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Grounding Criminal Procedure

Catherine M. Grosso & Barbara O'Brien*

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* Associate Professors of Law, Michigan State University College of Law. We presented an earlier version of this article at a panel on the interface between policing and being policed at the Law and Society Annual Conference in 2015. We thank the panel participants, Shima Baradaran, Sarah Brayne, Eric J. Miller, and L. Song Richardson, as well as audience members, for insightful comments on the article. We also received helpful feedback from Alexandra Natapoff, Matthew Fletcher, and Glen Staszewski, and at the annual Michigan State University College of Law Summer Research Workshop. The research librarians at Schafer Law Library at Michigan State and law student Mitchell Widner provided outstanding research assistance, particularly with respect to several tedious data collection requests.

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I. INTRODUCTION

The tense relationship between citizens and our police forces has made an unbroken appearance on national news in the second decade of the twenty-first century. The nation staggers collectively from city to city, counting, naming, and mourning each human loss. Citizens and communities see the insidious power of racism in our criminal justice system in sharper focus. Activists seek consequences for each perpetrator. Government leaders revisit and revise police department practices with an eye to reform. This empirical study of constitutional criminal procedure as taught and practiced provides new evidence of the need to ground the law governing police investigations in the lived experience of being policed, as well as useful points of focus for government initiatives.

We argue that one source of the disconnect between policing as practiced and as regulated is a gap in knowledge. Most lawyers' shared understanding of police investigation practices arises from published caselaw. Lawyers almost uniformly encounter the nonfiction world of police investigation of crime during law school and learn basic constitutional limits on these investigations during a course on criminal procedure. Law students, like anyone, possess their own narratives of policing from popular culture and, perhaps to a lesser extent, personal experience. But, for many, the course provides a foundational understanding of the "real world"—the understanding that allows the law student to scoff at the inaccuracies of procedural crime dramas.

After law school, new lawyers encounter published cases that build on this foundation and form the enduring basis for the constitutional regulation of police investigation. Each round of argument arises out of an evolving set of published decisions with roots in the earlier cases. We should expect this in a common law system. A problem could arise, however, if the consequent universe of published cases fails to capture important aspects of police investigative techniques that comprise the relationship between the state and individuals.

In fact, the picture of policing in published cases reflects only the facts and observations present in the few cases that made it to the tail end of a formidable winnowing process.¹ A legal controversy about a citizen-police encounter must

¹ Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 L. & SOC'Y REV. 869, 885 (1999) (describing the winnowing process that occurs from initial dispute in a civil case to a law making opportunity).

last from stop to arrest to charge, then past plea negotiations to a trial (or at least a motion to suppress), through an appeal, and, finally, to a published opinion before it can influence this shared understanding. The winnowing reinforces itself through an iterative process. Published cases provide guidance for which facts and cases merit appellate review by validating or invalidating both legal claims² and factual understandings of policing as practiced.³

The empirical study reported in Part I analyzes the depiction of police investigation in five leading criminal procedure casebooks and a one-year sample of state and federal Fourth Amendment decisions. We coded three aspects of the cases included in the study: procedural history (motion to exclude, civil rights case, class action, or other), the severity of the underlying crime (felony or misdemeanor), and whether the case mentioned race or racism.

We found that almost 90% of leading cases in casebooks and over 75% of published decisions arose under the exclusionary rule where a defendant sought to exclude incriminating evidence. We found very little attention given to misdemeanors with the overwhelming majority of reported cases involving felonies. Finally, we found discussions of race or racism overwhelmingly absent from the cases.

Part II presents a larger view of policing and documents how the caselaw itself—caselaw that, in fact, constitutes the jurisprudence of criminal procedure—omits information about policing as practiced on the ground. The caselaw's heavy focus on the exclusionary rule depicts police as shrewd observers of crime (an officer may have been wrong about the Constitution, but she was correct about guilt). This section looks beyond the cases to show that police actually spend a great deal of time following leads that turn out to be unfounded. It also presents research demonstrating that, in contrast to the felony-centric world depicted by the caselaw, misdemeanors overwhelmingly dominate the system. Finally, this section explores some dimensions of the lived and documented importance of race in citizen-police encounters.

Part III analyzes the adverse impact of the gap between policing as imagined and as practiced on the development of the law of criminal procedure. This gap can be particularly costly when decision makers, including many judges and prosecutors, see police practice exclusively or preferentially through the winnowed subset. We argue that the winnowed subset of cases governing the regulation of police arises from and creates a schema about policing that reinforces itself. While those who practice criminal law will encounter situations beyond those presented in published caselaw, the foundation laid in a law

² See, e.g., *Whren v. United States*, 517 U.S. 806 (1996) (denying defendant's Fourth Amendment claim so long as an actual traffic violation occurred, regardless of the subjective motivations the officers might have had for stopping the vehicle); *McCleskey v. Kemp*, 481 U.S. 279 (1987) (denying defendant's Eighth Amendment race discrimination claim because defendant failed to prove purposeful discrimination).

³ See, e.g., *Illinois v. Wardlow*, 528 U.S. 119, 129 (2000) (describing fleeing from a police convoy in an area known to receive intense policing tactics as suspicious behavior).

student's introductory criminal procedure class and reinforced in every subsequent round of briefing may be difficult to overcome. If—as we find—the winnowing process has created a body of caselaw depicting colorblind police as more savvy and the people they encounter as more guilty and dangerous than they really are, lawyers' shared but flawed understanding of policing may foster unwarranted trust in the actors they are charged with regulating and the ways they report facts.

We also argue that overstating police accuracy, suspect guilt, and the presence of felonies can encourage fact finders to uphold police investigative findings with less regard to constitutional protections. We raise concerns that overstating the proportion of police time spent on felonies creates false understandings of the average depth of investigation, police professionalism, and legal review. Finally, we argue that viewing police-citizen encounters from a race-less perspective fundamentally garbles the jurisprudence by misreading context and facts.

In Part IV, we identify two possible strategies to ground the law of criminal procedure more firmly in policing as experienced. Reliance on the exclusionary rule as the primary tool for the regulation of police investigation poses a significant problem that inhibits the kind of meaningful regulation of police necessary to address these problems. We therefore endorse calls to expand the available remedies for unconstitutional behavior as a means to broaden the array of evidence under consideration when evaluating police behavior. Along similar lines, mitigating disincentives to go to trial instead of pleading guilty would broaden the pool of decision makers who evaluate police behavior. Onerous pretrial detention practices and severe sentencing guidelines make the prospect of a jury trial, or even a motion to suppress, too risky for many defendants to chance. With each guilty plea, however, comes a lost opportunity for legal rulemaking and input from the community in their role as jurors.

We also revisit concerns raised by others about the manner in which the rules arising from the winnowed subset of constitutional cases on police investigation are implemented through unpublished executive policies and regulations. Opening these policies to democratic review and deliberately encouraging broad public participation in the development of police investigation policies may produce a richer understanding of the enduring importance of race, the rate of error, and the dominance of low-level crimes and other police "stops."

In the conclusion, we reiterate that both reforms intend to expand the factual record, thereby grounding criminal procedure in the lived experience of being policed. Only by cultivating an understanding of policing grounded in both reality and the values of the communities being policed can the jurisprudence of criminal procedure effectively regulate and ensure constitutional protections.

II. CASEBOOKS AND CASES

We systematically reviewed two subsets of criminal procedure caselaw to analyze empirically the nature of any skew in the body of cases that composes lawyers' shared understanding of police investigation practices. We focused on severity, procedure, and race. In subsection A, we analyze the caselaw that students encounter in introductory courses on the regulation of police investigation. This course constitutes the only nonfiction exposure to this jurisprudence for many lawyers and judges.⁴ For others, defined here as those who work in criminal law, these cases form an influential foundation for subsequent arguments and decisions. In subsection B, we evaluate how a snapshot of contemporary criminal procedure decisions from jurisdictions across the country extends or alters the initial impression the casebooks create.

The jurisprudence of criminal procedure remains almost entirely within the constitutional common law tradition,⁵ and federal and state constitutional law

⁴ For example, only two of the current U.S. Supreme Court justices worked in criminal law: Justice Sonia Sotomayor and Justice Samuel Alito worked as prosecutors. Justice Alito worked as an assistant U.S. attorney and a U.S. attorney. Justice Sonia Sotomayor spent four and one-half years as an assistant district attorney in New York City. Radley Balko, *The Supreme Court's Massive Blind Spot*, WASH. POST (Jan. 22, 2015), https://www.washingtonpost.com/news/the-watch/wp/2015/01/22/the-supreme-courts-massive-blind-spot/?utm_term=.0c219ebf678c.

We also conducted an informal review of the publicly available biographical material available about supreme court justices in the most populous states from within each of the eleven federal circuits. The eleven states included California, Colorado, Florida, Illinois, Massachusetts, Maryland, New York, North Carolina, Ohio, Pennsylvania, and Texas. The justices on these state supreme courts have a higher rate of experience in criminal law than those on the U.S. Supreme Court, as an average of 53% worked in criminal law. The states cluster in three groups. More than 70% of the supreme court justices in California, Colorado, Massachusetts, and Pennsylvania have criminal law practice experience. Approximately 50% of the supreme court justices in Illinois, North Carolina, and Ohio worked in criminal law. Finally, fewer than 30% of the supreme court justices in Florida, Maryland, New York, and Texas had prior criminal practice experience. Florida had the lowest rate of only 14%. The overwhelming majority of state supreme court justices also reported prior judicial experience, suggesting that they may have worked with criminal trials at some point. This would also expose them to a broader sector of criminal cases.

A small fraction of private attorneys work in criminal law. According to the American Bar Association Lawyer Demographics, Year 2015, approximately 3% of lawyers worked in the judiciary in 2005 (the most recent year reported). 8% of lawyers work in the government (exclusive of the judiciary) and 1% in legal aid/public defender offices. All told, fewer than 10% work as prosecutors or public defenders. AM. BAR ASS'N, *Lawyer Demographics, Year 2015*, http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2015.authcheckdam.pdf (last visited Sep. 29, 2016). Approximately 66% of all federal felony defendants in 1998, and 82% of state felony defendants in 1996 used public defenders. *Presumed Guilty: Tales of the Public Defenders, Research the System*, PBS, <http://www.pbs.org/kqed/presumedguilty/3.2.0.html> (last visited Sep. 29, 2016). The remaining criminal defendants are represented by private lawyers.

⁵ See Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3–23 (1975) (discussing constitutional common law with particular reference to core criminal procedure cases and doctrines); Alice Ristroph, *Regulation or Resistance? A Counter-Narrative of Constitutional Criminal Procedure*, 95 B.U. L. REV. 1555, 1556 (2015) (“The Fourth, Fifth, and Sixth Amendments have been among the most jurisgenerative provisions of the Constitution: at least until recently, the Supreme Court has devoted more attention to the interpretation of the Fourth

continues to wield a strong influence.⁶ It remains a system in which individual cases provide the primary basis for applying and developing criminal procedure rights.⁷ Rulemaking opportunities in criminal procedure arise almost exclusively via “published judicial opinions containing substantive interpretations” of the U.S. Constitution or analogous sections of state constitutions.⁸

If not all types of police investigatory tactics are equally likely to lead to a “rule-making opportunity”⁹ in the form of a published opinion, a risk arises that the jurisprudence itself will be impacted.¹⁰ Consider, then, the powerful winnowing process the legal system’s attention to a citizen-police encounter faces from the moment the Constitution becomes relevant. The encounter begins with a police decision to stop or question a citizen or to search a car or a house or a bag—a decision informed by caselaw. This decision should be judged by the standards of the Fourth or Fifth Amendment, but the police investigatory tactic is “invisible” to the law unless the police officer decides to bring a charge.¹¹

As Chief Justice Warren noted in *Terry v. Ohio*, “Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated

Amendment than to any other constitutional provision, and the Fifth and Sixth Amendments’ implications for interrogations and confessions are also frequently adjudicated.”)

⁶ Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 765 (2012) (“By expanding constitutional rights, the [Warren] Court brought constitutional law to bear directly on police officers and departments. By augmenting constitutional remedies, the Court facilitated court challenges to police conduct. And by justifying its sweeping action on the ground that local and state governments had failed to prevent police misconduct, the Court established the primacy of constitutional adjudication for regulating the police. There has been tremendous debate about the import and consequences of these changes to the law of criminal procedure. But whatever else the Court can be said to have done, it allocated wholesale the responsibility for solving the problem of policing to courts and promoted the regulation of the police primarily by constitutional adjudication.”); Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 851 (2014) (noting “[i]n our localist legal tradition, the Court is the sole centralized regulator of police conduct”). Appellate decisions are particularly influential. Andrew Hessick, *The Impact of Government Appellate Strategies on the Development of Criminal Law*, 93 MARQ. L. REV. 477, 477 (2009) (“Appellate courts are a principal source of change in and growth of the criminal law.”). The point here is not that the Constitution is the only law that regulates the police. Rather, we observe that courts rely almost entirely on constitutional law to regulate police.

⁷ Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 409 (2012) (noting that courts and commentators acknowledge that courts not only resolve disputes but also make law and that individual cases remain a primary vehicle for rights-making, both generally and in criminal procedure).

⁸ Albiston, *supra* note 1, at 878 (discussing law making opportunities).

⁹ *Id.* (defining a rule-making opportunity).

¹⁰ See generally Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95 (1974) (arguing that repeat players shape the development of law by strategically selecting which cases proceed to a rule making opportunity); see also Albiston, *supra* note 1 (testing and expanding Galanter’s theory in the context of litigation under the Family and Medical Leave Act of 1993 and providing important insights concerning the ways institutional features of the litigation process impact the meaning of the law itself).

¹¹ Albiston, *supra* note 1, at 883 (discussing the concept of legally “invisible” actions).

to a desire to prosecute for crime.”¹² The citizen-police interaction has potential consequences for the shared understanding of the Constitution.¹³ But, without a charge there is no record of the event and certainly no lawmaking opportunity.

Imagine the successive steps in the process. Suppose the police officer arrests a citizen but the prosecutor decides not to prosecute the case¹⁴ or decides to negotiate a plea, perhaps because the police investigation violated the Constitution.¹⁵ The case is closed, the defendant is relieved, but there will be no record. A lawmaking opportunity will arise only if the citizen has the courage and resources to bring a civil suit against the government.¹⁶

¹² Terry v. Ohio, 392 U.S. 1, 13 n.9 (1968).

¹³ Jordan Blair Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. REV. 672, 676–77 (2015) (“A long line of sociological and criminal justice literature describes the criminal justice process along a spectrum involving complementary institutions of social control (for example, police, courts, and corrections) including the following stages: crime is detected or reported, police investigate and arrest suspects, suspects make court appearances, claims of innocence and guilt are adjudicated, and the guilty are punished (the so-called ‘sanctioning’ stage). Even though sanctioning is only one stage in this progression, it dominates discussions about decriminalization.” (internal citations omitted)). See also Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 FLA. L. REV. 509, 511 (2015) (“It is difficult to assess the precise number of consent searches conducted because so many of them go undocumented, especially when they yield nothing incriminatory.” (citing Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 214 n.7 (2001) (“There is no national clearinghouse for statistics on the number of times police ask for consent to search. And obviously, the published cases that raise the issue of consent are only the tip of the iceberg. For every consent search that ends up in the books, there are likely hundreds that are never disputed, either because nothing was found or because the defendant plea bargained and thus no evidentiary issues were litigated, or even, in rare circumstances, because the person refused consent to search!”))).

¹⁴ Such dismissals are common. Consider, for example, the experiences Issa Kohler-Hausmann documents in her groundbreaking research on misdemeanors in New York City. Issa Kohler-Hausmann, *Misdemeanor Justice: Control Without Conviction*, 119 AM. J. OF SOC. 351, 363 (2013) [hereinafter *Misdemeanor Justice*] (noting that “over 50% of the dispositions for misdemeanor arrests in New York City in 2011 were dismissals in one fashion or another”). See also *id.* at 363 n.12 (“One of the other most common forms of dismissal is where the district attorney declines to prosecute the case. Over the past decade, the decline-to-prosecute rate has fluctuated between 8% and 12.5% of all misdemeanor case dispositions, usually a substantially higher percentage than the decline-to-prosecute rate for felony cases.”). The reasons for dismissals may be unclear, but in at least some instances prosecutors may decline to prosecute because of concerns about investigatory tactics. See, e.g., *id.* at 377–78 (recounting the experience of “Malik”). See also Elina Treyger, *Collateral Incentives to Arrest*, 63 U. KAN. L. REV. 557, 565 (2015) (“The quality of the arrest is a function of its evidentiary basis, and dismissal by the magistrate or non-prosecution are quality-based constraints on police arrest decisions.” (emphasis in original)).

¹⁵ Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2472 (2004) [hereinafter *Plea Bargaining Outside the Shadow of Trial*] (“Losses at trial hurt prosecutors’ public images, so prosecutors have incentives to take to trial only extremely strong cases and to bargain away weak ones.”).

¹⁶ As Christopher Slobogin argues, “A key defect of the exclusionary rule from the behavioral perspective is that it is not applied in the vast majority of illegal searches and seizures In a large number of cases involving questionable stops and searches, the police do not make an arrest, either because they never intended to do so or because they find nothing, so the exclusionary rule never has a chance to come into play. Even when an arrest occurs, the search issue frequently is not litigated because the police don’t pursue the case, or because the case is resolved through a plea or in some

Even if the prosecutor brings a charge, it is most often a misdemeanor and the defendant pleads guilty.¹⁷ Misdemeanors typically proceed in the style of an assembly line with minimal production of records and even less lawyering.¹⁸ Typically, misdemeanors provide no opportunity for a court to evaluate the constitutionality of police behavior or to create precedents to guide future courts evaluating similar investigatory tactics.¹⁹

Similarly, judges seldom prepare written decisions when granting a motion to dismiss.²⁰ The case (and with it the underlying unconstitutional police investigatory tactic) “vanishes” the moment the motion is granted, unless the prosecution chooses to appeal. The prosecution is what Galanter called a “repeat player” and can decide strategically whether to appeal based on the police practices at issue and the strength of the evidence against the suspect.²¹

At the end of the day, a very small percent of citizen-police encounters result in written published opinions on police investigation techniques. Fewer make it to a state supreme court or to the U.S. Supreme Court. Even fewer make it to a casebook. Yet, published cases constitute the whole of the jurisprudence going forward and limit the cases seen to merit review. This observation would raise no concerns so long as the winnowing process was random and unrelated to the very behavior at issue. If, however, the final product arises from and creates a body of precedent with a skewed view of policing, the cases themselves essentially function as part of a damaging jurisprudential feedback loop.

other fashion that avoids or undermines a hearing on the Fourth Amendment issue.” Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 374–75 [hereinafter *Why Liberals Should Chuck the Exclusionary Rule*] (citations omitted).

¹⁷ See Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1313–15 n.7–8 (2012) [hereinafter *Misdemeanors*] (citing the Bureau of Justice Statistics and the National Center for State Courts).

¹⁸ Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 FORDHAM L. URB. J. 1043, 1060 (2013) [hereinafter *Aggregation and Urban Misdemeanors*] (stating that the realities of generic prosecutorial screening policies, over-burdened defense attorneys, and pressures to plead guilty counter the procedural protections that ensure individuation).

¹⁹ *Id.* at 1060 (“[M]isdemeanors comprise the massive bottom of a penal pyramid where cases are processed quickly, in bulk, and where aggregation tendencies dominate.”); *id.* at 1082 (“[U]rban misdemeanants are often handled in the aggregate: identified, prosecuted, and punished in ways that ignore definitional criminal commitments to individuation, evidence, and the ultimate requirement that defendants be personally culpable.”); *id.* at 1085–86 (“The masquerade succeeds in part because criminal law lacks analytic tools to identify the ‘hollowing out’ effects of aggregation. More broadly, it succeeds because transparency and political accountability are in short supply at the bottom of the pyramid.”).

²⁰ See generally Nancy Gertner, *Losers’ Rules*, 122 YALE L.J. ONLINE 109, 113 (2012), <http://yalelawjournal.org/forum/losers-rules> (noting that federal judges seldom prepare a formal written decision for cases where the defendant successfully moves for summary judgment).

²¹ Galanter, *supra* note 10, at 101 (describing the potential influence of repeat players); see also Hessick, *supra* note 6, 479 (describing the government as a repeat player with an opportunity to influence law based on case or argument selection).

A. The Casebook Review

We reviewed the contents of five of the most frequently assigned law school casebooks to develop a richer understanding of the core materials assigned in typical criminal procedure courses.²² We selected these casebooks based on responses to an email to the CrimProf listserv and to individual law professors at the top 25 law schools according to *U.S. News and World Report* after the publishers declined to provide more detailed information.²³ The survey suggested substantial overlap in casebook selection. We also looked more briefly at every other casebook respondents mentioned.

The books we reviewed in detail include the following:

- ALLEN ET AL. COMPREHENSIVE CRIMINAL PROCEDURE (3rd ed. 2011) with 2014 SUPPLEMENT.
- ERWIN CHEMERINSKY & LAURIE LEVENSON, CRIMINAL PROCEDURE (2nd ed. 2013) with 2014 SUPPLEMENT.
- JOSHUA DRESSLER & GEORGE C. THOMAS, III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES, AND PERSPECTIVES (5th ed. 2013) with 2014 SUPPLEMENT.
- YALE KAMISAR ET AL. MODERN CRIMINAL PROCEDURE (13th ed. 2012) with 2014 SUPPLEMENT.
- MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS (5th ed. 2015).²⁴

Our review focused on the regulation of police investigation under the Fourth, Fifth, and Sixth Amendments.²⁵ We identified the main cases presented in the text and identified any mention of race and racism, the crime at issue, and the procedural history (motion to exclude, civil rights case, class action, or

²² Several instructors provide supplementary materials in addition to the casebook, as does one of the co-authors who teaches criminal procedure investigation.

²³ Publishers declined to provide use rates as they had for an earlier article. Compare Stephanos Bibas, *The Real-World Shift in Criminal Procedure*, 93 J. CRIM. L. & CRIMINOLOGY 789, 793 n.16 (2003) [hereinafter *The Real-World Shift in Criminal Procedure*] (reporting that information on casebook adoptions had been provided by publishers).

²⁴ RONALD JAY ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE (3rd ed. 2011 & supp. 2014); ERWIN CHEMERINSKY & LAURIE L. LEVENSON, CRIMINAL PROCEDURE (2nd ed. 2013); JOSHUA DRESSLER & GEORGE C. THOMAS, III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES, AND PERSPECTIVES (5th ed. 2013 & supp. 2014); YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE (13th ed. 2012 & supp. 2014); MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS (5th ed. 2015) [hereinafter MILLER & WRIGHT, CRIMINAL PROCEDURES].

²⁵ We did not review the materials on adjudication.

other).²⁶ Finally, we reviewed introductory and background materials provided by each casebook relating to these topics.

Most books comprised opinions from the U.S. Supreme Court almost exclusively.²⁷ Using cases to teach law has been the dominant practice in the United States since Langdell, but competing methods have been proposed from the start.²⁸ Miller and Wright include more state supreme court decisions but typically focus on constitutional issues in these cases that arise under both the federal and state constitutions.²⁹ Miller and Wright also provide more non-case material than the other casebooks, including state statutes and regulations, and excerpts of administrative reports or academic papers. Allen and colleagues introduce the materials with extensive excerpts from law reviews and a “statistical snapshot” of the state and federal criminal justice systems. Kamisar and colleagues provide a similar overview.³⁰ The materials provide a context from which students might view cases, but cases comprise the bulk of each casebook.

1. On Race and Racism

Stephanos Bibas reported twelve years ago that “[t]raditional doctrinal casebooks include few materials on race . . . beyond the occasional doctrinal subsection.”³¹ We reviewed the casebooks in our sample to see whether the situation has changed and found that largely it has not. The casebooks included materials providing context about policing and the criminal justice system, including the role that race continues to play in the system, but these references were few and far between.

²⁶ Four of the five casebooks present around seventy main cases with extensive notes on additional cases following each main case. The fifth, Chemerinsky and Levenson, present 125 cases as “main cases” with relatively few notes. We limited our review to “main cases” in the interest of time and consistency. “Note cases” were presented in widely varying detail—from paragraphs to a simple citation. This variance made identifying a rule for inclusion too complicated to ensure consistency.

²⁷ See *The Real-World Shift in Criminal Procedure*, *supra* note 23, at 789–90 (noting the focus on Supreme Court doctrine in casebooks the author reviewed in the early 2000s).

²⁸ Russell L. Weaver, *Langdell's Legacy: Living with the Case Method*, 36 VILL. L. REV. 517, 533–34 (1991) (reviewing Langdell's case method). Cf. Anders Walker, *The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course*, 7 OHIO ST. J. CRIM. L. 217, 219–20 (2009) (discussing debates about whether criminal law course should focus on cases); Benjamin H. Barton, *A Tale of Two Case Methods*, 75 TENN. L. REV. 233, 233–34 (2008) (proposing the business school case method as an improvement on the law school case method); Rachel Harmon, *Reconsidering Criminal Procedure: Teaching the Law of the Police*, 60 St. Louis U. L.J. 391, 393 (2016) [hereinafter *Reconsidering Criminal Procedure*] (proposing greater attention to the law of policing beyond constitutional caselaw).

²⁹ See MILLER & WRIGHT, *CRIMINAL PROCEDURES: THE POLICE* xxiii (5th ed. 2015) [hereinafter MILLER & WRIGHT, *THE POLICE*] (explaining the variety of materials included in the casebook).

³⁰ See KAMISAR ET AL., *supra* note 24, at ch. 1.

³¹ *The Real-World Shift in Criminal Procedure*, *supra* note 23, at 805.

As Bibas observed, Miller and Wright continue to provide students with “an awareness” of “racial dynamics” throughout the book.³² The casebook points out the ways in which police continue to rely on race in investigations and notes which proxies for race have been found constitutional.³³ Allen and colleagues seek to cultivate a critical lens with which students might analyze the standard doctrinal sections on racial topics. They do so by: (1) setting forth race and race discrimination as an “important variable” in criminal justice in the introduction,³⁴ (2) providing data on arrests by offense charged and race,³⁵ and (3) providing students with analyses by leading scholars on the way race is embedded in law, law enforcement, and jurisprudence.³⁶

Kamisar and colleagues and Dressler and Thomas also follow the pattern identified by Bibas.³⁷ That is, in addition to addressing race in doctrinal sections as it relates to the doctrinal material,³⁸ each casebook provides excerpts from several law review articles and reports analyzing the role of race in police investigation in one of the first chapters of the casebook.³⁹ These authors also reference scholarly work on the role of race in criminal investigation briefly in other parts of the casebook.⁴⁰

Chemerinsky and Levenson’s casebook post-dates Bibas’s review and includes very few notes on the cases. An introductory section on the purpose of procedure rules invites student to consider the role of race in the criminal justice

³² *Id.* at 809.

³³ See MILLER & WRIGHT, *THE POLICE*, *supra* note 29, at 67 n.1–2 (discussing the use of “bad neighborhoods” as a proxy for race), 69–73 (presenting a state case that discusses racism and pretext stops), 76 n.5 (discussing arbitrary enforcement), 77–84 (discussing criminal profiles based on race), 84–86 (presenting a problem exploring race and witness descriptions), 86–97 (discussing the regulation of racial profiling and presenting three examples of regulation on racial profiling), 343 (presenting a problem on racial patterns in arrests), 353 (note discussing arrest for minor crimes and race), 363–64 (discussing excessive force doctrines and race). See also *The Real-World Shift in Criminal Procedure*, *supra* note 23, at 809 n.73–74 (reviewing a similar pattern in an earlier edition of the casebook).

³⁴ See ALLEN ET AL., *supra* note 24, at 8.

³⁵ *Id.* at 22–26.

³⁶ *Id.* at 30, 52–53, 54–55, 92–94, 97–101, 101–02, 569–76, 579–80, 595–97.

³⁷ *The Real-World Shift in Criminal Procedure*, *supra* note 23, at 805–06.

³⁸ See, e.g., KAMISAR ET AL., *supra* note 24, at 356–58 (mentioning the role of race in traffic stops) and 418 (role of race in police department criminal profiles); DRESSLER & THOMAS, *supra* note 24, at 267–68 (discussing role of race in pretext stops), 321 (importance of race in understanding consent), 361–63 (role of race in reasonable suspicion), 401–03 (use of racial profiles).

³⁹ KAMISAR ET AL., *supra* note 24, at 64–68 (excerpting articles by Tracey Maclin and Sharon L. Davies and reports by the U.S. Department of Justice and the Vera Institute of Justice); DRESSLER & THOMAS, *supra* note 24, at 12–32 (providing a broad review of the role of race in the criminal justice system from multiple perspectives).

⁴⁰ See, e.g., KAMISAR ET AL., *supra* note 24, at 418 (discussing race and flight), 422 (discussing high crime areas and race).

system.⁴¹ The only other mention of race relates to doctrinal material on profiling.⁴²

2. On Procedure

Our next question concerned the procedural context of the cases included in these casebooks. Appeals from a motion to exclude constitute well over 80% of the cases in every casebook we reviewed. Exclusionary motion cases constituted closer to 90% in the majority of the books. One casebook included almost only exclusionary motion cases—more than 95%.⁴³ Miller and Wright include the smallest percent of exclusionary rule cases. Nonetheless, the overwhelming majority of cases in their casebook also arrive in court (state or federal) via a motion to exclude.

This finding is not surprising. The exclusionary rule provides an almost exclusive remedy for police violations of the Fourth, Fifth, and Sixth Amendments.⁴⁴ As such, any collection of the important cases shaping the rules of criminal procedure necessarily includes many exclusionary rule cases. The concern raised here, however, is whether the view of police investigation that develops from exclusionary cases will be distorted.

3. The Crimes at Issue

The balance between misdemeanors and felonies creates a different limitation in the view from the materials included in introductory criminal procedure courses. Allen et al. address the outsized role misdemeanors play in the criminal justice system in their broad introduction. Chapter 1 documents the ratio between felonies and misdemeanors generally, as well as details on the processing of misdemeanors in several state courts.⁴⁵

Nevertheless, as expected when U.S. Supreme Court cases provided the material, the cases included in the five casebooks overwhelmingly involved felonies. Several casebooks approached 90% felony cases.⁴⁶ Miller and Wright's

⁴¹ CHEMERINSKY & LEVENSON, *supra* note 24, at 12.

⁴² *Id.* at 332–33.

⁴³ CHEMERINSKY & LEVENSON, *supra* note 24.

⁴⁴ Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 586 (2011) (“The exclusionary rule is the principal remedy of constitutional criminal procedure”); William C. Heffernan, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J.L. REFORM 311, 318 (1991) (noting that “exclusion is employed in all jurisdictions”). The U.S. Supreme Court has recognized a sufficiently long list of exceptions to the exclusionary rule to call its very survival into question. See generally Christopher Slobogin, *The Exclusionary Rule: Is It on Its Way Out? Should It Be?*, 10 OHIO ST. J. CRIM. L. 341 (2013) [hereinafter *The Exclusionary Rule*] (introducing a special symposium issue comprised of six articles by leading criminal procedure scholars evaluating the continued viability and future of the exclusionary rule).

⁴⁵ ALLEN ET AL., *supra* note 24, at 15, 19.

⁴⁶ KAMISAR ET AL., *supra* note 24; DRESSLER & THOMAS, *supra* note 24.

cases included the lowest percent of felonies at 75%. Chemerinsky and Levenson present two or three times as many as misdemeanors as appear in the other casebooks.⁴⁷

The foundational images provided to lawyers during their first and perhaps only exposure to the fact patterns that constitute the world of police investigation are dominated by cases arising under the exclusionary rule and in which the defendant is accused of a felony.⁴⁸ The casebooks cannot be said to avoid race altogether but nor do most present a thorough examination of the central and dynamic role of race in most citizen–police encounters.⁴⁹

B. One Year of Fourth Amendment Opinions

The next section considers how contemporary criminal practice, as reflected in published opinions, reinforces or diverges from this foundational impression of the nature of police investigation. Earlier, we asserted that the winnowing process feeds itself. By this, we meant that published cases provide guidance for which facts and issues are likely to result in appellate review by validating or invalidating both legal claims and factual understandings of policing as practiced. In so doing, published cases determine which cases survive the winnowing process and join the body of published caselaw. This section—focused on one year of Fourth Amendment case opinions—presents some evidence of the iterative nature of the winnowing process.

⁴⁷ Chemerinsky and Levenson included the following misdemeanor cases: *Alabama v. White*, 496 U.S. 654 (2002); *Atwater v. Lago Vista*, 532 U.S. 318 (2001); *Berkemer v. McCarty*, 468 U.S. 420 (1984); *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822 (2002); *Brigham City v. Stuart*, 547 U.S. 398 (2006); *Camara v. Mun. Court of S.F.*, 387 U.S. 523 (1967); *Florida v. J.L.*, 529 U.S. 266 (2000); *Hiibel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177 (2004); *Kastigar v. United States*, 406 U.S. 441 (1972); *Knowles v. Iowa*, 525 U.S. 113 (1998); *Schmerber v. California*, 384 U.S. 757 (1966); *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973); *South Dakota v. Opperman*, 428 U.S. 364 (1976); *Welsh v. Wisconsin*, 466 U.S. 740 (1984).

Kamisar et al. included the following misdemeanor cases: *Pennsylvania v. Muniz*, 496 U.S. 582 (1990); *People v. Berrios*, 270 N.E.2d 709 (N.Y. 1971); *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973). *Allen et al.* included the following misdemeanor cases: *Alabama v. White*, 496 U.S. 654 (2002); *Berkemer v. McCarty*, 468 U.S. 420 (1984); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979); *New York v. Belton*, 453 U.S. 454 (1981); *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973).

⁴⁸ *See also Reconsidering Criminal Procedure, supra* note 28, at 396 (arguing that “[s]tudents should take criminal procedure. But they shouldn’t walk away believing they understand how to think about regulating the police”).

⁴⁹ Many criminal procedure professors and casebook authors recognize the limits inherent in teaching through caselaw, and therefore incorporate supplemental materials in their own courses or teach separate courses about the regulation of police. *See, e.g., id.*; Karen Sloan, *Law School Courses Delve into Racial Strife*, LAW.COM (Sept. 23, 2016), <http://www.law.com/sites/almstaff/2016/09/23/law-school-courses-delve-into-racial-strife/>; GUERRILLA GUIDES TO LAW TEACHING, <https://guerrillaguides.wordpress.com/> (last visited Oct. 30, 2016) (providing resources for law professors to broaden and deepen classroom discourse to address contemporary debates and the limits of doctrinal analysis).

1. Defining a Sample for Review

Identifying a manageable survey of current court decisions presented a significant challenge. We sought to identify a reasonable number of cases for review, yet a subset large enough to support broader observations. To this end, we sought to review all written opinions referencing the Fourth Amendment and arising from any state supreme court, the U.S. courts of appeals, or the U.S. Supreme Court between June 3, 2014 and June 3, 2015.⁵⁰ Cases from one year across all jurisdictions are limited by time but otherwise appear reasonably likely to constitute a reliable snapshot of the general state of criminal procedure cases. We did not identify any reason to believe that this particular year presented a risk of unusual cases or aberrant behavior by the courts. Likewise, Fourth Amendment cases appear to follow a pattern sufficiently similar to Fifth and Sixth Amendment cases to allow broader observations based on this limited snapshot.

The snapshot initially included 792 cases. We excluded fifty-four cases because they did not pertain to police investigation. This left a sample of 738 cases. Sixty-four percent of the cases (468) arose in federal court and 37% (270) in state court.

The initial sample included published and unpublished cases. State and federal practice diverge widely with respect to publication. Almost all of the state court opinions were published (94%). Publication rules vary by state, but many have adopted selective publication rules for intermediate courts similar to those in federal court.⁵¹ Our sample, however, included only supreme court decisions from state courts, and almost all were officially designated for publication. In contrast, about one-third of the federal cases were designated for publication in the federal reporters (35%). As a result, state cases make up the majority of the 417 published decisions in the snapshot (61%).

⁵⁰ We identified 792 cases using Westlaw KeyCite. Citing References: Amendment IV; Search and Seizure; USCA CONST Amend. IV-Search and Seizure; limited to last twelve months and to cases decided by the U.S. Supreme Court, the U.S. courts of appeals, or any state supreme court.

⁵¹ See generally WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS 81 n.41 (2013) (observing that “many states have limited publication regimes that resemble the federal system”); Penelope Pether, *Constitutional Solipsism: Toward A Thick Doctrine of Article III Duty; or Why the Federal Circuits’ Nonprecedential Status Rules Are (Profoundly) Unconstitutional*, 17 WM. & MARY BILL RTS. J. 955 (2009) (reviewing the history of the practice of nonpublication and raising questions as to its constitutionality under Article III); David R. Cleveland, *Draining the Morass: Ending the Jurisprudentially Unsound Unpublication System*, 92 MARQ. L. REV. 685 (2009).

Table 1. Descriptive Statistics for Sample of Cases

	n	Percent of sample	Raised under exclusionary rule	Underlying crime is felony	Filed by defendant	Won by defendant	Mentions race
FEDERAL CASES	468	64% (468/738)	51% (240/468)	58% (274/468)	93% (434/468)	29% (87/468)	4% (18/468)
Published	164	35% (164/468)	52% (86/164)	63% (103/164)	79% (130/164)	25% (41/164)	6% (10/164)
Unpublished	304	65% (304/468)	51% (154/304)	56% (171/304)	88% (269/304)	15% (46/304)	3% 8/304
STATE CASES	270	37% 270/738	92% 249/270	73% 196/270	78% 211/270	23% 63/270	2% (5/270)
Published	253	94% (253/270)	92% (233/253)	72% (182/253)	77% (194/253)	25% (63/253)	2% (4/253)
Unpublished	17	6% (17/270)	94% (16/17)	82% (14/17)	100% (17/17)	0% (0/17)	6% (1/17)
TOTAL	738	100%	66% 489/738	64% 470/738	87% 645/738	20% 150/738	3% 23/738

Detailed descriptive statistics on the sample of cases included in this snapshot appear in Table 1. The analysis below focuses primarily on the cases designated for publication, as only these cases can be used in subsequent litigation, and therefore only these cases create rule-making opportunities in criminal procedure jurisprudence.⁵² Again we focus on severity, procedure, and race.

2. On Race and Racism

Twenty-three of the 738 cases mentioned race at all—only 3% of the cases. Not all of the race discussion related to the Fourth Amendment claim that brought the cases into this sample. Most of the cases that mentioned race are federal. Eight published⁵³ and seven unpublished⁵⁴ federal cases discussed a race

⁵² See Albiston, *supra* note 1, at 878 (defining a rule-making opportunity).

⁵³ Puller v. Baca, 781 F.3d 1190 (10th Cir. 2015) (hate crime, malicious prosecution); Rodgers v. Knight, 781 F.3d 932 (8th Cir. 2015) (racially-motivated investigation); United States v. Robinson, 781 F.3d 453 (8th Cir. 2015) (jury selection); Melendres v. Arpaio, 784 F.3d 1254 (9th Cir. 2015) (racial profiling in police stops); Loza v. Mitchell, 766 F.3d 466 (6th Cir. 2014) (selective prosecution); Marshall v. City of Chicago, 762 F.3d 573 (7th Cir. 2014) (jury selection); United States v. Starks, 769 F.3d 83 (1st Cir. 2014) (racial profiling alleged to establish standing); United States v. Mason, 774 F.3d 824 (4th Cir. 2014) (selective enforcement).

⁵⁴ James v. Hampton, 592 F. App'x 449 (6th Cir. 2015) (race discrimination in search); United States v. Alabi, 597 F. App'x 991 (10th Cir. 2015) (equal protection partially based on race); Benson v. City of San Jose, 583 F. App'x 604 (9th Cir. 2014) (racially motivated allegedly unconstitutional

claim. Three other federal cases, two published and one unpublished, mentioned race in passing but no more.⁵⁵ Five state cases mentioned race, but only one of these, an unpublished case from Kentucky, provided more than a passing mention that race might be relevant.⁵⁶ Thirteen of the twenty-three cases mentioning race arose under the exclusionary rule. The second largest group, eight, arose from a civil rights claim.⁵⁷

Cases typically discussed race in the context of racial profiling in police stops. Several cases discussed allegations that race had influenced policing at length.⁵⁸ One case dismissed an Equal Protection discrimination claim because the defendant failed to demonstrate intentional discrimination as required under *McCleskey v. Kemp*.⁵⁹ The vast majority of these twenty-three cases, however, spent fewer than three lines dismissing the allegation that race played a role in the underlying police investigation or prosecution.

3. On Procedure

As in the previous section, a majority of the published cases arose under the exclusionary rule (76%). This pattern is driven by state cases where 92% arose under the exclusionary rule. In contrast, an unexpectedly high percent of federal cases, 41% (68/164), concerned civil right claims against police officers (the state won 57% of these cases outright (39/68) and won at least partially in 63% (43/68)).

seizure); *Buchanan v. Kelly*, 592 F. App'x 503 (7th Cir. 2014) (racial profiling in police stops); *Moreno v. Turner*, 572 F. App'x 852 (11th Cir. 2014) (racially motivated detention); *United States v. Gaskin*, 587 F. App'x. 290 (6th Cir. 2014) (racial profiling in stops); *Young v. Owens*, 577 F. App'x 410 (6th Cir. 2014) (racial discrimination claim).

⁵⁵ *United States v. Watson*, 787 F.3d 101, 103 (2d Cir. 2015) (noting that officers had information on the race of the suspect prior to apprehending Watson); *United States v. Wheelock*, 772 F.3d 825, 830 n.2 (8th Cir. 2014) (noting that Wheelock did not make a race claim); *United States v. McKnight*, 568 F. App'x 178 (3d Cir. 2014) (noting that eyewitness provided race among other details).

⁵⁶ Four published state cases mention race in passing. See *Commonwealth v. Arzola*, 26 N.E.3d 185, 188 (Mass. 2015) (noting that race was considered when selecting photographs to include in an array for identification purposes); *Cooper v. State*, 145 So. 3d 1164, 1167 (Miss. 2014) (finding anonymous tip found reliable because it was detailed, including race information); *Gales v. State*, 153 So. 3d 632, 653 (Miss. 2014) (Kitchens, J., dissenting) (noting that reasonable suspicion was based on matching race without more); *State v. Dotson*, 450 S.W.3d 1, 2 (Tenn. 2014) (mentioning race as a factor to consider in a death penalty proportionality review). One unpublished state case, *Stovall v. Commonwealth*, No. 2013-SC-000788-MR, 2014 WL 7239876 (Ky. Dec. 18, 2014), discussed race at greater length. *Stovall* denied a constitutional claim that the traffic stop was racially motivated.

⁵⁷ The remaining two arose under the habeas corpus statutes. See 28 U.S.C. §§ 2254–2255 (2015).

⁵⁸ See, e.g., *Puller v. Baca*, 781 F.3d 1190, 1194–1200 (10th Cir. 2015) (discussing hate crime prosecution and alleged racial motivation in prosecuting the case at length); *United States v. Mason*, 774 F.3d 824, 829–30 (4th Cir. 2014) (discussing allegations of racially motivated law enforcement investigation for several pages); *Loza v. Mitchell*, 766 F.3d 466, 495–97 (6th Cir. 2014) (discussing allegations of selective prosecution for a full page); *Marshall v. City of Chicago*, 762 F.3d 573, 577–79 (7th Cir. 2014) (discussing defense counsel's innovative race-conscious jury selection proposal at length).

⁵⁹ *Loza*, 766 F.3d 466.

4. The Crimes at Issue

A majority of these published cases involved felonies, 64% overall. State cases involved a higher percentage of felonies, with 72%, than federal cases, with 63%.

C. Comparisons and Observations

The profile identified in our one-year snapshot of published cases parallels the profile of (mostly U.S. Supreme Court) cases included in criminal procedure casebooks. This reflects the duty of courts to follow precedents, a principle appearing consistently in the law.⁶⁰ In fact, the very manner in which the system becomes self-referencing is intentional. The system seeks consistency and predictability by giving precedential value to prior cases.⁶¹ This predictability and consistency, however, creates the self-referencing loop that fosters a biased impression of police investigation practices and their effects on targeted individuals.

1. On Race and Racism

Casebooks push further into discussions of race than attorneys are likely to see subsequently in published opinions. Rarely do cases discuss race or the racial context in which a citizen–police encounter occurred. This is consistent with evidence that attorneys may avoid raising race concerns directly for fear of backlash.⁶²

2. On Procedure

In both samples, most cases arose in the context of a motion to exclude evidence allegedly obtained in violation of the Constitution. This is not surprising. The exclusionary rule provides the major vehicle for individuals to challenge unconstitutional police practice.⁶³ By its very nature, however, the

⁶⁰ See generally Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68 (1991) (reviewing the role of precedent in Supreme Court decisionmaking and examining the ways in which precedents operate as a stabilizing influence and source of indeterminacy in constitutional law).

⁶¹ Steven J. Burton, *The Conflict Between Stare Decisis and Overruling in Constitutional Adjudication*, 35 CARDOZO L. REV. 1687, 1688 (2014) (“Stare decisis fosters unity, stability, and equality over time.”).

⁶² Tonya L. Brito et al., *“I Do for My Kids”*: *Negotiating Race and Racial Inequality in Family Court*, 83 FORDHAM L. REV. 3027, 3042 (2015).

⁶³ See ALLEN ET AL., *supra* note 24, at 337 (noting that “[e]ver since [*Mapp v. Ohio*], exclusion of illegally seized evidence has been the primary remedy for Fourth Amendment violations”); see also Kenneth W. Starr & Audrey L. Maness, *Reasonable Remedies and (or?) the Exclusionary Rule*, 43 TEX. TECH L. REV. 373 (2010) (noting that the exclusionary rule is “[t]he chosen method for vindication” of Fourth Amendment values); James J. Tomkovicz, *Sacrificing Massiah: Confusion over Exclusion and Erosion of the Right to Counsel*, 16 LEWIS & CLARK L. REV. 1, 4–5 (2012) (“The Sixth Amendment right-to-counsel bar to inculpatory government evidence was the first of four new constitutional exclusion doctrines announced by the Warren Court during a mere four-year

exclusionary rule means that the contours of Fourth, Fifth, and Sixth Amendment protections are almost exclusively shaped in cases where police suspicions were right. That is, these are cases in which a guilty person raises a constitutional claim. Evaluating constitutional claims in the context of “individuals who are seen as criminals in the eyes of the court” skews the perspective toward the government.⁶⁴ It may seem that police make no errors in identifying criminals.

Civil rights cases provide an alternative remedy for citizens concerned that police investigative tactics violated their constitutional rights. Each casebook includes several civil rights cases. Perhaps unsurprisingly, however, plaintiffs lose the overwhelming majority of these civil rights cases.⁶⁵ As such, civil rights cases, at least so far, do little to counter the powerful impact of the exclusionary rule in developing the view that police seldom err. On the other hand, as discussed below, the value in reading these cases may lie in exposing readers to facts where the police erred or behaved badly (even if still protected by qualified immunity).

Federal published cases included civil rights cases at a much higher rate (41%) than the casebooks, and plaintiffs (that is, the would-be criminal defendants) won a significant minority of the cases (37% (25/68) outright and at least partially in four additional cases (43%)).⁶⁶ These data suggest that published federal cases may sometimes serve to broaden the impressions of lawyers and judges of police tactics.

3. The Crimes at Issue

Both sets of cases include almost only felonies. The dominance of felonies in these cases reflects the relative likelihood that a felony would go to trial and receive the level of representation that allows significant review of the police

span in the mid-1960s.”); Sharon L. Davies, *Some Reflections on the Implications of Hudson v. Michigan for the Law of Confessions*, 39 TEX. TECH L. REV. 1207, 1208 (2007) (describing the exclusionary rule as “the primary penalty for police lawlessness”).

⁶⁴ Shima Baradaran, *Rebalancing the Fourth Amendment*, 102 GEO. L.J. 1, 4 (2013) (also noting that “the rights of all to be free from police intrusion are protected by an individual with contraband she seeks to suppress”); see also Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL’Y 111, 112 (2003) (discussing the impact of the exclusionary rule on the evaluation of close cases).

⁶⁵ Garner is the only plaintiff in the cases listed *infra* note 166 who recovered damages for police action. These cases are also likely to be underrepresented in published opinions and casebooks because strong civil claims against police officers and departments are often settled quietly. See Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 775 (2004) (“[M]any civil claims against police are resolved either before a case is filed, or through secret settlements and judgments sealed by courts. Police departments, cities and counties are settling strong cases . . . but they are requiring (and probably paying for) sealed agreements.”)

⁶⁶ The unpublished federal cases sample included 46% civil rights cases, and the state won 71% of those cases.

investigation.⁶⁷ Felonies are disproportionately present among reported cases at all levels and particularly at the Supreme Court. It seems unlikely that a view saturated with felonies can accurately capture the nuances of police investigations that focus overwhelmingly on misdemeanors.⁶⁸

Several of the casebooks provide information introducing students to a broader view of the criminal justice system beyond guilty felons. For example, Miller and Wright's non-case materials mitigate the impression that all suspects targeted by police turn out to be guilty by including administrative reports reviewing police practices or scholarly articles exploring the regulation of police, and its limits, or theories of policing.

Several casebooks include excerpts from law review articles providing a "statistical snapshot" that includes broader information on the breadth and depth of police investigations in the criminal justice system. It may be that these sections could be used effectively to provide insight on the implicit message that police spend most of their time carefully investigating felonies.⁶⁹ Misdemeanors, however, remain almost entirely invisible in published cases (state or federal). A lawyer trying criminal cases is unlikely to learn from published caselaw about the kinds of investigations that lead to misdemeanor charges.

At the end of the day, it seems fair to conclude that the foundational view of police investigation established in law school is reinforced with each new decision. Three attributes dominate this view: (1) suspects are usually guilty, (2) cases usually involve felonies, and (3) race seldom merits discussion as possibly relevant.

III. A LARGER VIEW OF POLICING (WHAT THE CASES MISS)

The picture one gets from reading those cases fails to connect with the day-to-day reality of actual policing. While we do not claim to present *the* definitive story of something as complex and varied as policing, in this part we present evidence that challenges the shared understanding of policing presented above. Each subsection focuses on one of the three attributes listed above and demonstrates ways in which that alleged attribute omits part of the picture.

A. For Every Hit, Many False Positives

In the cases we reviewed, the police have an excellent hit rate. The existence of some incriminating evidence that the defendant seeks to exclude means that even if the police were arguably wrong about the law, they were

⁶⁷ Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 303 (2011) (discussing the complexities of misdemeanor practice including Fourth, Fifth, and Sixth Amendment issues).

⁶⁸ *Misdemeanors*, *supra* note 17, at 1320–21 (“[T]he world of misdemeanors looks to be about four or five times the size of the world of felonies.”).

⁶⁹ ALLEN ET AL., *supra* note 24, at 352–61.

usually right to be suspicious.⁷⁰ Even in cases where the evidence is suppressed, the facts confirm the notion that police officers have insight that allows them to detect criminality based on evidence that may appear unremarkable to the untrained layperson.⁷¹ In contrast to the world suggested by the exclusionary rule, where police are usually right when they become suspicious that someone is engaged in serious crime, police actually spend a great deal of time investigating suspicions that turn out to be unfounded and arresting people for minor, non-violent offenses.⁷²

Lawyers and judges also know that police make mistakes.⁷³ Yet, it is rare to see any discussion in the cases or casebooks of just how often their inferences are wrong and, thus, no consideration by reviewing courts (with “law making” power) of how high an error rate is too high.⁷⁴ Indeed, assessing officers’ hit rates with any certainty—either generally or for a particular officer—is no easy task. Doing so requires recordkeeping about each stop, search, and interrogation, not just those that end in arrest or citation. Departments are only beginning to adopt this practice—and not universally.⁷⁵

⁷⁰ See also *Utah v. Strieff*, 136 S. Ct. 2056, 2065 (2016) (Sotomayor, J., dissenting) (noting this temptation).

⁷¹ See, e.g., *Ornelas v. United States*, 517 U.S. 690, 699–700 (1996) (“[O]ur cases have recognized that a police officer may draw inferences based on his own experience in deciding whether probable cause exists To a layman the sort of loose panel below the back seat armrest in the automobile involved in this case may suggest only wear and tear, but to Officer Luedke, who had searched roughly 2,000 cars for narcotics, it suggested that drugs may be secreted inside the panel.” (citation omitted)).

⁷² Andrew E. Taslitz, *Police Are People Too: Cognitive Obstacles to, and Opportunities for, Police Getting the Individualized Suspicion Judgment Right*, 8 OHIO ST. J. CRIM. L. 7, 10–11 (2010) (discussing errors in police investigation); Clea Wright Whelan, Graham Wagstaff & Jacqueline M. Wheatcroft, *High Stakes Lies: Police and Non-Police Accuracy in Detecting Deception*, 21 PSYCHOL. CRIME & L. 127, 128 (2015) (reporting that police participants in an experimental setting achieved mean accuracy in detecting deception of 72%).

⁷³ See generally BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (2011); Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173 (2008); Samuel R. Gross & Barbara O’Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. EMPIRICAL LEGAL STUD. 927 (2008); Samuel R. Gross et al., *Exonerations in the United States 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005).

⁷⁴ See Eric J. Miller, *Detective Fiction: Race, Authority, and the Fourth Amendment*, 44 ARIZ. ST. L.J. 213, 229 (2012) [hereinafter *Detective Fiction*] (citing *Ornelas v. United States*, 517 U.S. 690, 700 (1996)) (observing that the *Ornelas* Court placed great weight on the roughly 2,000 automobile searches the officer had conducted before searching the defendant’s car based on a suspicion of drug smuggling, but never inquired into how many of those searches turned up no evidence to support his suspicions). *But see* *Navarette v. California*, 134 S. Ct. 1683, 1695 (2014) (Scalia, J., dissenting) (suggesting that a base rate of accurate hits of at least 5–10% might be necessary to establish reasonable suspicion).

⁷⁵ See, e.g., CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE SEATTLE POLICE DEPARTMENT 29–30 (2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/12/16/spd_findletter_12-16-11.pdf [hereinafter DOJ SEATTLE] (finding that the department does not collect sufficient data to assess whether pedestrian stops are reasonable). *But see* David A. Harris, *Across the Hudson: Taking the Stop and Frisk Debate Beyond New York City*, 16 N.Y.U. J. LEGIS. PUB.

Nevertheless, there is evidence that many, if not most, stops fail to reveal any wrongdoing and that many searches uncover no contraband. Litigation on the constitutionality of the New York Police Department's (NYPD) stop and frisk practices brought under scrutiny the over 4.4 million *Terry* stops conducted from January 2004 through June 2012.⁷⁶ Analysis of the NYPD's stop reports revealed that 52% of stops involved a protective frisk for weapons, but only 1.5% of these 2.3 million frisks revealed a weapon.⁷⁷ Only 6% of stops resulted in arrest, another 6% in the issuance of a summons, and in less than 2% of stops did officers seize contraband of any sort (such as weapons, drugs, or stolen property).⁷⁸ Yet in the context of exclusionary rule cases, little if any thought is given to this issue.

B. *Contrasting the Evidence and Procedure Rich Felonies with Misdemeanors*

The cases we reviewed—in casebooks and in published opinions—present almost exclusively felonies. Yet, national records suggest that just over ten million non-traffic misdemeanors occur nationally each year, as compared to approximately 1.2 million felonies.⁷⁹ This section evaluates the ways in which the “winnowing” of misdemeanors from the sample paints a distorted view of policing.

Important research in the past five years has highlighted significant distinctions between felony and misdemeanor processing.⁸⁰ Alexandra Natapoff, for example, documents the surprisingly minimal role individualized evidence plays in the processing of misdemeanors, especially when the misdemeanors at issue involve “urban loitering and trespassing policies, zero tolerance policing, and routine urban street control.”⁸¹ The primary evidence in these cases comes

POL'Y 853 (2013) (reporting the results of a survey of the fifty-five largest police departments in the United States that show that more are now collecting data on officers' stop and frisk activity). See also Sonja B. Starr, *Explaining Race Gaps in Policing: Normative and Empirical Challenges*, Paper No. 15-003, U. MICH. L. & ECON. RES. PAPER SERIES (Jan. 2015), <http://ssrn.com/abstract=2550032> (noting the challenges of determining hit rates accurately).

⁷⁶ *Floyd v. City of New York*, 959 F. Supp. 2d 540, 573 (S.D.N.Y. 2013) (noting that “[i]n other words, in 98.5% of the 2.3 million frisks, no weapon was found”).

⁷⁷ *Id.*

⁷⁸ *Id.*; see also CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF LOS ANGELES COUNTY SHERIFF'S DEPARTMENT STATIONS IN ANTELOPE VALLEY 18 (2013), https://www.justice.gov/sites/default/files/crt/legacy/2013/06/28/antelope_findings_6-28-13.pdf (asserting that the Los Angeles County Sheriff's Department “spends significant resources, in terms of time and community trust, conducting searches that turn up nothing”).

⁷⁹ *Misdemeanors*, *supra* note 17, at 1320 (citing a survey by the National Association of Criminal Defense Lawyers and the U.S. Department of Justice, Bureau of Justice Statistics).

⁸⁰ See *id.*; see also *Misdemeanor Justice*, *supra* note 14, at 363; Roberts, *supra* note 67, at 303.

⁸¹ *Misdemeanors*, *supra* note 17, at 1337 (contrasting these crimes with misdemeanors arising from motor vehicle offenses or drunk driving); see also *id.* at 1330 (“[F]or urban street control crimes such as loitering, trespassing, disorderly conduct, and gang injunction violations—a large and crucial

from a police report of the behavior at issue.⁸² She questions the frequency with which police arrest for minor offenses without probable cause⁸³ and argues that we cannot know the true level of risk because “inattention to evidence and factual guilt is not an aberration, but is part and parcel of how the misdemeanor process works.”⁸⁴

Natapoff has noted elsewhere the impact of public order policing on misdemeanor case processing, observing that the “informal aggregations of the criminal system . . . tend to render substantive decisions based on categorical generalizations or institutional policies in ways that sideline individual defendant characteristics, the most important being the factual question of whether that particular defendant actually committed a particular crime.”⁸⁵ Adjudication of felonies is by no means perfect, but it is more likely to focus on individual cases. Prosecutors and defense counsel hone in on the alleged felon’s charge, evaluating the witness, the evidence, the police procedures. In contrast, misdemeanants find themselves thrust together, made invisible by the forces of the high-volume system.⁸⁶

Ethnographic studies of people who live in heavily policed neighborhoods tell the same story. Victor M. Rios closely observed forty Latino and African American youths in Oakland, California over a three-year period.⁸⁷ During this time, he counted forty-two citations issued against the boys for non-violent offenses such as loitering, disturbing the peace, failing to wear a bicycle helmet, and violating curfew.⁸⁸ These relatively minor citations often led to major consequences for the boys when they missed court dates or were unable to pay their fines, resulting in arrest warrants and probation.⁸⁹

Alice Goffman documented similar dynamics in her study of a Philadelphia neighborhood, where police officers were encouraged to round up people with

subset of the docket—the conclusion that these convictions are valid is more leap of faith than demonstrable fact.”).

⁸² *Id.* at 1346 (contrasting the evidence in misdemeanors with the evidence required for “serious offenses of burglary, rape or homicide”).

⁸³ *Id.* at 1331.

⁸⁴ *Id.* at 1329 (describing a broad consensus among scholars and legal watchdog organizations).

⁸⁵ *Aggregation and Urban Misdemeanors*, *supra* note 18, at 1058.

⁸⁶ *Id.* at 1074–75; *see also* Roberts, *supra* note 67, at 303 (Sometimes misdemeanors may be simpler than felonies, but they can also be complicated. For example, misdemeanors can “raise issues of suppression in drug and weapons cases, expert testimony in drug, assault, and drunk driving cases, and *Crawford*/Confrontation Clause issues in domestic violence and other types of cases.”).

⁸⁷ VICTOR M. RIOS, PUNISHED: THE LIVES OF BLACK AND LATINO BOYS 17 (2011).

⁸⁸ *Id.* at 44. Philando Castiles, a 32-year-old black man, shot and killed by a Minneapolis police office on July 6, 2016, had been stopped 49 times in 13 years for mostly minor infractions. Sharon LaFraniere & Mitch Smith, *Philando Castile Was Pulled Over 49 Times in 13 Years, Often for Minor Infractions*, N.Y. TIMES (July 16, 2016), http://www.nytimes.com/2016/07/17/us/before-philando-castiles-fatal-encounter-a-costly-trail-of-minor-traffic-stops.html?_r=0.

⁸⁹ RIOS, *supra* note 87, at 44–45.

outstanding warrants by combing hospital admission records, utility bills, and employment records.⁹⁰ Likewise, the American Civil Liberties Union reported a practice in Genesee County, Michigan, where officers engaged in “warrant sweeps” to bring people in to night court and where judges arraigned large numbers of people and collected thousands of dollars in bonds and fines in a single 24-hour period.⁹¹

C. *A World Without Race*

Race plays an enduring role in police investigation and the cases that arise from it.⁹² The silence noted above stands in contrast to the lived and documented importance of race. This is evident, for example, in comparative lifetime likelihood of arrest rates. The Sentencing Project reports that while one in seventeen white men born in 2001 is likely to face imprisonment in his lifetime, one in three black men and one in six Latino men face imprisonment.⁹³ The Sentencing Project analyzes the extent to which different crime rates can explain these disparities and concludes that, while an important factor, it cannot completely account for the observed racial discrepancies.⁹⁴

Race plays a significant role in felonies and misdemeanors. Consider, for example, the change in rate of misdemeanor arrests in New York City between 1990 and 2012 according to the race or ethnicity of the arrestee. In that period, “the number of misdemeanor arrest events of white individuals increased by around 35%, whereas the number of misdemeanor arrest events of black individuals increased by over 105%, and of Hispanic individuals by over 158%.”⁹⁵ As for felonies, the Court notoriously avoided discussing race when addressing the well-documented disparities in sentencing guidelines for crack versus powder cocaine.⁹⁶

⁹⁰ ALICE GOFFMAN, *ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY* (2014). Interviews with 308 men between the ages of eighteen and thirty revealed that 144 had a warrant issued for their arrest for failing to appear for a court date or delinquencies in paying court fines. Technical violations of probation such as breaking curfew led to arrest warrants for 119. *Id.* at 18–19.

⁹¹ See also A.C.L.U., *In For A Penny: The Rise of America’s Debtors’ Prisons* 40 (2010), http://www.aclu.org/files/assets/InForAPenny_web.pdf.

⁹² See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 209–48 (2010).

⁹³ THE SENTENCING PROJECT, *Black Lives Matter: Eliminating Racial Inequity in the Criminal Justice System* 11 (2016), <http://sentencingproject.org/wp-content/uploads/2015/11/Black-Lives-Matter.pdf> (describing statistics reflected in fig. 6).

⁹⁴ *Id.* at 14.

⁹⁵ Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 *STAN. L. REV.* 611, 633–34, 634 fig. 3 (2014).

⁹⁶ See generally William Stuntz, *Race, Class, and Drugs*, 98 *COLUM. L. REV.* 1795 (1998) (summarizing the issue and relevant research). The Court ultimately offered some remedy for this disparity in *United States v. Kimbrough*, when it held that “under *Booker*, the cocaine Guidelines, like all other Guidelines, are advisory only” and upheld the district court’s sentence for a crack cocaine offense below the United States Sentencing Guideline’s 100–1 ratio to powder cocaine

Finally, on the rare occasions when race is explicitly discussed, the controversy it creates is telling. Consider the attention garnered by Justice Sonya Sotomayor's discussion of racially disparate police practices in her dissent in *Utah v. Streiff*. For example, she noted:

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 type of scrutiny. 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 of talking back to a stranger—all out of fear of how an officer with a gun will react to them.⁹⁷

The national media, in print and online, found her focus on race unusual enough to be noteworthy.⁹⁸ Race persists as an important factor in the criminal justice system despite having been winnowed both from the discourse on individual cases and from the jurisprudence as a whole.

In sum, our research demonstrates that the winnowed subset of constitutional criminal procedure cases present police as more savvy and the people they encounter as more guilty and dangerous than they really are. Our research demonstrates the silence on race is not justified. The next question is whether the ways in which the cases differ from policing as experienced matters to the law.

offenses. In doing so, however, the Court relied on the *Apprendi-Booker* lines of cases, recognizing greater Sixth Amendment rights at sentencing than the Guidelines had afforded defendants. It did not discuss, or even mention, the racially disparate impact of the Guidelines. *Spears v. United States*, 555 U.S. 261, 263–65 (2009) (citing *Kimbrough v. United States*, 552 U.S. 85, 91 (2007)).

⁹⁷ *Utah v. Streiff*, 136 S. Ct 2056, 2070 (2016) (Sotomayor, J., dissenting) (citations omitted).

⁹⁸ See, e.g., Tal Kopan, *Sotomayor in Fiery Dissent: Illegal Stops "Corrode All Our Civil Liberties,"* CNN (June 21, 2016), <http://edition.cnn.com/2016/06/20/politics/sotomayor-supreme-court-dissent-utah-streiff/>; Matt Ford, *Justice Sotomayor's Ringing Dissent*, THE ATLANTIC (June 20, 2016), <http://www.theatlantic.com/politics/archive/2016/06/utah-streiff-sotomayor/487922/>; Mark Joseph Stern, *Read Sonia Sotomayor's Atomic Bomb of a Dissent Slamming Racial Profiling and Mass Imprisonment*, SLATE (June 20, 2016, 11:34 AM), http://www.slate.com/blogs/the_slatest/2016/06/20/sonia_sotomayor_dissent_in_utah_v_streiff_takes_on_police_misconduct.html; Victoria M. Massie, *You Need to Read Sonia Sotomayor's Devastating, Ta-Nehisi Coates-Citing Supreme Court Dissent*, VOX (June 20, 2016, 12:48 PM), <http://www.vox.com/2016/6/20/11976560/sonia-sotomayor-dissent-supreme-court>; Robert Barnes, *Sotomayor's Fierce Dissent Slam's High Court's Ruling on Evidence from Illegal Stops*, WASH. POST (June 20, 2016), https://www.washingtonpost.com/politics/courts_law/supreme-court-rules-5-3-that-mistakes-by-officer-dont-undermine-conviction/2016/06/20/f1f7d0d2-36f9-11e6-8f7c-d4c723a2becb_story.html; Meghan Daum, *My White Privilege Meets Sonia Sotomayor's Scathing Attack on Police Power*, L.A. TIMES (June 23, 2016, 5:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-daum-sotomayor-dissent-20160623-snap-story.html>; *Sotomayor Dissent Reads Like 'A Black Lives Matter Manifesto'*, MSN (June 20, 2016), <http://www.msn.com/en-us/tv/watch/sotomayor-dissent-reads-like-%e2%80%99a-black-lives-matter-manifesto-%e2%80%99/vp-AAhIGru>.

IV. THE ADVERSE IMPACT OF THESE DISCREPANCIES ON THE LAW

This section evaluates some of the costs of overstating police investigative accuracy, understating the presence of misdemeanors in the system, and ignoring race on the regulation of police investigation. We start by considering the psychological cost of the overall impression created by these factual distortions and then discuss costs of each aspect of the disparity in turn.

A. *The Costs of a Shared and Inaccurate Understanding of the Nature of Reality*

This shared distorted perception affects how attorneys and judges approach cases by exacerbating cognitive biases. A number of scholars have explored how cognitive biases influence legal decision making generally,⁹⁹ and in the context of the exclusionary rule in particular.¹⁰⁰ The limited race-silent fact patterns in the cases and casebooks create a schema about policing that shapes how they approach these issues as lawyers and judges.

Schemas are “a kind of informal, private, unarticulated theory about the nature of events, objects or situations” that serve as a “private theory of the nature of reality.”¹⁰¹ They develop from personal encounters or from second-hand information about the people and events associated with the schema.¹⁰² This information develops into a set of expectations about people’s behaviors and motivations when they have a particular role or face a certain situation.¹⁰³ One may develop a schema about police from personal interactions with officers but also from what one hears about others’ experiences, watches on television, or reads in a casebook.

Schemas affect how people encode information, fill in gaps about an event, and the inferences they draw. In that way, schemas “function as implicit theories, biasing in predictable ways the perception, interpretation, encoding, retention and recall of information about other people.”¹⁰⁴ Schemas tend to resist

⁹⁹ See, e.g., Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. L. REV. 1165, 1170–71 (2003) (reviewing the availability heuristic, the representativeness heuristic, anchoring and adjustment, hindsight bias, and self-serving biases).

¹⁰⁰ *Why Liberals Should Chuck the Exclusionary Rule*, *supra* note 16, at 403–04 (arguing that the representativeness and availability heuristics lead judges to err against excluding evidence under the Fourth Amendment); see also Avani Mehta Sood, *Cognitive Cleansing: Experimental Psychology and the Exclusionary Rule*, 103 GEO. L.J. 1543 (2015) (reporting on experimental research documenting “motivated judgement” by judges faced with exclusionary rule); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2056–72 (2011).

¹⁰¹ Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (quoting David E. Rumelhart, *Schemata and the Cognitive System*, 1 HANDBOOK SOC. COGNITION 161, 166 (1984)).

¹⁰² Susan T. Fiske & Shelley E. Taylor, SOCIAL COGNITION 147 (2d ed. 1991).

¹⁰³ See Gregory S. Alexander, *A Cognitive Theory of Fiduciary Relationships*, 85 CORNELL L. REV. 767, 770 (2000) (reviewing social cognitive research on schemas).

¹⁰⁴ Krieger, *supra* note 101, at 1188.

change even when people and events do not conform to expectations. This tendency can manifest as confirmation bias, which is the tendency to support a hypothesis by seeking consistent evidence while minimizing inconsistent evidence.¹⁰⁵ This kind of bias can lead to testing a hypothesis in a way that is likely to support it¹⁰⁶ or to searching for new information in a biased or biasing manner.¹⁰⁷ This stubborn tendency to see the world as conforming to one's schema is not necessarily motivated (though it may be)¹⁰⁸ but operates even without an incentive to perceive members of a certain group favorably or unfavorably.¹⁰⁹ Importantly for our purposes, a schema can bias someone early in the decision making process by affecting how one approaches and interprets the data.¹¹⁰

Consider how this might operate in judgments about the legitimacy of police behavior. If someone has developed a schema about policing in which officers are highly professional, shrewd perceivers of guilt, and operating with proper motivations, they are likely to minimize evidence to the contrary or to consider officers who clearly do not fit that mold to be outliers.¹¹¹ Instances where the police were wrong to suspect someone are perceived as exceptional rather than common. Officers who act out of improper motivations, such as racial bias, are bad apples who will face discipline by their highly professional departments and do not represent a systemic problem warranting a systemic

¹⁰⁵ See generally Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175 (1998) (examining confirmation bias in interpreting evidence).

¹⁰⁶ See generally Joshua Klayman & Young-Won Ha, *Confirmation, Disconfirmation, and Information in Hypothesis Testing*, 94 PSYCHOL. REV. 211 (1987) (discussing confirmation bias and its impact on testing).

¹⁰⁷ See generally James Friedrich, *Primary Error Detection and Minimization (PEDMIN) Strategies in Social Cognition: A Reinterpretation of Confirmation Bias Phenomena*, 100 PSYCHOL. REV. 298 (1993) (discussing confirmation bias as it relates to searching for new information); Dieter Frey, *Recent Research on Selective Exposure to Information*, in ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 41–80 (Leonard Berkowitz ed., 1986); Eva Jonas, Stefan Schulz-Hardt, Dieter Frey & Norman Thelen, *Confirmation Bias in Sequential Information Search after Preliminary Decisions: An Expansion of Dissonance Theoretical Research on Selective Exposure to Information*, 80 J. PERSONALITY & SOC. PSYCHOL. 557 (2001) (discussing confirmation bias as it relates to the collection of new information). Confirmation bias can affect not only how we interpret police behavior but also how police approach their investigation. Confirmation bias may lead police investigating a crime to focus on information consistent with the guilt of their lead suspect and to minimize evidence pointing in a different direction. Barbara O'Brien, *Prime Suspect: An Examination of Factors that Aggravate and Counteract Confirmation Bias in Criminal Investigations*, 15 PSYCHOL. PUB. POL'Y & LAW 315 (2009). For a review, see DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS (2012).

¹⁰⁸ See Sood, *supra* note 100.

¹⁰⁹ Krieger, *supra* note 101, at 1188.

¹¹⁰ *Id.* (arguing that “[t]hese biases ‘sneak up on’ the decision maker, distorting bit by bit the data upon which his decision is eventually based”).

¹¹¹ See Alexander, *supra* note 103, at 772–73 (citing Ward Edwards, *Conservatism in Human Information Processing*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 359 (Daniel Kahneman et al. eds., 1982)).

legal solution. We have seen this tendency in the departmental responses to incidences in which citizens died at police hands.¹¹²

There are aspects of practice that can cause lawyers to adapt the schemas they developed in law school, but the anchoring effect of a starting narrative of policing is a powerful thing to overcome. Furthermore, in the exclusionary rule dominated samples we discussed above, the availability of examples in which the police were right to suspect someone of wrongdoing abound and, thus, make the potential for error seem relatively low. The vast majority of the cases even practicing attorneys encounter will be those in which the police uncovered wrongdoing, not those in which police suspicions were ultimately baseless.

The same argument can be made for the education of law students. Though law students do not immediately shape the law the way judges do when presiding over cases, their understanding of the scope of the rights they are studying and how police practices actually implicate those rights creates the schema for how they approach legal practice. The practice of law will correct some, but not all, of the imbalances in legal education. A student who becomes a prosecutor or public defender will realize quickly how few cases result in the type of published appellate decisions they read in law school and just how much of the criminal docket involves misdemeanors rather than serious felonies. But, as our study shows, the vast majority of the published opinions they encounter will still be those in which the police uncovered wrongdoing, not those in which police suspicions were ultimately baseless.

This is not to say that lawyers meander through their careers, blithely naïve to the realities of policing. They will encounter cases in which a search warrant yields nothing incriminating, or where a defendant is charged with resisting a peace officer for an encounter that also involved a fruitless search. In other words, they will see cases where police—like anyone—make mistakes. The point is that the examples of police getting it wrong will be underrepresented in the universe of cases they see. The most representative and readily accessible examples in their minds will be those in which police suspicions were verified.

We should expect that this distorted perception of policing influences decisions about what police may do and, therefore, skews the jurisprudence. A belief by those litigating and ultimately ruling on motions to suppress that police are shrewd, race-blind perceivers of guilt (as evidenced by all of the apparently race-less guilty defendants seeking to suppress evidence) influences what they consider to be reasonable police action and thus the law that governs it. Considered in this light, the erosion of defendants' rights that others have noted in the areas of consent, good faith, reasonable suspicion, the exclusionary rule,

¹¹² See, e.g., Tasha Tsiaperas, *Dallas Chief Bluntly Challenges Protesters to 'Serve Your Community'*, DALL. MORNING NEWS (July 11, 2016), <http://www.dallasnews.com/news/crime/headlines/20160711-dallas-chief-bluntly-challenges-protesters-to-serve-your-community.ece> (reporting the Dallas police chief's comments that a small number of bad police officers taint the public's perception of police).

and *Miranda* should not surprise us.¹¹³ Greater deference to the state in cases involving these areas may therefore be better understood not solely as an ideological shift but as the expected result of years of winnowing away contradictory cases and a stubborn unwillingness to talk about race.

B. The Costs of Overstating Police Investigative Accuracy

We documented that reliance on motions to exclude evidence has created a body of cases that overstate police investigative accuracy. Sherry Colb observed a decade ago that “[p]eople feel differently about guilty versus innocent holders of Fourth Amendment privacy rights.”¹¹⁴ Colb observed that a person’s criminal behavior may seem to justify some level of forfeiture of the Fourth Amendment right to privacy.¹¹⁵ This is true because the Fourth Amendment authorizes police to investigate crime, so long as they do so reasonably. Police knowledge of criminal wrongdoing can be deployed to limit an individual’s privacy rights.¹¹⁶

Justice Sotomayor echoed this concern in *Streich*. “It is tempting in a case like this, where illegal conduct by an officer uncovers illegal conduct by a civilian, to forgive the officer. After all, his instincts, although unconstitutional, were correct.”¹¹⁷ Criminal defendants appear guilty in the caselaw more often than they do in the actual practice of police investigation. The distortion we document may provide implicit impetus for courts to “forgive the officer” and ask criminal defendants to “forfeit” Fourth Amendment privacy rights at an increased rate.

This intuition that criminal behavior may justify unconstitutional investigations appears in scholarship that observes an apparent relationship between the egregiousness of a suspect’s crime and likelihood that evidence would be suppressed. Researchers have found that the exclusionary rule seldom sends serious felons home, but instead reaches lower value crimes, such as drug cases.¹¹⁸ To reach this end, “[t]rial judges . . . tilt fact-finding against exclusion,

¹¹³ See generally Burke, *supra* note 13 (analyzing the doctrine of consent); David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under Terry v. Ohio*, 72 ST. JOHN’S L. REV. 975 (1998) (analyzing the *Terry* doctrine); Tracey L. Meares, *Programming Errors: Understanding the Constitutionality of Stop-and-Frisk as a Program, Not an Incident*, 82 U. CHI. L. REV. 159 (2015) (analyzing the *Terry* doctrine); *The Exclusionary Rule*, *supra* note 44 (introducing six articles reviewing the status of the exclusionary rule); Justin F. Marceau, *The Fourth Amendment at a Three-Way Stop*, 62 ALA. L. REV. 687, 733 (2011) (analyzing the constricting power of the exclusionary rule in light of the good faith and inevitable discover doctrines).

¹¹⁴ See generally Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456 (1996).

¹¹⁵ *Id.* at 1459.

¹¹⁶ *Id.*

¹¹⁷ *Utah v. Strieff*, 136 S. Ct. 2056, 2065 (2016) (Sotomayor, J., dissenting).

¹¹⁸ See, e.g., Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. CAL. L. REV. 1, 44 (1994) (discussing a study of 7500 cases from nine counties in three states

while appellate judges give constitutional rights crabbed and grudging interpretations.”¹¹⁹

If a significant proportion of the population shares this intuition (explicitly or implicitly), a sample of cases that over represents serious criminals would form an unreliable foundation for interpretation and construction of the Fourth Amendment. While this “tilted” fact-finding presents a problem in its own right, an overrepresentation of serious felony cases in published cases can also undermine constitutional protections in less serious cases. The published cases (including those overrepresented and “tilted” serious cases) constitute the body of precedent judges rely on to assess the legitimacy of police actions in all cases—even those involving low-level crime.

C. The Costs of a Disproportionate Focus on Felonies

An overrepresentation of felonies creates additional risks to the jurisprudence. Contrast the impression of a high volume of thinly supported arrests with the carefully curated evidence presented in *United States v. Watson*, the case most often used to teach criminal procedure students about the regulation of arrest.¹²⁰ *Watson* involved a prosecution for possession of stolen credit cards and distribution of these cards in the U.S. mail.¹²¹ Postal inspectors learned about Watson’s behavior from a known informant who “had provided the inspector with reliable information on postal inspection matters” on “five to 10 previous occasions.”¹²² The informant provided a sample of the stolen credit cards.¹²³ The case involved an arrest that took place six days after the inspector opened the investigation.¹²⁴

where 40 defendants were acquitted because of suppression of physical evidence, and none of the motions granted in cases of offenses against the person involved serious cases such as murder, rape, or robbery (citing Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585, 602 (1983))).

¹¹⁹ Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1, 2 (2001). See also John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1049 n.109 (1974) (“It is hard to read the mass of appellate search and seizure decisions without getting a distinct feeling that a police action which the courts would uphold where the search produced heroin would not always be held valid when only marijuana was found). Compare *United States v. Page*, 302 F.2d 81 (9th Cir. 1962), with *Higgins v. United States*, 209 F.2d 819 (D.C. Cir. 1954) (showing this practice is much clearer in the trial courts, where every defense lawyer knows that his chances on a motion to suppress will depend to a great extent on whether his client has been apprehended with marijuana or with heroin. The fact that judges today can distinguish between marijuana and heroin does not mean that they could do so 5 years ago. And it does not mean that they can distinguish between LSD and either marijuana or heroin today.)”

¹²⁰ ALLEN ET AL., *supra* note 24; CHEMERINSKY & LEVENSON, *supra* note 24; DRESSLER & THOMAS, *supra* note 24; KAMISAR ET AL., *supra* note 24; MILLER & WRIGHT, CRIMINAL PROCEDURES, *supra* note 24. See *United States v. Watson*, 423 U.S. 411 (1976).

¹²¹ *Watson*, 423 U.S. at 412–13.

¹²² *Id.* at 412.

¹²³ *Id.* at 412–13.

¹²⁴ *Id.*

Compare the picture of thoroughness and attention to detail in the evaluation of probable cause in *Watson* to the typical misdemeanor. Misdemeanor cases typically face a “lack of time, . . . lack of attorney training, lack of investigation, and pressure on attorneys from judges to resolve cases as quickly as possible or risk losing future appointments.”¹²⁵ As Natapoff reports, “Misdemeanor pleas can take place in bulk, with dozens of defendants being advised of their rights and pleading guilty en masse.”¹²⁶ Amy Bach observed similar high-volume low-procedure criminal practice in court in Greene County, Georgia, during field research in 2001. The defendants in the cases she observed had been appointed counsel, which suggests that the cases involved more than petty misdemeanors. Nonetheless, no review of the evidence or other meaningful defense took place in the dozens of cases she observed.¹²⁷

The kind of pressure exerted on lawyers in misdemeanor practice also presented distinct criminal procedure issues:

Misdemeanor defenders handle caseloads far above nationally recommended standards, yet have few resources to investigate and perform the core tasks for their clients’ cases. They practice in overcrowded courts where defendants are pressured to enter quick guilty pleas without adequate time to consult with the attorney they may have just met.¹²⁸

Prosecutors face no less pressure. In some jurisdictions, standard procedures for individual arrest review become reduced to something resembling rapid-fire automatic charging machines.¹²⁹ Criminal procedure jurisprudence cannot properly evaluate the impact of these pressures on regulatory decisions when the cases most affected by them remain overwhelmingly absent from consideration.

An overemphasis on felonies also contributes to the presumptions of professionalism and accountability in police departments that are perceived to serve as a check on the well-intentioned but occasionally aberrant police behavior. In the felony narrative, police carefully develop suspicion and evidence one case at a time following training and expertise. Officer

¹²⁵ *Misdemeanors*, *supra* note 17, at 1343.

¹²⁶ *Id.* at 1345 (citing AM. BAR ASS’N, *GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE*, 24–25 (2004)).

¹²⁷ See AMY BACH, *ORDINARY INJUSTICE: HOW AMERICA HOLDS COURT* 12–28 (2010).

¹²⁸ Roberts, *supra* note 67, at 282. See also *id.* at 289 (noting that courts are committed to “rapid finality and churning the large numbers of docketed cases through the system”); *Aggregation and Urban Misdemeanors*, *supra* note 18, at 1048 (“At the top of the penal hierarchy, where cases are serious and/or well-litigated, defendants can insist on countervailing individualizing procedures and escape the influence of aggregate tendencies. At the bottom, by contrast, the mass adjudication of hundreds of thousands of petty offenses and poor defendants precludes such rigor. Here, aggregation tendencies collectively overwhelm the individualized ideal.”).

¹²⁹ *Aggregation and Urban Misdemeanors*, *supra* note 18, at 1068 (noting that “[w]ith respect to minor offenses . . . prosecutors in some jurisdictions forgo the screening inquiry and convert arrests into charges more or less automatically.”).

McFaddon's depiction in *Terry* typifies this.¹³⁰ Yet, misdemeanor scholars have documented a sharply contrasting role for policing in these cases.¹³¹

As Eric Miller has observed, in assessing the reasonableness of police behavior, the Court relies heavily on self-regulation by professionalized police forces to ensure compliance with the Fourth Amendment but makes no effort to assess the efficacy of internal regulation and training to curb abuses or to improve accuracy in detecting crime.¹³² The relatively thorough narrative explaining the investigation leading to a felony arrest suggests extensive training and experience that should provide officers with the intuition to detect crime and the prevalence of professional norms that deter misconduct; this professionalism, in the Court's view, allows for a light judicial touch in regulating their day-to-day actions.

The accountability that officers face, however, may not be doing the job the Court thinks it does. A Department of Justice report documenting findings from an investigation into Ferguson, Missouri law enforcement ("Ferguson Report") demonstrates just how internal regulation can fall short in achieving police compliance with the law.¹³³ The Ferguson Report paints a picture of policing that differs markedly from the idealized view fostered by published appellate decisions. The investigation revealed a system of pervasive disregard for civil liberties, encouraged in large part by the city's reliance on revenue generated by fines for petty infractions.¹³⁴ Officers who failed to issue enough citations suffered poor performance evaluations.¹³⁵ Rather than ensuring that citations were issued in accordance with the law, department higher-ups actively

¹³⁰ *Terry v. Ohio*, 392 U.S. 1, 5 (1968).

¹³¹ *Aggregation and Urban Misdemeanors*, *supra* note 18, at 1061 ("The police decision to stop and/or arrest a person is the threshold selection function of the criminal process. It is increasingly clear that urban police often make such decisions based not on evidence of individual criminal behavior, but rather on group characteristics and location. The aggregations are iterative: the aggregate qualities of stop and frisk policies have ripple effects on the arrest process, and the arrest process itself is heavily shaped by generalized decisionmaking.").

¹³² *Detective Fiction*, *supra* note 74, at 217. See also Jennifer E. Laurin, *Quasi-Inquisitorialism: Accounting for Deference in Pretrial Criminal Procedure*, 90 NOTRE DAME L. REV. 783, 789 (2014) (arguing that "throughout its Fourth Amendment jurisprudence, the Court has pushed back against technically exacting standards for probable cause or reasonable suspicion, and has diminished the prospect for exclusion of evidence. But it has done so while characterizing law enforcement regulatory regimes and professional expertise as operating to constrain the discretion otherwise afforded by lack of judicial legal review.").

¹³³ CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [hereinafter DOJ FERGUSON].

¹³⁴ *Id.* at 10 ("City and police leadership pressure officers to write citations, independent of any public safety need, and rely on citation productivity to fund the City budget.").

¹³⁵ *Id.* at 12.

discouraged supervisors from disciplining officers who issued questionable citations.¹³⁶

Ferguson might present an extreme example of revenue-driven and unprofessional policing, but the practices there are not unique. In New York City, for instance, officers were not only encouraged to conduct more *Terry* stops, but those who failed to meet quotas for stops and arrests faced discipline.¹³⁷ Department of Justice reports on investigations in a number of other cities across the country reveal similar problems.¹³⁸

Thus, while many police departments do closely supervise and hold accountable their officers, the metrics they use are not necessarily what reviewing courts envision when they speak confidently of the ability of modern police forces to regulate themselves.¹³⁹ To paraphrase Natapoff's observation about the Court's overreliance on the presence of defense counsel to cure all procedural deficiencies, the professionalism and internal regulation of police forces have become the "cod liver oil" of policing, "prescribed for a wide range of ailments even when it may be merely palliative."¹⁴⁰ Oversight is often largely focused on productivity, which is measured not by officers' fidelity to constitutional rules but by the number of citations they issue.¹⁴¹

These mistaken presumptions of professionalism arise in part from the felony-centric sample that dominates casebooks and published cases. Winnowing misdemeanors from the jurisprudence runs a high risk of distorting the jurisprudence itself.

¹³⁶ *Id.* (citing an incident in which the Chief of Police informed a supervisor who noted an officer's excessive number of tickets that there should be "[n]o discipline for doing your job").

¹³⁷ Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in Terry Stops in Street Policing*, 82 U. CHI. L. REV. 51, 54 (2015) (citing GRAHAM A. RAYMAN, *THE NYPD TAPES: A SHOCKING STORY OF COPS, COVER-UPS, AND COURAGE* 43, 64, 182, 236 (2013) and John Del Signore, *Police Union Delegate Caught on Tape Demanding Cops Meet Quotas*, *GOTHAMIST* (Mar. 19, 2013, 2:07 PM), http://gothamist.com/2013/03/19/police_union_delegate_caught_on_tap.php [<http://perma.cc/66P6-FD4M>]).

¹³⁸ See, e.g., CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, *INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT* 29 (2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf [hereinafter DOJ, NEW ORLEANS] ("[P]ressure to make arrests and engage in sufficient 'activity' to satisfy command staff and NOPD brass encourages aggressive enforcement of low-level infractions, and diverts attention and resources from quality arrests leading to significant convictions."); DOJ SEATTLE, *supra* note 75, at 14 (finding a pattern of officers using excessive force against people who "talk back" to police).

¹³⁹ Cf. Alexandra Natapoff, Gideon *Skepticism*, 70 WASH. & LEE L. REV. 1049, 1055 (2013).

¹⁴⁰ *Id.*

¹⁴¹ DOJ FERGUSON, *supra* note 133, at 11 ("Indeed, officers told us that some compete to see who can issue the largest number of citations during a single stop.").

D. The Costs of Ignoring Race

Avoiding race fundamentally garbles the jurisprudence in other ways. The costs of this ongoing silence appear clearly in the raw and tense relationship between citizens and police officers in many jurisdictions,¹⁴² in disproportionately high rates of police killing of unarmed black men,¹⁴³ and most recently in the targeted killing of police officers.¹⁴⁴ This analysis echoes that of others calling on society to face the ongoing importance of race in criminal justice and in our communities.

The world without race observed in casebooks and cases reviewed in the project fits comfortably within a significant collection of literature noting the avoidance of race in the doctrine and jurisprudence of criminal procedure.¹⁴⁵ Bibas reported on the dearth of casebook materials discussing race twelve years ago.¹⁴⁶ Casebook authors address and seek to remedy this concern in their introductory materials. The silence in the casebooks, however, arises from a pattern of cultivating silence on race in caselaw that emerged decades ago in the Supreme Court.¹⁴⁷ It may be that sometimes “race [is] such an ingrained feature of our social systems that it becomes difficult to notice,”¹⁴⁸ but race plays an identifiable role in criminal procedure that more likely reflects the dominance of

¹⁴² See, e.g., Dara Lind, *The Ugly History of Racist Policing in America*, VOX (July 7, 2016, 10:06 AM), <http://www.vox.com/michael-brown-shooting-ferguson-mo/2014/8/19/6031759/ferguson-history-riots-police-brutality-civil-rights>; Al Sharpton, *Police and Black Americans: A Relationship Worse than in the 90s*, GUARDIAN (July 10, 2016, 10:43 AM), <https://www.theguardian.com/commentisfree/2016/jul/10/police-black-american-relationship-reform-justice-al-sharpton>.

¹⁴³ See Wesley Lowery, *Aren't More White People than Black People Killed by Police? Yes, but No*, WASH. POST (July 11, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/07/11/arent-more-white-people-than-black-people-killed-by-police-yes-but-no>.

¹⁴⁴ Manny Fernandez, Richard Pérez-Peña, & Jonah Engel Bromwich, *Five Dallas Officers Were Killed as Payback, Police Chief Says*, N.Y. TIMES (July 8, 2016), http://www.nytimes.com/2016/07/09/us/dallas-police-shooting.html?_r=0; Steve Visser, *Baton Rouge Shooting: Three Officers Dead; Shooter Was Missouri Man*, SOURCES SAY, CNN (July 18, 2016), <http://edition.cnn.com/2016/07/17/us/baton-route-police-shooting/>.

¹⁴⁵ Devon W. Carbado, (*E*)*racing the Fourth Amendment*, 100 MICH. L. REV. 946, 964–65 (2002) (reviewing the literature); L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 OHIO ST. J. CRIM. L. 115, 115–16 (2014) (reviewing the work of critical race scholars in this field).

¹⁴⁶ *The Real-World Shift in Criminal Procedure*, *supra* note 23, at 806.

¹⁴⁷ Tracey L. Meares, *Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 OHIO ST. J. CRIM. L. 105, 107 (2005) (“Although rarely acknowledged by the Court, the racial dimension of [the Warren Court’s criminal procedure] cases was not lost on contemporary observers. ‘The Court’s concern with criminal procedure,’ one wrote, ‘can be understood only in the context of the struggle for civil rights.’” (quoting A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 256 (1968))).

¹⁴⁸ Nicole Gonzalez Van Cleve & Lauren Mayes, *Criminal Justice Through “Colorblind” Lenses: A Call to Examine the Mutual Constitution of Race and Criminal Justice*, 40 LAW & SOC. INQUIRY 406, 408 (2015).

what Devon Carbado called the “perpetrator perspective.”¹⁴⁹ The perpetrator perspective involves the “active construction of an imaginary, race-less arena in which law enforcement and minorities interact.”¹⁵⁰

Carbado demonstrates how core Fourth Amendment doctrines—doctrines including consent, flight, and search incident to arrest—would change if the Court applied an explicitly race-conscious lens.¹⁵¹ For instance, Carbado proposes explicit consideration of race in determining whether a seizure occurred, setting forth three possible approaches to police interactions with a person of color. “Under the *per se* approach any interaction between a black person and the police would constitute a seizure, unless the officer advises that person that she is under no obligation to talk to the officer.”¹⁵² The “rebuttable presumption” approach operates in much the same way as the *per se* approach, but the presumption that an encounter was a seizure could be rebutted by evidence that the officer advised the person of her constitutional rights and did not otherwise act coercively.¹⁵³ Finally, he proposes a “totality of the circumstances” approach in which “the inquiry would be whether, under the facts of a given case, a person with the suspect’s racial identity, and considering the racial identity of the police officers, would have felt free to leave or otherwise terminate the encounter.”¹⁵⁴

Many scholars and activists have documented the harms of a race-blind system.¹⁵⁵ In a different example, David Sklansky used Supreme Court Fourth Amendment cases to demonstrate how largely unspoken understandings that favor law enforcement and “disregard the distinct grievances and concerns of minority motorists stopped by the police” may limit “the protection the [Fourth]

¹⁴⁹ Carbado, *supra* note 145, at 968.

¹⁵⁰ *Id.* at n.107 (noting that he uses the phrase “perpetrator perspective” in the Fourth Amendment context “to capture the Supreme Court’s active construction of an imaginary, race-less arena in which law enforcement and minorities interact” (drawing the phrase from Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052–57 (1978))).

¹⁵¹ Carbado, *supra* note 145, at 974–1000 (analyzing seizure law), 1004–25 (analyzing the law of consent), 1030–1043 (analyzing the law of traffic stops). Prof. Carbado contrasts the dominant race-less perpetrator’s perspective with the deliberately race-conscious victim’s perspective. He notes, “[t]he victim perspective . . . is explicitly race-conscious, and not only with respect to people with vulnerable racial identities (that is, potential victims), but also with respect to racial interpolators like the police (that is, potential perpetrators). The perspective is concerned with whether police officers are racially blameworthy or racially culpable in the ‘bad cop’ sense,” whereas the victim perspective is “more concerned with the coercive and disciplinary ways in which race structures the interaction between police officers and nonwhite persons.” *Id.* at 970.

¹⁵² *Id.* at 1000.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 1000–01.

¹⁵⁵ See, e.g., DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999); BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* (2014).

Amendment provides.”¹⁵⁶ He noted in particular that this line of cases fails to give credence to the ways in which searches and seizures can cause Fourth Amendment grievances unrelated to assaults on confidentiality.¹⁵⁷

Laura Gomez reviewed and analyzed scholarship interrogating ways the absence of race-conscious analysis harms the criminal justice system, noting a trend to analyze the ways that race and law mutually constitute each other.¹⁵⁸ Other scholars have worked to develop a better understanding of how unconscious racial biases influence the criminal law system.¹⁵⁹

The gap between caselaw and the lived experience of police investigation has real consequences for the regulation of police investigation. The final section evaluates proposals to minimize both the gap between the caselaw and practice, and the influence of that gap on criminal procedure.

V. GROUNDING CRIMINAL PROCEDURE: PROPOSALS FOR REFORM

The findings here show how the reliance on constitutional caselaw creates and reinforces widely shared and unreliable schema about the nature of policing. The overrepresentation of successful police investigation in exclusionary rule cases may lead to a tendency to discount Fourth Amendment protections and to advance unwarranted confidence on the reasonableness of police judgment. Overlooking the dominance of misdemeanors in policing and in criminal courts fosters unwarranted assumptions about the criminal justice system regarding the depth and thoroughness of each police investigation and each charge, as well as the roles of prosecutors, criminal defense attorneys, departmental policies as checks on the system, and particularized evidence. Again, the cases reinforce the tendency to overstate the appropriateness of deference to reasonable police investigation. Finally, the inability to analyze the role of race in policing fundamentally limits the ability of criminal procedure and criminal courts to understand factually the contours of police investigation both generally and in individual cases.

¹⁵⁶ David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 273 (1997) (arguing that largely unspoken understandings that favor law enforcement and “disregard the distinct grievances and concerns of minority motorists stopped by the police” may limit “the protection the [Fourth] Amendment provides”); see also *id.* at 311–17 (looking at the experience of traffic stops from the perspective of Black citizens).

¹⁵⁷ *Id.* at 318 (discussing non-privacy harms arising from an unconstitutional traffic stop or from a mythically “consensual” search).

¹⁵⁸ Laura E. Gómez, *Understanding Law and Race as Mutually Constitutive: An Invitation to Explore an Emerging Field*, 5 ANN. REV. L. & SOC. SCI. 487, 488 (2010) (analyzing the field).

¹⁵⁹ See generally L. Song Richardson, *Police Efficiency and the Fourth Amendment*, 87 IND. L.J. 1143 (2012) (discussing implicit racial biases and their relevance to criminal law and procedure); Cynthia Lee, *Making Race Salient: Trayvon Martin and Implicit Bias in a Not Yet Post-Racial Society*, 91 N.C. L. REV. 1555 (2013); Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777 (2000).

At the bottom line, the law of criminal procedure must be grounded in the lived experience of those being policed. Grounding criminal procedure requires: (1) encouraging the development of multiple remedies for police misconduct, and (2) fostering broad public involvement in developing and approving policing policies. These developments would help to situate criminal procedure cases more accurately in the complex racial context in which policing takes place.

*A. Encourage the Development of Multiple Remedies for
Police Misconduct*

Dependence on the exclusionary rule contributes a great deal to the skewed understanding of reality demonstrated above. It fosters false schemas and strong biases in the ways we interpret, collect, and understand information about criminal investigation. Nancy Leong argues that allowing legal doctrine to develop across a variety of litigation contexts can counteract these biases.¹⁶⁰ The context in which a right is created or interpreted shapes its contours, in part because courts consider evidence differently depending on the nature of the claim.¹⁶¹

For instance, in a case involving the exclusionary rule, the court is more likely to focus on the segment of an investigation specifically as it relates to the incriminating evidence they found. In contrast, a court hearing a section 1983 claim for civil damages tends to consider the encounter more holistically, looking at the officer's use of force and culpability when assessing issues of qualified immunity.¹⁶² Leong argues these contextual differences lead to better results in the long run.¹⁶³

Different contexts expose judges to more information about the kinds of situations in which a right applies, provide a more accurate representation of the people affected, and prevent procedural idiosyncrasies from skewing the legal evolution of that right.¹⁶⁴ Civil rights cases can provide an alternative remedy for a citizen faced with potentially unconstitutional police investigation,¹⁶⁵ and the police practices at issue might also provide a different view of police investigation. Most of the reviewed casebooks include several federal civil rights cases in which a plaintiff claims police behavior violated the Constitution

¹⁶⁰ Leong, *supra* note 7, at 406.

¹⁶¹ *Id.* at 407.

¹⁶² *Id.* at 445, 447–48, 454.

¹⁶³ *Id.* at 409.

¹⁶⁴ *Id.*

¹⁶⁵ Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1346 (2015) (noting that the exclusionary rule and civil right litigation provided the traditional remedies to counter police misconduct, but that they were “largely ineffective”).

usually the Fourth Amendment) and typically loses.¹⁶⁶ This pattern repeats in caselaw where structural limitations present significant barriers.¹⁶⁷

Brooks Holland argues that courts should treat racial injustice in criminal prosecutions as structural equal protection errors with full remedies available, notwithstanding the guilt of the criminal under prosecution or the possibility of harmless error.¹⁶⁸ He argues that providing full equal protection remedies for racial injustice is necessary to a just system.¹⁶⁹ Perhaps more importantly for this paper, however, Holland argues that “[w]ithout consistent remedies for violations of equal protection rights, lawyers and judges will not consistently engage the subject of race and criminal justice.”¹⁷⁰ This means there will be no discovery and no development of necessary evidence. The record will not

¹⁶⁶ The following civil rights cases appeared in one or more casebook: *Atwater v. City of Lago Vista*, 532 U.S. 318 (1985) (denying recovery on grounds that Fourth Amendment does not forbid warrantless arrests for minor criminal offense); *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822 (2002) (denying recovery on the grounds that the drug testing policy did not violate the Fourth Amendment); *Chavez v. Martinez*, 538 U.S. 760 (2003) (denying recovery on grounds that civil suits cannot be brought on the basis of *Miranda* violations); *City of Ontario v. Quon*, 560 U.S. 746 (2010) (denying recovery on the grounds that city’s review of employee’s text messages did not violate the Fourth Amendment); *Florence v. Bd. of Chosen Freeholders of Burlington*, 132 S. Ct. 1510 (2012) (denying recovery on the grounds that invasive searches of persons arrested and held in jail before trial did not violate the Fourth Amendment); *Graham v. Connor*, 490 U.S. 386 (1989) (remanding for evaluation of excessive force claim under the Fourth Amendment “objective reasonableness” standard; Graham lost at trial on remand); *Groh v. Ramirez*, 540 U.S. 551 (2004) (granting recovery on the grounds that the warrant was facially invalid and that qualified immunity did not apply because no reasonable officer could have believed otherwise); *Los Angeles Cty. v. Retelle*, 550 U.S. 609 (2007) (denying recovery on grounds that mistake that led police to order innocent residents out of bed and hold them at gunpoint during a warranted search did not violate the Fourth Amendment); *Muehler v. Mena*, 544 U.S. 93 (2005) (denying recovery on grounds that detaining bystander in handcuffs for two to three hours during warranted search of premises did not violate the Fourth Amendment); *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364 (2009) (granting recovery on the grounds that school search of 13-year-old student violated the Fourth Amendment); *Tennessee v. Garner*, 471 U.S. 1 (1985) (remanded for evaluation of excessive force claim under Fourth Amendment “reasonableness standard”) (*Garner* subsequently recovered damages in *Garner v. Memphis Police Dep’t.*, 8 F.3d 358 (6th Cir. 358)).

They also include several class actions typically bringing a facial challenge to the constitutionality of a new state policy such as sobriety checkpoints or drug testing. *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (challenge to constitutionality of a highway checkpoint program); *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990) (challenge to constitutionality of highway checkpoint program); *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (challenge to constitutionality of school drug testing policy); *Hageman v. Goshen Cty. Sch. Dist. No. 1*, 256 P.3d 487 (Wyo. 2011) (challenge to constitutionality of school drug testing policy). *Kamisar et al.* do not include any class actions in the main cases.

¹⁶⁷ See Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1867–70 (2015) (describing the constraints on damages actions).

¹⁶⁸ See generally Brooks Holland, *Race and Ambivalent Criminal Procedure Remedies*, 47 GONZ. L. REV. 341 (2011–2012) (arguing for full remedies for all equal protection remedies in criminal cases).

¹⁶⁹ *Id.* at 364.

¹⁷⁰ *Id.* at 361 (“Lawyers and judges will not argue and decide a claimed legal violation itself if no remedy exists . . .”).

document how the prosecutor “‘injected racial prejudice into the trial proceedings by asserting that black witnesses are unreliable and using derogatory language toward a black witness.’”¹⁷¹ or the extent to which the prosecutor in another case uses race to evaluate the desirability of potential jurors.¹⁷² Making equal protection remedies available would counter the power of the inaccurate schemas and in the development of others.

Finally, reforms geared to decrease the pressure on defendants to forfeit the right to a jury trial and plead guilty may also broaden the scope of evidence heard by both judges and jurors. The dominance of plea bargaining and the decline of the jury trial have been well documented by researchers.¹⁷³ Defendants who cannot afford to make bail on a relatively minor offense often plead guilty in exchange for immediate release, rather than challenge the evidence or circumstances of arrest in court.¹⁷⁴ Overburdened public defenders lack the resources to fully investigate and litigate on behalf of their clients, who inevitably face overwhelming pressure to plead guilty.¹⁷⁵ Harsh sentencing guidelines and mandatory minimums shift power from judges and juries to prosecutors and thereby increase the risks defendants face by going to trial.¹⁷⁶ While a comprehensive discussion of these issues is beyond the scope of this article, reforms aimed at fixing these problems could also have collateral benefits by increasing the transparency of policing and subjecting it to greater scrutiny.¹⁷⁷

B. Foster Increased Community Participation in Developing and Approving Policing Policies

Barry Friedman and Maria Ponomarenko recently revisited the extent to which the lack of regulation of policing constitutes “a failure of democratic

¹⁷¹ *Id.* at 363 (citing and quoting *State v. Monday*, No. 60265-9, 2008 WL 5330824, at *8–9 (Wash. Ct. App. Dec. 22, 2008), *rev'd*, 257 P.3d 551, 556 (Wash. 2011)).

¹⁷² See *Foster v. Chatman*, 136 S. Ct. 1737, 1747–48 (2016) (reviewing evidence on the prosecutor’s preparation for jury selection). Holland contrasts the Supreme Court’s approach to equal protection violations in jury selection with that in the case itself. He argues that the Court’s application of equal protection to jury selection provides a model for provision of criminal procedure remedies for equal protection violations in all contexts. Holland, *supra* note 168, at 356–57.

¹⁷³ See, e.g., George Fisher, *Plea Bargaining’s Triumph*, 109 YALE L.J. 857 (2000) (reviewing the history of plea bargaining).

¹⁷⁴ See *Plea Bargaining Outside the Shadow of Trial*, *supra* note 15, at 2491–93 (describing the power of pretrial detention to induce a guilty plea).

¹⁷⁵ See, e.g., Roberts, *supra* note 67, at 282.

¹⁷⁶ Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 95–102 (2003) (discussing the role that sentencing guidelines and mandatory minimums have had in encouraging guilty pleas).

¹⁷⁷ See Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731 (2010) (proposing the use of a “plea jury” to evaluate guilty pleas and restore the community’s voice in criminal adjudication).

processes and accountability.”¹⁷⁸ Police operate under broad authorizations “to enforce the criminal law.”¹⁷⁹ Police regulations that tell police how to go about enforcing the criminal law do not create new binding crimes or change the scope of the criminal law. As a result, police have been considered exempt from the typical rulemaking requirements for public participation, such as providing a period for notice and comment.¹⁸⁰

This exemption leaves the public and the courts without full information about the content or the rationale of police policies. Friedman and Ponomarenko argue that the “huge consequences” of police rules and policies about enforcement methods on people created a normative imperative for democratic accountability.¹⁸¹ They note that theirs is not the first effort to encourage publicly informed rulemaking for the police but that it has been a difficult change to enact.¹⁸²

Our research provides new support for their argument. We find that courts, including judges, prosecutors, and defense counsel, are fundamentally missing important information about the criminal justice system in both individual cases and systemically, and that this skew in perspective risks undermining constitutional protections. We welcome and seek to amplify their suggestion that public participation in the adoption and approval of rules governing policing can and should give new voices opportunities to be heard.¹⁸³ Doing so would provide critically needed information about policing as practiced to lawyers and judges, as well as to the community at large.

The research presented above suggests the urgency of legitimizing new sources of information about policing. Rulemaking procedures that identify a way to receive and evaluate information from the public can provide a more complete understanding of policing as experienced to the criminal justice system. Friedman and Ponomarenko provide examples of times that democratic engagement has led to changes in police policies.¹⁸⁴ These changes happened in part because new facts came to the table, such as facts about how much time police and courts spend on misdemeanors, the actual accuracy of individual police investigative techniques, the role of revenue in police accountability

¹⁷⁸ Friedman & Ponomorenko, *supra* note 167, at 1830.

¹⁷⁹ *Id.* at 1831; *see also id.* at 1859 (explaining that this approach to the regulation of police arose from an era of endemic police corruption at the hands of the public and a desire to create an autonomous police force based on a code of “professionalism”).

¹⁸⁰ *Id.* at 1857–58 (explaining “police exceptionalism”).

¹⁸¹ *Id.* at 1858.

¹⁸² *Id.* at 1861–62 (noting in particular initiatives by the American Law Institute, the American Bar Association, and a team of academics).

¹⁸³ *Id.* at 1879–81, 1879 n.279 (citing studies and listing examples).

¹⁸⁴ Friedman & Ponomorenko, *supra* note 167, at 1852–53 (explaining changes on the use of military equipment by local police forces and the deployment of drones); *id.* at 1880–81 (describing citizen police cooperation programs in Cincinnati and Los Angeles).

metrics, or the relationship between the demographic profile of drug users and that of drug arrestees. A more complete record would allow for more accurate review of police professionalism and the reasonableness of police actions.¹⁸⁵

Relying on the facts in constitutional criminal procedure cases to teach and describe police practices has created a skewed perspective on policing. Increased public participation in the approval of police regulations might begin to broaden the perspective. The new American Law Institute (ALI) Project on the Principles of the Law of Police Investigation has included public perspectives at the table.¹⁸⁶

The ALI Police Investigation Project has also included broadly diverse participants. Efforts to broaden the diversity of police, lawyers, judges, and other members of the criminal justice system are not new. Research has documented the value of diversity to creativity, problem solving, and information sharing in multiple settings.¹⁸⁷ For instance, Joscha Legewie and Jeffrey Fagan found that a police force that proportionally represents the diversity of the population it serves reduces the influence of group threat, lowering the number of officer-involved killings of African Americans.¹⁸⁸

Samuel Sommers and colleagues have shown that white participants in mock jury studies who expected to discuss a race-relevant topic with a racially diverse group exhibited better comprehension of topical background readings than did whites assigned to all-white groups.¹⁸⁹ This approach is not, however, a

¹⁸⁵ *Id.* at 1892 (discussing a new role for courts in reviewing police actions based on the content of written policies).

¹⁸⁶ *Project on the Principles of Police Investigation*, AM. LAW INST., https://www.ali.org/projects/show/police-investigations/#_participants (last visited Sept. 29, 2016).

¹⁸⁷ See Jennifer A. Richeson & Samuel R. Sommers, *Toward a Social Psychology of Race and Race Relations for the Twenty-First Century*, in 67 ANN. REV. PSYCHOL. 439, 449–52 (2016) (reviewing the literature on the value of diversity to groups and reporting positive consequences for creativity, problem solving, and information sharing).

¹⁸⁸ Joscha Legewie & Jeffrey Fagan, *Group Threat, Police Officer Diversity and the Deadly Use of Police Force* 6–7 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 14-315, 2016), <http://ssrn.com/abstract=2778692> (using new data to revisit this question). Earlier research has reached opposing conclusions. See David Jacobs & Robert M. O'Brien, *The Determinants of Deadly Force: A Structural Analysis of Police Violence*, 103 AM. J. SOC. 837 (1998); Brad W. Smith, *The Impact of Police Officer Diversity on Police-Caused Homicides*, 31 POL'Y STUD. J. 147 (2003); Dale W. Willits & Jeffrey S. Nowacki, *Police Organisation and Deadly Force: An Examination of Variation across Large and Small Cities.*, 24 POLICING & SOC'Y 63 (2014); Franklin E. Zimring & Brittany Arsiniega, *Trends in Killing of and by Police: A Preliminary Analysis*, 13 OHIO ST. J. CRIM. L. 247 (2015). Legewie and Fagan argue that the previous research was based on less reliable data. Legewie & Fagan, *supra* note 188, at 2, 11–12 (explaining commonly acknowledged concerns with the previous data and the steps they took to develop more reliable data).

¹⁸⁹ See Samuel R. Sommers et al., *Cognitive Effects of Racial Diversity: White Individuals' Information Processing in Heterogeneous Groups*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 1129 (2008); see also Samuel R. Sommers, *On Racial Diversity & Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J PERSONALITY AND SOC. PSYCHOL. 597 (2006) (finding that racially diverse juries deliberated longer, considered a wider

panacea. In particular, much research and work in this area has implied a monolithic perspective for each minority racial group and placed the burden of diversity on the minority participants.¹⁹⁰ Democratic participation of this kind requires broad public engagement.

Carbado has argued the need to shift from a perspective that is superficially colorblind, acknowledging race only when the perpetrator—that is, an overtly racist officer—behaves in such a way that makes racism incontrovertible. Instead, he proposed a victim perspective that explicitly acknowledges the role of race in everyday encounters between police and people of color. Likewise, Gabriel Chin and Charles Vernon pushed courts to engage directly in analyses of the role of race in police investigation.¹⁹¹ The article challenges *Whren*'s immunization of racial discrimination (by making it non-cognizable) with a careful review of the case and Fourth Amendment law, including: the role of race in *Whren*,¹⁹² the role and use of subjective inquiries in Fourth Amendment jurisprudence,¹⁹³ and the mechanisms by which a court could evaluate a race discrimination claim.¹⁹⁴ The authors argue that the Court must move away from the dicta excluding the consideration of race if it wants to evaluate the “reasonableness” of police investigation. Racist investigations are unreasonable. Instead, the Court should create an expectation that courts would identify how race influenced the police investigation.¹⁹⁵

Race-silence fundamentally skews the jurisprudence. It may be that the focus on the influence of race on policing that emerged in the second decade of the twenty-first century will encourage courts to consider the influence of race in the criminal justice system anew. At the same time, the existing jurisprudence makes such issues difficult to raise and even more difficult to win, thus reducing the opportunities for courts to bring race into consideration.¹⁹⁶ Recent trainings have encouraged trial lawyers to raise concerns about race and to present

range of information, and made fewer inaccurate statements when discussing a mock trial of a Black defendant than did all-White juries).

¹⁹⁰ See Richeson & Sommers, *supra* note 187.

¹⁹¹ Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of Whren v. United States*, 83 GEO. WASH. L. REV. 882, 884–88 (2015). The Supreme Court ruled in *Whren* that a stop is justified if an officer has probable cause that a traffic violation has occurred, regardless of the officer's actual motivation, because “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis,” even if based on “considerations such as race.” *Whren v. United States*, 517 U.S. 806, 813 (1996).

¹⁹² Chin & Vernon, *supra* note 191, at 891–94.

¹⁹³ *Id.* at 912–16.

¹⁹⁴ *Id.* at 935–41.

¹⁹⁵ *Id.* at 942. *But see* L. Song Richardson, *Implicit Racial Bias and the Perpetrator Perspective: A Response to Reasonable but Unconstitutional*, 83 GEO. WASH. L. REV. 1008 (2015) (critiquing Chin and Vernon's reliance on existing jurisprudence and their defense of pretext stops on the grounds that this approach will exacerbate the burdens of racial profiling on non-Whites).

¹⁹⁶ See, e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Whren v. United States*, 517 U.S. 806 (1996).

broader statistics about the context in which citizen–police encounters take place. Training in this area may be productive.¹⁹⁷ Perhaps it is also the case that teaching students to be race–conscious rather than race–blind in law school criminal procedure courses might prove the most successful stimulus for change.¹⁹⁸

VI. CONCLUSIONS

We began by observing that lawyers’ shared understanding of police investigation practices arises from published caselaw layered over a well–established set of U.S. Supreme Court opinions in which a guilty person in a race–less arena is charged with a felony and seeks to exclude incriminating evidence. We reviewed commonly used casebooks and one year of published opinions to estimate the key characteristics of cases that made it from stop to arrest to charge, then past plea negotiations to a trial, a written opinion and, finally, to published opinion. Turning to broader research, we demonstrated how the picture of policing presented both in casebooks and in the snapshot of published opinions reflect a limited subset of policing as practiced and is not grounded in reality.

The story that emerges from the winnowed subset of published opinions is one in which police are professional, uncannily intuitive about criminal wrongdoing, and colorblind. Police may sometimes get wrong the complicated law governing their behavior, but their motives and assessment of the facts are rarely in question. They act primarily out of concern for public safety and to catch perpetrators of serious felonies, rather than in response to bureaucratic incentives. The people challenging their actions are indisputably guilty, not only of committing a crime but of committing a serious one. They are often caught because police officers’ experience and training allow them to detect crime from cues that would seem unremarkable to a lay person. Of course, race plays no role in shaping police officers’ decision making or citizens’ responses to police officers and, thus, warrants little if any discussion in assessing the legitimacy of their actions.

A different story emerges from research on how police actually behave. Investigation often yields nothing incriminating, and, when it does, the crimes at issue are usually civil infractions or misdemeanors. Police departments often measure officers’ productivity, not by compliance with the law or accuracy in detecting crime, but by the number of stops they make and citations they issue.

¹⁹⁷ See, e.g., NAT’L ASS’N FOR PUB. DEF., Webinar, *How Do We Deal with Race in the Criminal Justice System?*, VIMEO (December 19, 2014), <http://vimeo.com/115017691> (training public defenders on how to introduce evidence on race at trial).

¹⁹⁸ See, e.g., M.K.B. Darmer, *Teaching Whren to White Kids*, 15 MICH. J. RACE & L. 109 (2009); Margalynne J. Armstrong & Stephanie M. Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 N.C. L. REV. 635 (2008); Beverly I. Moran, *Disappearing Act: The Lack of Values Training in Legal Education—A Case for Cultural Competency*, 38 S. U. L. REV. 1 (2010); David B. Wilkins, *Identities and Roles: Race, Recognition, and Professional Responsibility*, 57 MD. L. REV. 1502 (1998).

Significant disparities in who arouses their suspicions suggest that race indeed affects their decision-making. But this story is at best peripherally addressed in criminal procedure pedagogy and largely absent from the published cases that shape the law going forward.

This empirical study of constitutional criminal procedure as taught and practiced makes clear that initiatives to better inform lawyers, judges, and others about the lived experience of being policed merit attention. In so doing, criminal procedure will be more precisely grounded in the practices it is meant to govern.

