a higher level of abstraction, *all* remedies are imperfect. Tort damages do not heal physical injuries. Criminal convictions do not resuscitate the slain.

³¹⁸ Notably, in other criminal procedure contexts, the Court has subscribed to similarly under-theorized remedies. See *Lafler v. Cooper*, 132 S. Ct. 1376, 1389 (2012) (“In implementing a remedy . . . the trial court must weigh various factors; and the boundaries of proper discretion need not be defined here.”).

³¹⁹ Waldron, *supra* note 25, at 58.

³²⁰ See *id.* at 5 (“[O]ur understanding of the Rule of Law should emphasize not only the value of settled, determinate rules and the predictability that such rules make possible, but also the importance of the procedural and argumentative aspects of legal practice.”).

³²¹ *Id.* at 57.

³²² *Id.* at 54, 57.

³²³ *Id.* at 61.

³²⁴ See *id.* at 59 (“I do not think that a conception of law or a conception of the Rule of Law that sidelines the importance of argumentation can really do justice to the value we place on governments to treat ordinary citizens with respect as active centers of intelligence.”); see also *id.* at 55–56 (describing the adjudicatory practice of “offering both sides an opportunity to be heard” to be one of the “elementary features of natural justice”).

positive legality has spun off the rails. It has marginalized procedural opportunities for storytelling. At best, it has treated these opportunities as “optional extras,” not “integral parts.”³²⁵

Of course, concerns remain about predictability and notice. But these are relative concerns. And the prevailing paradigm hardly qualifies as a recipe for consistency and coherence across cases.³²⁶ To the contrary, positive legality often promotes sovereign prerogative over effective limits.³²⁷ For this reason, some scholars have suggested that a degree of equitable oversight might even produce more predictable law enforcement, particularly when it comes to the kinds of petty public-order cases for which moral and prudential considerations predominate over determinations of legal guilt accuracy.³²⁸

And, notably, a richer procedural approach to the rule of law might carry with it also a meaningful procedural form of notice.³²⁹ Admittedly, the individual who is subjected to police coercion cannot recapture her foregone opportunity to live a life free from state intrusion. Still, she might value the knowledge that she has the capacity to explain her predicament and demand an explanation in turn. Along these lines, Tom Tyler has stressed the importance of systemic “voice” for perceptions of “procedural justice.”³³⁰ For

³²⁵ See *id.* at 60 (arguing that “point of view” and “argumentation” are “not optional extras; they are integral parts of how law works and they are indispensable to the package of law’s respect for human agency”); see also Waldron, *supra* note 249, at 212 (arguing that exclusive attention to “the clarity and determinacy of rules . . . is to slice in half, to truncate, what law and legality rest upon”).

³²⁶ See BOWERS, ROUGH JUSTICE, *supra* note 32; see also Sections II.A-B. On the limits of the legality principle, see Bowers, *Pointless Indignity*, *supra* note 40, at 1043 (discussing the manner by which precisely drawn conduct rules create safe harbors for the unfettered exercise of official coercion); Jonathan Simon, *The Second Coming of Dignity* (unpublished manuscript) (on file with author).

³²⁷ *Supra* notes 117–18 and accompanying text.

³²⁸ According to Bill Stuntz: “[G]iving other decisionmakers discretion promotes consistency, not arbitrariness. Discretion limits discretion; institutional competition curbs excess and abuse.” Stuntz, *supra* note 25, at 2039; see also Kahan & Nussbaum, *infra* note 360, at 375–76 (“It’s when the law falsely denies its evaluative underpinnings that it is most likely to be incoherent and inconsistent.”); Bowers, *Legal Guilt, Normative Innocence*, *supra* note 1, at 1676 (endorsing transparent exercises of equitable discretion and adjudication); cf. William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW*, at lviii (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (describing realist view that “[l]aw would actually be more predictable and just if judges candidly articulated the theretofore submerged policy assumptions of their decisions”); M. Glenn Abernathy, *Police Discretion and Equal Protection*, 14 S.C. L.Q. 472, 486 (1962) (explaining that judicial constraints “would work more effectively if the facts of police discretion were recognized openly rather than being hidden beneath the myth of a mandate of full enforcement”); *infra* notes 360–63 and accompanying text (discussing the virtue of transparent moralizing).

³²⁹ See *supra* note 176 and accompanying text (introducing the concept of procedural notice).

³³⁰ See Tom R. Tyler, *Procedural Justice and the Courts* 44 CT. REV. 26, 30 (2007) (“People want to have the opportunity to tell their side of the story in their own words before decisions are made about how to handle the dispute or problem This desire for voice is found to be one of the reasons that informal legal procedures such as mediation are very popular.”); see also David Luban, *Lawyers as Upholders of Human Dignity (When They Aren’t Busy Assaulting It)*, 2005 U. ILL. L. REV. 815, 819

our purposes, the idea of “voice” entails an individual’s awareness not only that her reasonable concerns are going to be considered, but also that her reasonable perspective might be brought to bear to resolve any ambiguities of law and fact. And, since the individual understands her own perspective better than any other, she is likelier to anticipate how conduct rules may bend when they must bend. In this way, procedural notice has the capacity to promote *substantive* notice going forward. More to the point, since studies show that ordinary people “‘know’ fairness” better than formal law, the individual is likelier to discern the shape of constitutional doctrines that accommodate folk notions of equitable treatment.³³¹ As Martha Nussbaum remarked: “[T]he equitable person is characterized by a sympathetic understanding of ‘human things.’”³³² From the individual’s standpoint, then, bilateral understanding is more dependable and predictable than police-friendly asymmetric understanding. It is even potentially more dependable and predictable than precisely drawn conduct rules.³³³

In any event, even if there is some truth to the claim that “argument can be unsettling,”³³⁴ there is surely a difference between “deliberately aiming to treat like cases unlike, and . . . treating like cases differently . . . because we . . . have differing opinions . . . of what constitutes right treatment.”³³⁵ In this

(explaining that when a procedural system “gag[s] a litigant and refuse[s] even to consider her version of the case,” it is, “in effect, treating her story as if it did not exist, and treating her point of view as if it were literally beneath contempt.”); *supra* note 289 and accompanying text (discussing “rough justice”).

³³¹ See Meares et al., *supra* note 184, at 104, 121-23, 139 (“[T]he actual lawfulness of a police officer’s . . . conduct . . . had at best a minor influence upon people’s evaluations of police lawfulness”).

³³² Nussbaum, *supra* note 140, at 94.

³³³ See Nussbaum & Kahan, *infra* note 360, at 287 (observing that an Aristotelian conception of equity requires “asking what a person of practical wisdom would do and feel in the situation,” not by analyzing only what law commands). Bill Stuntz seemed to intuit this when he wrote: “[S]harp legal lines between ‘searches’ and ‘seizures’ and everything else ought to be replaced with hazier boundaries between decent police behavior and the indecent kind.” William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2141 (2002).

³³⁴ See Waldron, *supra* note 25, at 8 (“[T]here are aspects of the procedural side of the Rule of Law that are in some tension with the ideal of formal predictability.”).

³³⁵ Shiffrin, *supra* note 140, at 1242-43; see also Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 OHIO ST. J. CRIM. L. 329, 347 (2006) (“Treating like cases alike is a value, but not the only one. Equality also requires treating unlike cases unlike . . . Justice demands a balance of many competing values . . . that should keep justice from being inexorable and rigid.”). Perhaps the best statement I have read of late on the virtues of thoughtful moral deliberation over artificial consistency comes from Jacques Barzun:

[J]udgment does not mean outward consistency. The best judgment often looks inconsistent . . . [A] traveler was given hospitality by some remote peasants, who noticed with horror that the man blew on his hand to keep them warm and again on his soup to make it cool. Being great readers of Euclid and lovers of consistency, the peasants killed their guest, because his inconsistency frightened them. The poor victim, as we know, had a perfectly sensible idea. Life is not geometry. The living have to blow hot and cold, whether they like it or not.

Jacques Barzun, *The Advantages of Inconsistency*, GENTLE REREADER (Feb. 6, 2014), <https://gentlereader.com/2014/02/> [<https://perma.cc/6UTJ-K56E>].

vein, Seana Shiffrin has described the “virtues of fog”—that qualitative standards may produce sites of “deliberation and conversation on the ground, redounding to the moral health of both citizens and a democratic polity.”³³⁶ Comparatively, “rule by rote” is incompetent to resolve normatively contested questions, including the question that concerns us most here—whether police were “behaving reasonably.”³³⁷

* * *

If nothing else, a bilateral methodology of meaningful understanding might temper a particularly pernicious aspect of prevailing Fourth Amendment doctrine—namely, that judges currently must collapse or expand temporal horizons of evaluation to accommodate only the officer’s perspective. With respect to excessive force claims, the implications are profound and disturbing. To see what I mean, we need to interpret what the doctrine of excessive force actually is—another prospective piecemeal exception from an officer’s conventional conduct rules. *To wit*, the conventional rule dictates that an officer is obligated to take a suspect into custody *peacefully*.³³⁸ Nevertheless, he may use physical force, as reasonable under the circumstances.³³⁹ Doctrinally, then, an excessive force claim is evaluated in the same manner as any other piecemeal Fourth Amendment exception—“from the perspective of a reasonable officer on the scene.”³⁴⁰ Again, the dominant conception of the legality principle accommodates the perspective of only the conduct rule’s subject and only to excuse his conduct-rule violation. Positive legality thereby dictates that the officer’s story is the

³³⁶ See Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214, 1214, 1240 (2010). *Id.* at 1214 (“[T]he traditional picture ignores the salutary impact that superficial opacity may have on citizens’ moral deliberation and on robust democratic engagement with the law.”).

³³⁷ See *id.* at 1217 (explaining that evaluative standards provoke discussion over whether parties “are treating one another fairly, whether they are acting in good faith, whether they are taking due care, whether they are behaving reasonably, and the like”); see also LOUIS MICHAEL SEIDMAN, OUR UNSETTLED CONSTITUTION 8 (2001) (arguing that an open-textured constitutional standard that “unsettles creates no permanent losers . . . [leaving] citizens with a forum and a vocabulary that they can use to continue the argument”). On this score, Bill Stuntz once offered a counterintuitive criminal justice reform: make penal statutes *more vague* to provide juries and judges with statutory breathing room to moderate police and prosecutorial discretion and power. Stuntz, *supra* note 25, at 1974, 2038-39 (noting that “[t]he criminal law . . . is filled with bright lines” and arguing that governments should “define criminal prohibitions more vaguely—so jurors can exercise judgment instead of rubber-stamping prosecutors’ charging decisions”).

³³⁸ See, e.g., *Graham v. Connor*, 490 U.S. 386, 396 (1989).

³³⁹ See *id.* (“Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.”).

³⁴⁰ *Id.*

only story that matters. And it follows that his relevant timeframe is the only relevant timeframe.

By way of example, consider the horrific death of Tamir Rice, a twelve-year-old boy, shot by police while he played with a toy gun in a public park. The officer who killed Rice exited a squad car mere feet from the child and pulled the trigger *within seconds*.³⁴¹ A seemingly significant question was why the officer had decided to approach so closely and in such an exposed manner, thereby exacerbating an already apparently dangerous situation. But, consistent with dominant conception of legality, the prosecutor narrowed the timeframe to exclude that question: “The Supreme Court instructs [me] to judge an officer by what he or she knew *at the moment*.”³⁴² The only moment relevant to the officer’s excuse was the moment he came face-to-face with the child. And the prosecutor concluded that it was reasonable, from the officer’s perspective, to fire the gun at that moment.³⁴³ But, because the officer’s perspective matters, the prosecutor also expanded the time frame to consider what a reasonable officer might have known about years-old shootings of officers in the area.³⁴⁴ Notice what the prosecutor selectively left out—not only the officer’s dubious decision to invite danger, but also police reports that had described the officer’s firearms skills as “dismal” and his psychological profile as near “emotional meltdown.”³⁴⁵ These reports were no part of the narrative, because they were no part of the officer’s excuse.

It is not necessarily my position that the officer should have been charged. As indicated, I am agnostic as to whether a bilateral methodology ought to extend to contexts where officers are sued civilly or charged criminally.³⁴⁶ Here, I draw upon excessive force doctrine only to illustrate the ways in which

³⁴¹ See Daniel Marans, *How a Prosecutor Managed to Blame a 12-Year-Old for Getting Killed by a Cop*, HUFFINGTON POST (Dec. 29, 2015), http://www.huffingtonpost.com/entry/tamir-rice-timothymcginty_us_5681d451e4b014efe0d91562 [<https://perma.cc/FH75-3RSX>] (“We are instructed to ask what a reasonable police officer, with the knowledge he had, would do in this particular situation.” (quoting prosecutor)).

³⁴² *Id.* (emphasis added).

³⁴³ See *id.*; *cf.* Mullenix v. Luna, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting) (“Instead of dealing with the [officer’s entire course of action] . . . the majority dwells on the imminence of the threat The majority recharacterizes [the officer’s] decision to shoot . . . as a split-second, heat-of-the-moment choice, made when the suspect was ‘moments away.’”). According to Brandon Garrett and Seth Stoughton, this insensitivity to the right timeframes has allowed the Court to treat as irrelevant “imprudent, inappropriate, or even reckless” police conduct that precedes the moment of physical force. See Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 236, 299 (2017) (discussing *San Francisco v. Sheehan*, 135 S. Ct. 1765, 1777-78 (2015)).

³⁴⁴ See Marans, *supra* note 341 (noting that the prosecutor referenced shootings of officers that occurred in 2006 and 1996); *cf.* *Pennsylvania v. Dunlap*, 555 U.S. 964, 964 (2008) (Roberts, C.J., dissenting from denial of cert.) (evaluating officer’s perception of probable cause based on his experience doing drug interdiction and thus crediting officer’s “inferences ‘that might well elude an untrained person,’” and refusing to treat purported drug sale as a “single, isolated transaction”).

³⁴⁵ Marans, *supra* note 341.

³⁴⁶ *Supra* notes 312–19 and accompanying text.

an asymmetric narrative may affect timeframes and transform hard normative claims into oversimplified police excuses.³⁴⁷ My position is only that a genuine and complete story entails much more.³⁴⁸

C. *Understanding & Craft*

The question remains as to whether judges are up to the evaluative task of comprehending complete stories. Lon Fuller once described a related form of reflection, termed “productive thinking,” that demands the rejection of “ready-made solutions” and “familiar props” in favor of “free, flexible, and effective” evaluation.³⁴⁹ This is, of course, not the judge’s standard stock in trade. She tends to gravitate to formal rules by training and by disposition. Rules describe her conventional culture and craft.³⁵⁰ Except, not always. In other Fourth Amendment contexts, judges have demonstrated that they are competent to particularize. To date, they have only made serious efforts to understand officers’ objectively good reasons.³⁵¹ But, by the same approach, judges may recognize and reject officers’ objectively bad reasons. They need only the Supreme Court to extend jurisprudential invitations to do so.

I am somewhat more skeptical about whether judicial elites can access and understand the perspectives of ordinary individuals. The Court’s record is uninspiring. Already, there are two narrow Fourth Amendment doctrines where judges do consider lay perspectives. Specifically, the Court has defined a search based on whether the state has intruded upon an individual’s reasonable expectation of privacy.³⁵² And it has defined a seizure based on

³⁴⁷ See Mark Kelman, *Interpretive Construction in Substantive Criminal Law*, 33 STAN. L. REV. 591, 594 (1981) (explaining that adjudicators make normative choices “between narrow and broad time frames,” and the contestable “interpretive ‘choice’” may prove dispositive).

³⁴⁸ See Meares, *supra* note 288, at 165 (“Although the constitutional framework is based on a one-off investigative incident, many of those who are stopped—the majority of them young men of color—do not experience the stops as one-off incidents Fourth Amendment reasonableness must account for this fact.”).

³⁴⁹ Lon L. Fuller, *On Teaching Law*, 3 STAN. L. REV. 35, 39 (1950); *cf.* COATES, *supra* note 21, at 50 (criticizing the hollow exercise of “limiting the number of possible questions” and “privileging immediate answers” over “courageous thinking”).

³⁵⁰ See Dennis Jacobs, *The Secret Life of Judges*, 75 FORDHAM L. REV. 2855, 2856-59 (2007) (“In our courts, judges are lawyers The result is the incremental preference for the lawyered solution . . . and the confidence and faith that these things produce the best results [J]udges have a bias in favor of legalism and the legal profession It is a matter of like calling unto like.”); *see also* *People v. Warren*, 81 N.W. 360, 363 (Mich. 1899) (“[P]rofessional persons are under a constant temptation to make the law symmetrical by disregarding small things.”); *Hamilton v. People*, 29 Mich. 175, 190 (1874) (observing that legal professionals may reject common sense in favor of “rigid forms and arbitrary classes”); *State v. Williams*, 47 N.C. (2 Jones) 257, 269 (1855) (observing that the legal professional “generalises, and reduces every thing to an artificial system, formed by study”).

³⁵¹ See *supra* Part IV (discussing Supreme Court doctrine that accommodates professional police perceptions but not lay individual perceptions).

³⁵² See, e.g., *United States v. White*, 401 U.S. 745, 752 (1971).

whether a reasonable individual would have felt free to terminate an encounter with police.³⁵³ But, as Paul Robinson and I have examined elsewhere, the Court has adopted somewhat curious conceptions of this mythical reasonable person. The Court's reasonable private person seems exceptionally reclusive, and its reasonable autonomous person seems exceptionally courageous.³⁵⁴

Still, there are reasons to believe that lower court judges might do better than Supreme Court Justices. First, because these judges are closer to the ground, they are likelier to intuit the perspectives of police officers and the policed. Indeed, lower court judges might even have family and friends who occupy one or both camps. Recall Justice Sotomayor's observation: "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life."³⁵⁵ The comment was clumsy, but it powerfully illustrated how cultural proximity generates appreciation. And, true to her words, Sotomayor has come closest, in a series of recent dissents, to championing my preferred methodology of bilateral understanding.³⁵⁶

Second, lower court judges are uniquely well suited to develop and grasp the "protean variety of the street encounter" precisely because they may compel other professionals to help them understand.³⁵⁷ They may ask the

³⁵³ See, e.g., *Florida v. Bostick*, 501 U.S. 429, 436 (1991).

³⁵⁴ See *Bowers & Robinson*, *supra* note 1, at 224-25 (discussing social science studies that demonstrate that Court holdings often do not align with actual societal expectations of privacy). Thus, the Court has sometimes extended a reasonable expectation of privacy only to information an individual keeps secret from the whole world. See *White*, 401 U.S. at 752 ("[O]ne contemplating illegal activities must realize and risk that his companions may be reporting to the police."). Compare *Bowers & Robinson*, *supra* note 1, at 225 n.60 (citing a study showing lay disapproval with police officers rummaging through trash), with *California v. Greenwood*, 486 U.S. 35, 40-41 (1988) (holding no reasonable expectation of privacy in bagged trash). Likewise, the Court has sometimes imagined a heroic ability of the individual to exercise rights to ignore police. Compare *Bowers & Robinson*, *supra* note 1, at 226 ("[F]indings suggest that—notwithstanding the Court's view to the contrary—reasonable people rarely feel free to refuse police requests."), and Tracey Maclin, "Black and Blue Encounters" - Some Preliminary Thoughts about Fourth Amendment Seizures: Should Race Matter?, 26 VAL. U. L. REV. 243, 272 (1991) ("[F]or most black men, the typical police confrontation is not a consensual encounter. Black men simply do not trust police officers to respect their rights."), with *United States v. Drayton*, 536 U.S. 194, 205-06 (2002) (holding that reasonable bus passengers should feel free to terminate drug interdiction).

³⁵⁵ Charlie Savage, *A Judge's View of Judging Is on the Record*, N.Y. TIMES (May 14, 2009), <http://www.nytimes.com/2009/05/15/us/15judge.html> [<https://perma.cc/FB5L-WPAU>].

³⁵⁶ See *supra* notes 155, 167, 203, 343, *infra* notes 424-30, and accompanying text (discussing Justice Sotomayor's dissents in *Mullenix v. Luna*, *Utah v. Strieff*, and *Heien v. North Carolina*); cf. *Illinois v. Wardlow*, 528 U.S. 119, 132-36 (2000) (Stevens, J., dissenting) (considering the reasonable perspectives of both the officer and the civilian to determine the relevance of an individual's flight from police officers); cf. also *Atwater v. Lago Vista*, 532 U.S. 318, 362-63 (2001) (O'Connor, J., dissenting) (concluding that warrantless misdemeanor arrests require a balancing test).

³⁵⁷ *Terry v. Ohio*, 392 U.S. 1, 15 (1968).

attorneys to develop and deliver narratives, honed to each side's worldview. And they may consult social science, like the important empirical work Dan Kahan and others have done on "cultural cognition"—the idea that culturally contingent values shape normative beliefs and even perceptions of fact and risk.³⁵⁸ Lawyers' stories and social scientists' studies could thereby provide useful reference points against which judges might evaluate particular circumstances and perspectives.

Third, and most importantly, lower court judges are moral actors, who inevitably wrestle with normative questions (at least internally), even if prevailing doctrines preclude meaningful constitutional consideration. The aim is to replace the conventional kind of "stealthy moralizing" with transparent moral reasoning.³⁵⁹ And, notably, this goal has long been a principal objective of Aristotelian theories of virtue ethics and jurisprudence.³⁶⁰ Proponents of these theories stress "the virtue of justice" over "strict legal justice"—articulated "legal vision" over rigidly applied "legal rules."³⁶¹ They call upon judges to contemplate "what morality asks of all of us every day and what most of us do, as a general matter."³⁶²

The methodology is introspective, particularistic, and practical—at once, ordinary and complex. It is an approach that does not lend itself to easy answers and, therefore, may sit uncomfortably with the dominant conception of legality. But the judge—well accustomed to reflective deliberation—is up to the task. Indeed, Lon Fuller even concluded that "the kind of situation most

³⁵⁸ See, e.g., Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 120-25 (2007) ("The theory of cultural cognition posits that the heuristic processing of risk information interacts decisively with individuals' defining group commitments."); Kahan, Hoffman, & Braman, *supra* note 74, at (2009) (discussing the theory of cultural cognition of risk); see also, e.g., Anthony A. Braga et al., *The Salience of Social Contextual Factors in Appraisals of Police Interactions with Citizens*, 30 J. QUANTITATIVE CRIMINOLOGY 599, 619 (2014) ("[S]ocial contextual factors shape citizen evaluations of police wrongdoing even when people see the same event.").

³⁵⁹ See Kahan, *supra* note 172, at 153-54 ("Stealthy moralizing is in fact endemic to criminal law The moralizing that occurs with . . . criminal law doctrines . . . [is] on balance a good thing, and . . . ought at least to be made openly."); cf. PACKER, *supra* note 6, at 89 (noting that "the police and the official prosecutors operate in a setting of secrecy and informality").

³⁶⁰ See Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 374 (1996) ("[I]t is when the law refuses to take responsibility for its most contentious choices that its decisionmakers are spared the need to be principled, and the public the opportunity to see correctable injustice."); *supra* notes 139-42, 298, *infra* notes 410-15, and accompanying text (discussing particularism, virtue ethics, virtue jurisprudence, and the virtue of transparency).

³⁶¹ Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centric Theory of Judging*, 34 METAPHILOSOPHY 178, 197 (2003) (emphasis added); see also Nussbaum, *supra* note 140, at 93 ("Aristotle[] . . . define[s] equity as a kind of justice, but a kind that is superior to . . . strict legal justice."); *supra* notes 139-41, 306, and accompanying text; Bowers, *Legal Guilt, Normative Innocence*, *supra* note 1, at 1672.

³⁶² Shiffrin, *supra* note 140, at 1244; see also Waldron, *supra* note 140, at 284 (describing a jurisprudential approach that accommodates "a shared sense among us of how one person responds as a human to another human").

likely to elicit ‘productive thinking’ . . . [is] the process of adjudication.”³⁶³ My faith, then, is a faith in the judge as a moral, rational, empathetic, and sympathetic agent, capable of exercising experiential wisdom and common sense—and capable, also, of articulating that wisdom and common sense, once it is exercised.³⁶⁴ My faith may be misplaced. There are judges who are narrow-minded and insistent on applying rules for rules’ own sake.³⁶⁵ There are even judges who are bullies and brutes, just as there are officers who are bullies and brutes, just as there are defendants who are bullies and brutes, just as there are people who are bullies and brutes.³⁶⁶ But a layer of judicial oversight minimizes the chances that the bullying officer will get the best of the vulnerable individual.³⁶⁷

And there are two final reasons for hope. First, there may be extreme circumstances in which a normatively arbitrary search may be apparent *from any perspective*. Return, again, to *Atwater v. City of Lago Vista*.³⁶⁸ There, even the Supreme Court came to know and identify the bully—just as it has come to know and identify the decent enough officer with the good enough excuse.³⁶⁹ The distinction is that the Court lacked the constitutional will to turn its moral (but rhetorical) condemnation into meaningful constitutional oversight.³⁷⁰ But a normative conception of reasonableness would provide a jurisprudential opportunity for a more willing judge to take action. Second, even if a judge were to underutilize her equitable oversight, the cop on the beat typically cannot know this *ex ante*. He cannot know which judge a criminal case might draw or how that judge might respond to a persuasive normative claim. The

³⁶³ Fuller, *supra* note 349, at 39.

³⁶⁴ Shiffrin, *supra* note 140, at 1231 (“The sort of deliberation that is encouraged [by an evaluative standard] is moral in nature . . .”).

³⁶⁵ Jerome Frank once suggested that a rule-bound approach to adjudication may represent a kind of infantilism—a childlike fear of confronting the real. See JEROME FRANK, *LAW AND THE MODERN MIND* 166 (1930) (“The constant effort . . . is regressive, infantile, and immature.”). Judge Posner, while discussing Frank, wrote that “[t]he child becomes fearful and later in life intolerant of challenges to accepted modes of thought or structures of authority.” See RICHARD A. POSNER, *HOW JUDGES THINK* 99-100 (2008) (“Frank . . . believ[ed] that rigid, dichotomous, ‘inside the box’ thinking . . . was rooted in infantile troubles . . . an unwillingness to interpret law flexibly so that it would keep pace with changing social conditions and understandings.”).

³⁶⁶ For one perspective on a judge as bully, see Albert W. Alschuler, *How Frank Easterbrook Kept George Ryan in Prison*, 50 VAL. U. L. REV. 7, 7-8 (2015) (describing Judge Easterbrook’s involvement in the conviction of former Illinois Governor George H. Ryan).

³⁶⁷ See Stuntz, *supra* note 25, at 2039 (“[G]iving other decisionmakers discretion promotes consistency, not arbitrariness. *Discretion limits discretion*; institutional competition curbs excess and abuse.” (emphasis added)).

³⁶⁸ 532 U.S. 318 (2001); *supra* notes 99-110 and accompanying text.

³⁶⁹ See *Atwater*, 532 U.S. at 346-47 (condemning the officer for behaving badly and subjecting the arrestee to “gratuitous humiliations”).

³⁷⁰ *Id.* at 347 (expressing preference for “readily administrable rules” as opposed to contextual evaluation).

mere possibility of oversight, therefore, might lead the officer to self-screen at the scene—to think twice before intruding in a manner that would be irrational or overly aggressive.³⁷¹ This, according to Seana Shiffrin, is yet another hidden virtue of a comparatively evaluative and opaque standard: In the moment, “those subject to the standard must consider what is or is not fair or reasonable or unconscionable—not merely what is or is not in their interest.”³⁷²

In any event, it may not matter whether the judge is destined to fail. First, even when she falls short, her very efforts to understand carry expressive value.³⁷³ As the literature on “procedural justice” teaches, perceptions of fairness are shaped by opportunities for argument as opposed to favorable substantive outcomes.³⁷⁴ Second, and more importantly, a judge *must* strive to understand (independent of the promise of results) for the fundamental reason that, *by her position, she is obliged to try*. The nature of my claim here is institutional as much as it is normative. The judge may be considered a warden of the legality principle. Legality is one of her basic responsibilities. It puts her on the rule-of-law’s front line, just as politics puts the legislator on representative democracy’s front line.

Indeed, it is precisely because the stakes of law enforcement are so high that the legality principle is seen as playing such an indispensable role in criminal justice.³⁷⁵ The rule of lenity, the presumption of innocence, the Double Jeopardy clause—these and many other procedural protections—are all liberal devices designed to correct (and even overcorrect) for potentially arbitrary errors that could harm the individual.³⁷⁶ And the costs of error extend likewise to moral arbitrariness.³⁷⁷ Particularly in the context of order-maintenance

³⁷¹ See Shiffrin, *supra* note 140, at 1227 (explaining that “[e]valuative standards . . . empower citizens” by demanding “that others alter their conduct or take seriously considerations that might have been neglected or otherwise received relatively short shrift.”); see also COATES, *supra* note 21, at 29 (describing the virtue of “ruthlessly interrogat[ing]” one’s own motives and actions).

³⁷² Shiffrin, *supra* note 140, at 1231.

³⁷³ See Bowers, *Pointless Indignity*, *supra* note 40, at 1024 (discussing the expressive value of a jurisprudence of qualitative reasonableness). See generally Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339 (2000); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

³⁷⁴ See Bowers & Robinson, *supra* note 1, at 219-20 (citing studies about perceptions of “procedural justice” and fairness); see also *supra* notes 288, 320, and accompanying text (discussing “procedural justice” and the “procedural aspect” of the rule of law).

³⁷⁵ See Waldron, *supra* note 249, at 217 (observing that the rule of law is especially important to criminal justice because “its currency is ultimately life and death, prosperity and ruin, freedom and imprisonment”) (contrasting LON L. FULLER, *THE MORALITY OF LAW* 108 (rev. ed. 1969)); *supra* notes 48-50 and accompanying text (discussing the special role legality plays with respect to criminal justice).

³⁷⁶ See Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1018 (1980) (discussing the liberal principle that “it is ultimately better to err in favor of nullification than against it”).

³⁷⁷ See Bowers, *Legal Guilt, Normative Innocence*, *supra* note 1, at 1672; *supra* notes 140-42, 308, 332-70, and accompanying text.

enforcement, the normatively inequitable exercise of coercion may hurt every bit as much as the legally inaccurate.³⁷⁸ With that in mind, the criminal justice system's prevailing asymmetries of understanding seem almost anachronistic—a product of sovereign eras before legality's purported triumph.³⁷⁹ The modern message is that when two sets of rules or exceptions stand in tension, the autonomy interests of the individual ought to outweigh the instrumental needs of the state. Look no further than Blackstone's maxim.³⁸⁰

But, notably, I do not go even that far. I do not definitively prize the individual's interests above those of the state. I seek only case-specific balance; that is, bilateral understanding. The liberal state owes genuine reasons to the autonomous individual, and the judge is duty-bound to provide them:

[I]ndividualized inquiry into the reason for each intrusion . . . [is a] guarantee against arbitrary harassment . . . [T]o eliminate any requirement that an officer be able to explain the reasons for his actions signals an abandonment of effective judicial supervision . . . and leaves police discretion utterly without limits.³⁸¹

Ordinary political checks are just too contingent.³⁸² Even if a particular community-policing measure might carry great practical promise in a particular political climate, the “flourishing” judge must be willing to provide appropriate oversight within her own particular domain—the domain of legality.³⁸³ In the face of all forms of arbitrary state treatment, legality is the judge's liberal call to action. She cannot abdicate her duties—whatever her

³⁷⁸ See *supra* Section V.A, notes 321, 410, 124, 218, *infra* notes 402–06, and accompanying text (discussing the concept of normative innocence, the phenomenon and instances of rough justice, and the notion of process as punishment).

³⁷⁹ See *supra* notes 42, 66–68, 127, 233–36, and accompanying text (discussing common law crimes).

³⁸⁰ See WILLIAM BLACKSTONE, COMMENTARIES *352 (“[B]etter that ten guilty persons escape than that one innocent suffer.”); Bowers, *Pointless Indignity*, *supra* note 40, at 1041 & n.273 (“[A]s Blackstone's maxim prescribes, the state ought to take extra precautions to avoid unwarranted punishment.”); see also AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 445–46 (2012) (“Cruel and unusual punishments are expressly prohibited by the Constitution; merciful and unusual punishments are not.”); Matt Matravers, *Unreliability, Innocence, and Preventative Detention*, in CRIMINAL LAW CONVERSATIONS 81, 82 (Paul H. Robinson, Stephen Garvey, & Kimberly K. Ferzan eds., 2009) (“[A] situation in which someone is overburdened is worse from the point of view of justice than one in which someone carries a burden that is too light. It is worse, still, for someone for whom no burden is appropriate and yet a burden is applied.”).

³⁸¹ *Pennsylvania v. Mimms*, 434 U.S. 106, 121–22 (1977) (Stevens, J., dissenting).

³⁸² Cf. Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1089 (1993) (arguing that, in crafting the rules of criminal procedure, the legislature's “members will be motivated by what consumers of this legislation are willing to pay for it, in such political currency as votes, volunteer time, and campaign contributions”).

³⁸³ See Solum, *supra* note 361, at 83 (describing “flourishing” as one of the aims of “virtue jurisprudence”).

prospects for success. “The art of life is to do this with a mind, guided by a lively conscience. With those guides one should not ask for guarantees.”³⁸⁴

* * *

Much has been made of the deference owed to officers on the beat. I do not mean to discount it entirely, but the argument is overplayed.³⁸⁵ First, there is the claim of danger. Admittedly, police officers do dangerous jobs. The killing of officers in Dallas and Baton Rouge provide vivid and tragic examples.³⁸⁶ But it is also dangerous to live as a presumed suspect, as recent killings of civilians have likewise shown.³⁸⁷ In any event, policing is not an *exceptionally* dangerous job, at least as compared to other industries that are regulated without similar calls for deference. According to the Bureau of Labor Statistics, policing is only the fifteenth most dangerous profession.³⁸⁸ Workers in the logging and fishing industries fare far worse, dying at rates many times higher than officers.³⁸⁹ Even as to homicide, taxi drivers are twice as likely to be victims than police officers.³⁹⁰ Danger matters, but there is more to the story.

Second, there is the claim of police expertise. And, admittedly, police officers are experts at their craft. They are trained professionals, and they develop experiential wisdom. But there are good reasons to believe that *partial* state actors, like police officers and prosecutors, are particularly bad at

³⁸⁴ Barzun, *supra* note 335.

³⁸⁵ See Bowers, *Pointless Indignity*, *supra* note 40, at 1028-29 (describing deference claims as “undefended, underanalyzed, undertheorized, and probably the product of unplanned evolution”) (internal quotation marks omitted); see also KENNETH C. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 188-89, 191 (1976) (discussing related questions of deference to prosecutors and concluding that “no one has done any systematic thinking to produce the assumptions”).

³⁸⁶ See Julie Bloom et al., *Baton Rouge Shooting Jolts a Nation on Edge*, N.Y. TIMES (July 17, 2016), <https://www.nytimes.com/2016/07/18/us/baton-rouge-shooting.html> [https://5A3J-KBQG] (reporting on Baton Rouge shooting); Patrick McGee et al., *Snipers Kill 5 Dallas Officers at Protest Against Police Shootings*, N.Y. TIMES (July 7, 2016), <https://www.nytimes.com/2016/07/08/us/dallas-police-officers-killed.html> [https://perma.cc/9226-JMJV] (describing the shooting in Dallas).

³⁸⁷ See, e.g., Matt Furber & Richard Pérez-Peña, *After Philando Castile’s Killing, Obama Calls Police Shootings ‘an American Issue’*, N.Y. TIMES (July 7, 2016), <https://www.nytimes.com/2016/07/08/us/philando-castile-falcon-heights-shooting.html> [https://perma.cc/45UE-QNEQ] (discussing outrage in the aftermath of the shooting of Philando Castile); Wesley Lowery et al., *Outrage After Video Captures White Baton Rouge Police Officer Fatally Shooting a Black Man*, WASH. POST (July 6, 2016), <https://www.washingtonpost.com/news/morning-mix/wp/2016/07/06/video-captures-white-baton-rouge-police-officer-fatally-shooting-black-man-sparking-outrage/> [https://perma.cc/BWY8-LBBD] (reporting on shooting of a black man by police).

³⁸⁸ See Max Ehrenfreund, *Charted: The 20 Deadliest Jobs in America*, WASH. POST (Jan. 28, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/01/28/charted-the-20-deadliest-jobs-in-america/?utm_term=.e3c02cf7bdbe [https://perma.cc/65MU-DEFU] (displaying data for deaths per 100,000 full time works in specific industries for the year 2013).

³⁸⁹ *Id.*

³⁹⁰ *Id.*

seeing past their own professional perspectives—their own cognitive and institutional biases.³⁹¹ Simply put, an officer’s vested interests may outweigh even his well-developed “situation sense.”³⁹²

This is not to say that constitutional law is the best means to cultivate positive relationships between police and civilians. The most effective reforms might be political. Police chiefs, policymakers, and civic leaders might better alter institutional culture to broaden respect for the individual and for her moral claim to a maximally autonomous life.³⁹³ But, as numerous scholars have

³⁹¹ See Bowers, *Pointless Indignity*, *supra* note 40, at 1029 (noting that, because of underlying institutional incentives, “police and prosecutors may be considerably worse than laypeople at moral reasoning and decisionmaking.”); cf. Bowers, *Legal Guilt, Normative Innocence*, *supra* note 1, at 1688–90 (examining a prosecutor’s cognitive and institutional biases). The institutional biases are somewhat obvious. An officer has prudential reasons to play on people’s fears, as we have already discovered—to shake the tree and see what falls. See *supra* note 196, 252 and accompanying text. After a civilian is stopped (lawfully or not), an officer may check for warrants. See *Utah v. Strieff*, 136 S. Ct. 2056, 2063 (2016) (“The outstanding arrest warrant for Strieff’s arrest is a critical intervening circumstance that is wholly independent of the illegal stop.”). He may search incident to arrest, and catalogue pedigree information incident to booking. See *United States v. Robinson*, 414 U.S. 218, 224 (1973) (“It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment [A] search may be made of the *person* of the arrestee by virtue of the lawful arrest [A] search may be made of the area within the control of the arrestee.”).

In some circumstances, the police officer may even conduct body cavity searches and harvest DNA samples. See *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1521–23 (2012) (holding body-cavity searches of even misdemeanor detainees constitutional); see also *Maryland v. King*, 133 S. Ct. 1958, 1980 (2013) (holding constitutional a statute that provides for taking DNA samples as part of routine booking); see also *id.* at 1989 (Scalia, J., dissenting) (“Make no mistake about it: As an entirely predictable consequence of today’s decision, your DNA can be taken and entered into a national DNA database if you are ever arrested, rightly or wrongly, and for whatever reason.”). Remarkably, the officer may even benefit financially. In some jurisdictions, officer compensation is pegged to arrest numbers. See, e.g., *Brown v. Edwards*, 721 F.2d 1442, 1452–53 (5th Cir. 1984) (noting that a Mississippi fee statute was not unconstitutional “simply on account of the officer’s motives in making the arrest”); see also HARRY G. LEVINE & DEBORAH P. SMALL, *MARIJUANA ARREST CRUSADE: RACIAL BIAS AND POLICE POLICY IN NEW YORK CITY: 1997–2017* 20 (New York Civil Liberties Union ed., 2008) (describing so-called “collars-for-dollars” phenomenon whereby officers make order–maintenance arrests to generate overtime pay); cf. Sarah Stillman, *Taken*, *NEW YORKER*, Aug. 12 & 19, 2013, at 18 (discussing police incentives to enforce criminal laws to trigger civil forfeitures, generating profits for departments). As an early proponent of order–maintenance policing, James Q. Wilson observed: “A legalistic department will . . . make a large number of misdemeanor arrests.” JAMES Q. WILSON, *VARIETIES OF POLICE BEHAVIOR* 172 (1968); see also Bowers, *Legal Guilt, Normative Innocence*, *supra* note 1, at 1698 (“[T]he resultant pool of petty crime arrestees is somewhat larger than the pool of normatively guilty offenders”).

³⁹² *Solum*, *supra* note 360, at 192 (quoting Karl Llewellyn). This seemed to be the case with Officer Encinia, who could not appreciate what he had done to so upset Sandra Bland: “Over a simple traffic stop. Yeah, I don’t get it. I really don’t. Why act like that? I don’t know.” *Bland Transcript*, *supra* note 254. Of course, Officer Encinia might be the atypically bad cop. But his words reveal that if the judge does not strive to understand the individual’s story, it may never be understood meaningfully.

³⁹³ See Bowers & Robinson, *supra* note 1, at 216–19 (discussing community justice). In the same vein, social justice movements may push departments to back progressive talk with effective action. And cameras have kept evidence of some of the worst encounters from falling through the cracks. Thereafter, the bad apple may face discipline. As indicated, Brian Encinia was terminated and is facing perjury charges. See *supra* note 266 and accompanying text.

recognized, judges also may play parts to achieve the laudable objectives of community justice.³⁹⁴ More to the point, *they are compelled to try*.³⁹⁵

D. *Understanding Understood?*

One final (and potentially fundamental) objection. Perhaps there is no asymmetry in the first instance. Courts already recognize a set of particularistic *trial* defenses that potentially could build meaningful understanding into backend questions of criminal conviction. Indeed, there is a fairly obvious overlap between the criminal defendant's affirmative defenses and the officer's justifications and excuses. To see what I mean, consider the character of an officer's intrusions. It is no accident that, traditionally, the definition of a Fourth Amendment search correlated with trespass law, because the conduct of the law enforcer often parallels the conduct of the criminal.³⁹⁶ The officer forces entry into homes. He detains people. He carries away property. He perpetrates violence. And he even sometimes kills. These are the actions of the trespasser, the robber, the kidnapper, and the murderer. But, just as affirmative defenses provide individuals with justifications and excuses against criminal charges,³⁹⁷ the Fourth Amendment provides police officers with justifications and excuses against constitutional claims. Justifications and excuses separate the police officer from the offender in the same fashion that they separate the individual from the offender.³⁹⁸

³⁹⁴ Dan Kahan and Tracey Meares, for instance, have advocated greater constitutional deference to legislation and law enforcement that are products of collaboration between civilians and legal officials. See Dan M. Kahan & Tracey L. Meares, *Forward: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1173 (1998); see also Stuntz, *Unequal Justice*, *supra* note 25, at 2031-39 (offering constitutional reforms designed to localize law enforcement).

³⁹⁵ *Supra* notes 376, 385 and accompanying text. Elsewhere, I have suggested an alternative or complementary reform—a “Fourth Amendment jury”—that might evaluate questions of qualitative reasonableness. Josh Bowers, *Upside-Down Juries*, 112 NW. U. L. REV. ___ (forthcoming 2017). Of course, laypeople might have more difficulty understanding the police perspective. I could envision, therefore, some amount of collaboration between judge and jury. In any event, such an ambitious proposal, which sounds in “popular constitutionalism,” is beyond the scope of this project. See generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2005); Bibas, *supra* note 116, at 914 (examining the respective competencies of lay “outsiders” and professional criminal-justice “insiders”).

³⁹⁶ See *Boyd v. United States*, 116 U.S. 616, 627 (1886) (“By the laws of England, every invasion of private property, be it ever so minute, is a trespass.” (quoting Lord Camden)).

³⁹⁷ See, e.g., George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 954 (1985) (distinguishing between justifications and excuses).

³⁹⁸ See *Boyd*, 116 U.S. at 627 (“No man can set his foot upon my ground without my license If he admits the fact, he is bound to show, by way of justification, that some positive law has justified or excused him [I]t is now incumbent upon the [state actors] to show the law by which this seizure is warranted. If that cannot be done, it is a trespass.” (quoting Lord Camden)).

It is for this reason that I have used the term “excuse” quite purposefully throughout this Article to describe an officer’s piecemeal exceptions from his baseline conduct rules.³⁹⁹ Moreover, I am not the first academic to compare the manner by which “reasonableness” has been used in the contexts of affirmative defenses and criminal procedure.⁴⁰⁰ And we might extend the analogy still further. As applied to Fourth Amendment conduct rules, we could say that a police officer is *justified* for his otherwise illegal intrusion when he has satisfied his baseline conduct rules. Indeed, Mitch Berman has described justifications in just this way: “[O]ne might suppose that justifications simply are those defenses that fall within the system’s conduct rules, while excuses are the defenses residing in the [exceptions]. I think this is precisely right.”⁴⁰¹

For the most part, this overlap with affirmative defenses provides only taxonomical clarity. But it also invites the question of whether the criminal justice system really has been so unwilling to understand the layperson’s perspective. Perhaps affirmative defenses take up the slack?⁴⁰² The problem, however, is that these trial defenses are largely nonresponsive to the rough punishment of an inequitable order–maintenance intrusion.⁴⁰³ Simply put, the question of whether an officer inequitably overreached or overbore is often irrelevant to the individual’s criminal culpability (or lack thereof).⁴⁰⁴ Indeed, this is a principal descriptive point of my project: the problems of order–maintenance policing tend to be unrelated to technical legal guilt.⁴⁰⁵

³⁹⁹ See, e.g., *supra* notes 140, 144 and accompanying text.

⁴⁰⁰ Most notably, scholars have drawn analogies between “reasonableness” in the contexts of civilian self-defense and police use of force. See Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1147–48 (2008) (proposing excessive force test modeled on self-defense doctrine); see also Garrett & Stoughton, *supra* note 341, at 231 (explaining that both doctrines turn on questions of imminence, necessity, and justification); cf. Victoria Nourse, *Passion’s Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1338 (1997) (explaining that the partial defense of provocation is available to the killer when he successfully “appeals to the very emotions to which the state appeals to rationalize its own use of violence.”).

⁴⁰¹ Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1, 33 (2003).

⁴⁰² See JAMES Q. WHITMAN, *HARSH JUSTICE* 35–36 (2003) (observing that “flexible doctrines of liability, permitting defendants to plead excuse or justification . . . [or] extenuating circumstances” provide space for “a form of authority to exercise mercy”); Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive Versus Normative Crime Control?*, 86 VA. L. REV. 1839, 1842 (2000) (“Social science research makes clear that . . . excuse defenses are part of laypersons’ intuitions of justice.”); Huigens, *supra* note 143, at 1439 (describing the manner by which excuses invite “the actual, individualized adjudication of a person by a jury . . . [of] twelve people judging another person”).

⁴⁰³ This is a topic I take up elsewhere in more detail. BOWERS, *ROUGH JUSTICE*, *supra* note 32.

⁴⁰⁴ The entrapment defense may be the exception. But, critically, courts almost never recognize entrapment claims based upon “outrageous” government conduct. Dripps, *supra* note 37; McAdams, *supra* note 119.

⁴⁰⁵ *Supra* notes 30, 35, 111–15, 124, and accompanying text.

In any event, prevailing affirmative defenses are not nearly as flexible and forgiving as an officer's prospective excuses. There is no equivalency of understanding as between the two domains. Whereas a piecemeal Fourth Amendment exception may accommodate all manner of extraordinary policing conditions, affirmative defenses are reserved for a narrow set of fairly well defined and highly unusual circumstances. Thus, courts have recognized no general affirmative trial defense of situational excuse.⁴⁰⁶ And even as to the conditions that might trigger an established affirmative defense, trial courts typically consider the question by reference to the fictive *every person* only—a point of comparison that, according to Judge Bazelon, stands in the way of “a deeper *understanding*” of the defendant's distinct community, culture, and experiences.⁴⁰⁷ Comparatively, the Court's Fourth Amendment methodology of understanding slices the evaluation of reasonableness more finely. The inquiry is attuned to the particular reasonable officer—his professional training, his experiences, his perceptions of his own environment.⁴⁰⁸ If anything, the more apt comparison to the officer's piecemeal Fourth Amendment exception is the practice of jury nullification, which is prohibited by the dominant conception of the rule of law.⁴⁰⁹

Of course, it is not encouraging that trial courts have failed to slice affirmative defenses thinly enough. Perhaps, then, my faith in judges is misplaced after all. Or perhaps there is another reading. The adage that “practice makes perfect” is surely an overstatement, but it may be fair to say that *practice*

⁴⁰⁶ See BONNIE ET AL., *supra* note 2, at 9 (“[T]he criminal law treats the vast majority of accused persons as fit candidates for punishment, notwithstanding their internal failings or situational difficulties.”); Richard Delgado, “Rotten Social Background”: *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9, 9 (1985) (“No jurisdiction in the United States or elsewhere recognizes a criminal defense based on socioeconomic deprivation *simpliciter*.”); Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247, 1261 (1976) (“There are various factors which have a strong positive correlation with violent crime, such as youth and poverty. But social science is not yet ready to make firm causal statements.”); see also *United States v. Alexander*, 471 F.2d 923, 960-65 (D.C. Cir. 1972) (discussing the defendant's defense that his crimes were the result of his “rotten social background”); cf. Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 314 (1996) (proposing an affirmative defense of general situational excuse).

⁴⁰⁷ See David L. Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 396 (1976) (explaining that cultural defenses are necessary to cultivate “a deeper *understanding* of the causes of human behavior in general and criminal behavior in particular” (emphasis added)); see also *Bedder v. Director of Public Prosecutions*, [1954] 1 W.L.R. 1119 (H.L.) (“The reasonable person, the ordinary person, is the person you must consider.”); Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 MINN. L. REV. 959, 996 (2002) (“[T]he dominant culture is not required to accept the values of another community”). *But see, e.g.*, *State v. Kargar*, 679 A.2d 81, 83 (Me. 1996) (holding that the lower court erred by not considering the defendant's cultural background).

⁴⁰⁸ *Supra* Part IV.

⁴⁰⁹ See *Sparf v. United States*, 156 U.S. 51, 87-88 (1895) (“[W]hile to facts answer juries, to the law answers the court” (internal quotations omitted)); see also Leipold, *supra* note 406, at 253-55 (exploring the practice of jury nullification).

makes better. And, to date, the judge is not well enough practiced in the craft of meaningful understanding—a craft that is closer to sociology or literature than conventional legal training.⁴¹⁰ There is no obvious impediment, however, to the judge developing her capacities, as Sherman Clarke once suggested:

Athletes lift weights, run long distances, and the like. They task themselves in ways they hope will build the capacities they need. Life too calls for capacities What strengths and capacities might we develop through bearing this weight? . . . [The] ability to see things from the perspective of others—to not only understand what it is like to be in their shoes, but also to see what the world looks like through their eyes.⁴¹¹

Max Weber suggested that meaningful understanding is integral to productive social interaction. But real-world experience has taught that the gulf may be just too great between the perspectives of police and the populace. On this reading, urban policing is plagued by misunderstanding. But, with time and effort, a judge may learn to become an arbiter of understanding,⁴¹² who negotiates sensitively “the two separate worlds” occupied by the officer and the individual.⁴¹³ And the common law method is available to provide (light) guidance.⁴¹⁴

Indeed, there is even the possibility that a Fourth Amendment methodology of bilateral understanding might push judges to likewise appreciate capaciously and comprehensively criminal trial defenses of general situational excuse. But that is a topic for another time.⁴¹⁵

⁴¹⁰ See MARTHA NUSSBAUM, *LOVE’S KNOWLEDGE*, 95-96 (comparing the novelist to the particularist, who demands “understanding the whole story”); Tucker, *supra* note 134, at 163 (describing the sociological methodology of *verstehen* as an effort to “know enough about the situations from which individuals come, and couple this with knowledge of a particular situation in which they are involved at the time of observation”); *supra* notes 20, 134, 139-41, 306-08, and accompanying text.

⁴¹¹ Sherman J. Clarke, *The Juror, the Citizen, and the Human Being: The Presumption of Innocence and the Burden of Judgment*, 8 CRIM. L. & PHIL. 421, 422 (2013); see also Shiffrin, *supra* note 140, at 1224 (“Maintenance of moral agency, like muscle tissue, requires exercise through practices of attention and thoughtful consideration not merely the will and practice of staying within pre-drawn lines.”).

⁴¹² Thanks to Jim Whitman for helping me think through this point.

⁴¹³ Meares et al., *supra* note 184, at 105. As studies of diversity in the corporate context show, the more viewpoints that are heard, the more reliable and sensible the decision making. See generally SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* (2007). Of course, when it comes to a Fourth Amendment question there is only one ultimate decisionmaker, but the judge may benefit from hearing many voices and perspectives. This is the virtue of some of our most cherished constitutional principles, from federalism, to jury trials, to democratic experimentalism more generally. See generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005); Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005).

⁴¹⁴ See *supra* notes 307-09 and accompanying text.

⁴¹⁵ BOWERS, *ROUGH JUSTICE*, *supra* note 32.

CONCLUSION

Woody Guthrie was on to something when he inscribed these words on his guitar: “This Machine Kills Fascists.” He used his instrument to craft fully formed narratives of oppression.⁴¹⁶ Fortunately, very few police officers behave consistently like oppressors. No doubt, there are some bullies in uniform—but, hopefully, not too many.⁴¹⁷ The threat more often is just the propensity of the law enforcer to exercise dominion reflexively over the usual suspect—to fail to perceive the *genuine* individual with a *genuine* life interrupted.⁴¹⁸ In a related vein, Ta-Nehisi Coates wrote:

Slavery is not an indefinable mass of flesh. It is a particular, specific enslaved woman, whose mind is active as your own, whose range of feeling is as vast as your own; who prefers the way the light falls in one particular spot in the woods, who enjoys fishing where the water eddies in a nearby stream, who loves her mother in her own complicated way.⁴¹⁹

I do not mean to draw too tight comparisons between the evils of slavery or fascism and the more complicated normative questions that surround urban policing. Still, there are dangers common to all institutions of power that come to treat people as numbers or commodities—as bodies without internal lives and stories to tell. At a minimum, there is disengagement and disempowerment—in our terms, the perceived and real inability to “predict and plan” a life.⁴²⁰ This sense of futility is obvious not only in Coates’s prose, but also in the words of Eric Garner, who was stopped for unlicensed vending and then died in a chokehold after he refused to comply with police orders: “Every time you see me, you want to mess with me. I’m tired of it. This ends today! . . . Please leave me alone . . . Every time I turn around, you grab me . . . *I can’t breathe.*”⁴²¹

⁴¹⁶ See, e.g., WOODY GUTHRIE, *All You Fascists Bound to Lose*, YOUTUBE (Jan. 4, 2009), <https://www.youtube.com/watch?v=VwcKwGS7OSQ> [<https://perma.cc/HN28-P4NM>]; cf. *supra* note 310 and accompanying text (describing “complete” stories as expressed by rules tempered by standards).

⁴¹⁷ But cf. *supra* notes 101–02, 211, 257, 268, 367–79, and accompanying text (providing examples of disrespectful or otherwise controversial police behavior).

⁴¹⁸ See Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 907 (1981) (observing that liberalism “has at its core the notion that individuals are the basic unit of moral and political value.”); Kelman, *supra* note 347, at 210 (“Each defendant is a unique individual, with a unique set of perceptions and capabilities. Every crime is committed in a unique setting.”); cf. Tucker, *supra* note 134, at 159 (“The individual is . . . the upper limit and the sole carrier of meaningful conduct.” (quoting Max Weber)); cf. also Josh Bowers, *Response: The Unusual Man in the Usual Place*, 157 U. PA. L. REV. PENNUMBRA 260, 262 (2009) (discussing “usual suspects” policing).

⁴¹⁹ COATES, *supra* note 21, at 69.

⁴²⁰ HART, *supra* note 46, at 180; see also *supra* notes 2, 47, 213, 325, and accompanying text.

⁴²¹ Eric Garner Video —Unedited version, YOUTUBE (July 12, 2015), <https://www.youtube.com/watch?v=JpGxagKOkv8> [<https://perma.cc/84AA-6PKB>] (emphasis added); see also COATES, *supra* note 21, at 82 (describing “a people who control nothing, who can protect nothing”); *supra* notes 289, 329 373–75, and accompanying text (discussing “procedural justice” studies).

One could tell a story of race. Coates did just that.⁴²² But the story is more complicated.⁴²³ There are problems of policing that transcend race.⁴²⁴ Still, the discriminatory effects cannot be ignored or lightly dismissed, particularly within heavily policed majority–minority neighborhoods. On this score, Justice Sotomayor wrote recently of “the canaries in the coal mine whose deaths, civil and literal, warn us *that no one can breathe in this atmosphere*,” inclusive of all, “white and black, guilty and innocent.”⁴²⁵ Sotomayor understands that these “voices matter too.”⁴²⁶ They carry messages that resonate from “the bottom of the well.”⁴²⁷ We cannot ignore them, jurisprudentially, without conveying our own destructive message—a message antithetical to liberal criminal justice.⁴²⁸ In Sotomayor’s words, the message is just this: “[T]hat your body is subject to invasion while courts excuse the violation of your rights . . . that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be catalogued.”⁴²⁹

⁴²² See generally COATES, *supra* note 21; see also KRS-ONE, *Sound of Da Police*, on RETURN OF THE BOOM BAP (Showbiz Records 1993) (“[T]he overseer had the right to kill/The officer has the right to arrest/And if you fight back they put a hole in your chest . . . /After 400 years, I’ve got no choices.”).

⁴²³ See generally *Utah v. Strieff*, 136 S. Ct. 2056, 2064 (2016) (Sotomayor, J., dissenting).

⁴²⁴ See *id.* at 2070 (“The white defendant in this case shows that anyone’s dignity can be violated in this manner. But it is no secret that people of color are disproportionate victims of this kind of scrutiny.”). Likewise, race and racism were not factors in *Ryburn v. Huff* or *Atwater v. Lago Vista*. See *supra* notes 99–112, 142–44, and accompanying text. James Forman has recently discovered decades-long patterns of problematic policing even within minority-led departments. See generally JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017).

⁴²⁵ *Strieff*, 136 S. Ct. at 2070–71 (2016) (Sotomayor, J., dissenting).

⁴²⁶ *Id.*

⁴²⁷ See generally DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992).

⁴²⁸ Cf. Ekow N. Yankah, *The Truth About Trayvon*, N.Y. TIMES, July 15, 2013, at A23, <http://www.nytimes.com/2013/07/16/opinion/the-truth-about-trayvon.html> [<https://perma.cc/8TQC-HURS>] (advocating “an honest [constitutional] jurisprudence that is brave enough to tackle the way race infuses our criminal law . . . a jurisprudence that at least begins to [consider] racial disparities”).

⁴²⁹ See *Strieff*, 136 S. Ct. at 2071 (Sotomayor, J., dissenting) (“Until their voices matter too, our justice system will continue to be anything but.”). Or consider the perspective of an outsider, lay theologian G.K. Chesterton:

And the horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it. Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place. They do not see the awful court of judgment; they only see their own workshop.

G.K. Chesterton, *The Twelve Men*, in *TREMENDOUS TRIFLES* 80, 85–86 (1910); see also Michael O’Hear, *Restorative Justice: Dangers of the Big Tent*, in *CRIMINAL LAW CONVERSATIONS* 602, 602 (Paul H. Robinson, Stephen Garvey, & Kimberly K. Ferzan eds., 2009) (discussing the virtues of a restorative justice system that “insist[s] that victims and offenders are real human beings, not just wooden marionettes to be brought upon the criminal justice stage as it serves the convenience of the lawyers”).

The promise of the legality principle is to keep the overreaching state at bay—to challenge as arbitrary an official’s *legally and normatively* illiberal motivations and actions. To that end, conduct rules lay the foundation. But rules are competent to do only so much. After the rules, there is understanding.⁴³⁰ And meaningful understanding is not asymmetric. Nor may we leave it to sovereign prerogative.⁴³¹ We are *owed* understanding. It is our rightful claim. It is the job of all branches of government to deliver it.⁴³² And legality is the mechanism by which the judiciary does its fair share of the work. That principle—appropriately appreciated and expressed—is our jurisprudential call on the state’s debt.

⁴³⁰ See Shiffrin, *supra* note 140, at 1226 (“[W]here precedent runs out, the parties will have to try to articulate for themselves what sorts of conduct are beyond the pale and whether the conduct they contemplate falls within or outside that line”).

⁴³¹ Cf. PACKER, *supra* note 6, at 93 (“A good definition of a police state would be a system in which the law enforcers were allowed to be the judges in their own cases.”); *supra* notes 4–5, 25, 40–41, 45–52, 127, 250, 295, 385 and accompanying text (describing sovereign prerogative as lawless, and discussing inadequacy of ordinary political checks).

⁴³² Cf. Stoughton, *supra* note 256 (“We all deserve more than legal policing. We deserve good policing.”).