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Outcome Sensitivity and the Constitutional Law of Criminal Procedure

Lee Kovarsky
University of Texas School of Law, lee.kovarsky@law.utexas.edu

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LEE KOVARSKY*

Iconic criminal procedure doctrines that perform the same function go by different names. When constitutionally disfavored conduct taints a criminal proceeding, courts must determine how much the taint affected an outcome—and whether the damage requires judicial relief. These doctrinal constructs calibrate judicial responses to, among other things, deficient defense lawyering (prejudice), wrongful State suppression (materiality), unlawful policing (attenuation), and an assortment of trial-court mistakes (harmless error). I refer to these constructs, which tightly orbit the constitutional law of criminal procedure, as rules of "outcome sensitivity." Formal differences in sensitivity rules remain enduring puzzles subject to only the most superficial inspection. In this Article, I surface the parallel functions that these rules perform, explain why they should be banished from substantive constitutional law, and advance my preferred view of their legal status: as subconstitutional limits on judicial remedies. At stake are basic behavioral incentives for defense lawyers, police, prosecutors, and judges.

I proceed in three parts. In Part I, I map the universe of sensitivity rules. They can be internal pieces of substantive constitutional law (like materiality and prejudice elements), or they can be external limits on remedies for completed constitutional wrongs (like harmless error rules). They can also define downstream constitutional errors distinct from upstream constitutional violations (like certain rules against in-court identification). In Part II, I reject internal sensitivity rules, which unwisely transmit mixed signals to criminal justice actors engaged in disfavored conduct. Such rules undermine crucial professional norms, and they degrade constitutional enforcement that takes place outside the criminal process. In Part III, I argue that external sensitivity rules should be conceptualized as subconstitutonal limits on judicial remedies. That status neatly explains why sensitivity rules apply in state court, it avoids standard criticism of federal common law, and it is less doctrinally disruptive than the external alternatives.

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* Bryant Smith Chair in Law and Co-Director, Capital Punishment Center, University of Texas School of Law. For their generous attention to my drafts, I thank Richard Boldt, Josh Bowers, Oren Bracha, Carissa Byrne Hessick, Vincent Chiao, Erin Collins, Jens Damann, Erik Encarnacion, Dan Epps, Thomas Frampton, Willy Forbath, John Golden, John Greabe, Corinna Lain, Jennifer Laurin, Nancy Leong, Kay Levine, Sandy Levinson, Susan Morse, Justin Murray, Richard Re, Jenny Roberts, Larry Sager, Megan Stevenson, Wendy Wagner, and Ron Wright. I have presented this paper at the University of Texas Faculty Colloquium, the University of Virginia Neighborhood Criminal Justice Roundtable, and the Virtual Criminal Law Workshop, and I am grateful to the feedback I received at those events.

INTRODUCTION

In criminal cases, there are different doctrines that perform a common function: they tell courts when to ignore the taint of constitutionally disfavored conduct. Inquiries like "harmless error," "prejudice," and "materiality" have different names, but they all key judicial relief to the causal effect that tainting conduct has on some outcome (usually a verdict).[1] These rules are everywhere. Few criminal procedure inquiries are as omnipresent as the harmless-error doctrine. In capital litigation, for example, eighty-one percent of habeas cases require a prejudice inquiry for ineffective assistance of counsel claims, and about fifty percent require analysis of

1. *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 687 (1984) (setting forth prejudice criterion for Sixth Amendment ineffective-assistance-of-trial-counsel test); Chapman v. California, 386 U.S. 18, 24 (1967) (announcing harmless error standard for appellate review of constitutional error in a criminal trial); Brady v. Maryland, 373 U.S. 83, 87 (1963) (imposing rule that exculpatory evidence suppressed by the state will amount to a constitutional violation when it is "material either to guilt or to punishment").

materiality for prosecutor misconduct claims.[2] I refer to these related doctrines, which orbit the constitutional law of criminal procedure, as "outcome-sensitivity" rules—and those rules exhibit a puzzling inconsistency. Among other things, they can be external limits on judicial remedies (like harmless-error doctrine) or internal elements of substantive constitutional law (like materiality and prejudice elements).[3]

Several recent, high-profile articles analyze different sensitivity rules in a more siloed way, and the conclusions diverge sharply.[4] Professor Justin Murray argues that certain sensitivity elements now conceptualized as substantive constitutional law should instead be treated as subconstitutional limits on remedies.[5] Professor Daniel Epps contends that the harmless-error rule, currently considered such a subconstitutional limit, should be reclassified as an internal element of substantive constitutional law.[6] Professor Richard Re suggests something more unusual: that there is a second, downstream due process infraction whenever an upstream Fourth Amendment violation sufficiently taints a conviction.[7] My goal is to link all of this scholarship, generalize outcome sensitivity for the purposes of more abstract analysis, and argue that sensitivity rules should be subconstitutional limits on judicial remedies.

The question of "juridical status" is exceedingly important, even if the reasons aren't obvious. Why does it matter whether a rule is classified as constitutional law, a subconstitutional limit on remedies, or something else? First, legal enforcement happens in contexts other than criminal prosecutions, and internal sensitivity

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2. *See* NANCY J. KING, FRED L. CHEESMAN II & BRIAN J. OSTROM, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 5 tbl.15 (2007), https://www.ojp.gov/pdffiles1/nij/grants/219559.pdf [https://perma.cc/Z5GX-QTMR].

3. Consider the cases in *supra* note 1. *Strickland* prejudice and *Brady* materiality are part of the doctrinal test for the underlying violation and are therefore treated as questions of substantive law. *See Strickland*, 466 U.S. at 687; *Brady*, 373 U.S. at 87; *see also infra* notes 56 and 80 and accompanying text (collecting authority supporting classification as constitutional rules). The harmless error rule for appeals, however, is usually considered a rule of procedure. *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1771 (1991).

4. *See generally, e.g.*, Daniel Epps, *Harmless Errors and Substantial Rights*, 131 HARV. L. REV. 2117 (2018) [hereinafter Epps, *Harmless Errors*] (urging a reconceptualization of harmless error rules as part of the constitutional rights to which they pertain); Daniel Epps, *The Right Approach to Harmless Error*, 120 COLUM. L. REV. F. 1 (2020) [hereinafter Epps, *Right Approach*] (responding to criticism of Epps, *Harmless Errors*); John M. Greabe, *Criminal Procedure Rights and Harmless Error: A Response to Professor Epps*, 118 COLUM. L. REV. ONLINE 118 (2018) [hereinafter Greabe, *Epps Response*] (arguing in response to Epps, *Harmless Errors*, *supra*, that harmless error doctrine should remain a question of remedy); John M. Greabe, *The Riddle of Harmless Error Revisited*, 54 HOUS. L. REV. 59, 62 (2016) [hereinafter Greabe, *Riddle*] (calling for courts to revisit the juridical status of the harmless error rule); Justin Murray, *Prejudice-Based Rights in Criminal Procedure*, 168 U. PA. L. REV. 277 (2020) [hereinafter Murray, *Prejudice-Based Rights*] (attacking practice by which courts denominate prejudice and materiality requirements as substantive constitutional law).

5. *See* Murray, *Prejudice-Based Rights*, *supra* note 4, at 319–22.

6. *See* Epps, *Harmless Errors*, *supra* note 4, at 2119–20.

7. *See* Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1912–17 (2014).

elements make enforcement in those other contexts considerably harder. Specifically, Congress has more legislative authority to protect constitutional rights when those rights omit sensitivity elements, and structural reform lawsuits are easier to win if sensitivity rules aren't constitutional law. Second, compliance with constitutional principles entails nonlegal enforcement. That is, compliance with constitutional rules increases when institutions set and abide by desirable norms, so the announced content of the constitutional rules exerts a critical influence over how related norms emerge and develop.

This Article divides into three parts. Part I sets forth the concept of outcome sensitivity at the necessary level of abstraction, and by reference to categories that I revisit throughout. As discussed above, a sensitivity rule keys a judicial response to the effect that a taint has on an outcome—usually (but not always) the guilt determination of a criminal trial. The three categories of sensitivity rules are: (1) *external* sensitivity rules that subconstitutionally limit relief for completed constitutional violations;[8] (2) *internal* sensitivity rules that limit relief because constitutional violations remain incomplete unless the sensitivity rule is satisfied;[9] and (3) sensitivity rules that are not limiting at all because they define distinct, downstream constitutional harms.[10]

Part II explains why we should do away with internal sensitivity rules. I repurpose Professor Meir Dan-Cohen's model of "acoustic separation," originally formulated as a way to understand the rules of substantive criminal law, as a framework for analyzing the constitutional law of criminal procedure.[11] When an internal sensitivity rule says that there is no constitutional violation without sufficient harm, it confounds the behavioral signals transmitted to nonjudicial actors,[12] and it promotes sub-optimal levels of secondary enforcement.[13] The stakes are considerable: internal sensitivity rules promote constitutionally disfavored conduct in prosecutor, police, and defense-counsel communities.[14]

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8. *See infra* Section 0.

9. *See infra* Section 0. *See also infra* notes 77–80 and accompanying text (discussing *Brady* materiality in particular).

10. *See infra* Section 0.

11. *See generally* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

12. *See infra* Section 0.

13. *See infra* Section 0.

14. There is a rich literature discussing the relationship between rights implementation and behavioral incentives. The pioneering work is by Larry Sager, who showed that judicial enforcement reaches only a fraction of constitutionally disfavored state action. *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1212–13 (1978) (showing that there exist valid constitutional norms, the outer registers of which often go unenforced by courts, that should nonetheless guide the conduct of nonjudicial actors); *see also, e.g.*, Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1299–1306 (2006) (mapping theories about over- and under-enforcement of constitutional norms); Jennifer E. Laurin, *Rights Translation and Remedial Disequilibration in Constitutional Criminal Procedure*, 110 COLUM. L. REV. 1002, 1007 (2010) (arguing that regulatory effect of constitutional principles should not be at the mercy of attempts to specify principles in new remedial contexts).

Part III considers the juridical status of external sensitivity rules. For my purposes, a rule's "juridical status" is fixed by reference to whether it limits relief, and whether it operates as a constitutional or subconstitutional law. The most important point is that, as a general matter, external sensitivity rules should be conceptualized as subconstitutional limits on judicial remedies. That status explains why the rules apply in state court, and it does not invite concerns that otherwise dog federal common law. As far as external sensitivity rules are concerned, there is one real alternative. Rather than using a harm metric to limit remedies for constitutional wrongs, sufficient harm might represent a *second*, *downstream* constitutional error that is distinct from the upstream constitutional taint. On this view, for example, a Fourth Amendment violation would create a distinct due process violation when a court convicted a defendant based on sufficiently tainted evidence.[15] I ultimately reject this theory of harm as too doctrinally radical.

In the end, readers should understand that different sensitivity rules perform the same function, even if they have roots in different doctrinal soil. That different sensitivity rules have varied juridical status may reflect little more than the accident of procedural posture in which courts developed them. If sensitivity rules perform largely the same function, and if varied juridical status is an accident of doctrinal path dependence, then a more theoretically consistent approach is in order. That approach's most important principles are (1) that there should be no internal sensitivity rules, and (2) that the external sensitivity rule should be a subconstitutional limit on relief. When sensitivity rules are subconstitutional and limiting, they optimize incentives for nonjudicial actors without making disruptive changes to remedies law.

I. SENSITIVITY IN LEGAL DOCTRINE

Criminal procedure is loaded with outcome-sensitivity rules, which fall into three categories. The first consists of *external*, subconstitutional limits on remedies for completed constitutional wrongs.[16] These include harmless-error doctrines that restrict appellate relief,[17] as well as independent source rules that limit the exclusion of evidence bearing some constitutional taint.[18] The second category consists of sensitivity rules that operate as *internal* elements of constitutional law.[19] An internal sensitivity rule, such as "materiality" or "prejudice,"[20] permits a finding of constitutional error only when disfavored conduct does enough downstream damage. The third category involves sensitivity rules that are not limiting at all, because they define a downstream, second-order constitutional violation.

Part I sketches these categories and highlights the common functions that outcome-sensitivity rules perform across all of them.[21] In each context, there is some

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15. *See supra* note 7 and accompanying text.
16. *See infra* Section 0.
17. *See infra* Section 0.
18. *See infra* Section 0.
19. *See infra* Section 0.
20. *See infra* Sections 0 (prejudice), 0 (materiality).
21. I acknowledge that one might conceptualize certain outcome-sensitivity rules as performing other functions, too. For example, the Supreme Court has occasionally discussed

taint (disfavored conduct) that might affect an outcome, and a harm threshold permitting judicial response. The disfavored conduct, outcomes, and harm thresholds will vary across contexts, but they always work together to modulate judicial relief.[22] In judicial opinions, these rules are almost always justified by reference to interests, such as judicial administration and finality, that we associate with remedial limits.[23]

A. External Rules: Remedial Limits

Many outcome-sensitivity rules restrict judicial relief for completed constitutional wrongs, and they are therefore classified juridically as remedial limits. This category of sensitivity rules includes, for example, the harmless-error doctrine,[24] as well as related restrictions on post-conviction relief.[25] It also includes independent source rules that permit the admission of certain taint-bearing evidence.[26]

1. Appellate Review Doctrines

The quintessential rule in this category is the harmless-error doctrine, which calibrates appellate relief for constitutional errors committed at criminal trials.[27] In

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Brady materiality as a means of preserving the adversarial character of truth-finding in criminal cases. *See, e.g.*, United States v. Bagley, 473 U.S. 667, 675 & n.7 (1985) (in reference to *Brady*'s effect on the "adversary system," noting that "[a]n interpretation of *Brady* to create a broad, constitutionally required right of discovery 'would entirely alter the character and balance of our present systems of criminal justice'"). Nevertheless, nobody seriously disputes that finality is the primary interest driving the presence of the *Brady* materiality rule. *See, e.g.*, Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391, 414 (1984) ("Of course, the major reason for a materiality standard (as opposed to the full effectuation of *Brady* rights that a mere favorability standard would provide) is to protect the finality of judgments."). A more-rigorous-but-complicated statement of my premise, then, is that sensitivity rules perform sufficiently common functions that they warrant analysis as a category, notwithstanding very minor differences.

22. Others have briefly noted the similar functions in passing, but without fuller exploration. *See, e.g.*, Nix v. Williams, 467 U.S. 431, 443 n.4 (1984) ("The ultimate or inevitable discovery exception to the exclusionary rule is closely related in purpose to the harmless-error rule . . . ."); Epps, *Harmless Errors*, *supra* note 4, at 2159–60 (analogizing his preferred harmless-error rule to what I have called internal sensitivity elements); Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 51–52 (2002) ("Ineffective assistance claims . . . appear to incorporate harmless error analysis into the substantive standard."); David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1253 (2005) (describing what I have called an internal sensitivity element as "a prejudice component that operates as a kind of internal harmless error doctrine").

23. *See supra* note 21 and *infra* notes 95–98 and accompanying text.

24. *See infra* Section 0.

25. *See infra* Section 0.

26. *See infra* Section 0.

27. For a history about the rise of harmless error rules, see Charles J. Ogletree, Jr., Arizona v. Fulminante*: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 156 (1991); *see also* ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR

Kotteakos v. United States,[28] the Supreme Court declared that a *nonconstitutional* error was to be treated as harmless when "the judgment was not substantially swayed by the error."[29] In *Chapman v. California*,[30] the Court finally committed to a harmless-error standard for *constitutional* mistakes, holding that such trial errors required reversal unless they were "harmless beyond a reasonable doubt."[31]

I focus on the *Chapman* rule here. *Chapman* is transsubstantive, as it applies across categories of trial court error. It applies, for instance, to judicial errors made in the course of enforcing Fourth, Fifth, and Sixth Amendment guarantees[32] and in many cases when a conviction is tainted by a due process violation.[33] (So-called structural error remains exempt from *Chapman*'s harmless error rule.[34]) In each scenario, the question is whether the constitutional error affected the conviction or sentence (i.e., the outcome) enough to justify vacatur or reversal. The reasons vary, but almost everyone considers the *Chapman* rule to be a limit on appellate remedies.[35]

2. Collateral Review Doctrines

Chapman sets the sensitivity threshold for *appellate* review of the conviction and sentence, but there is another standard for the applicable *post-conviction* review. In *Brecht v. Abrahamson*,[36] the Supreme Court held that the *Kotteakos* sensitivity threshold for appellate review of nonconstitutional mistakes also applied to federal

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13 (1970) (describing American backlash to incorporation of English rules).

28. 328 U.S. 750 (1946). I flag *Kotteakos* here because the Supreme Court later incorporated its sensitivity rule for the purposes of determining harmlessness during post-conviction proceedings. *See* Brecht v. Abrahamson, 507 U.S. 619, 623 (1993).

29. 328 U.S. at 765.

30. 386 U.S. 18 (1967).

31. *See id.* at 24.

32. *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279, 284 (1991) (Fifth Amendment); Moore v. Illinois, 434 U.S. 220, 232 (1977) (Sixth Amendment); Chambers v. Maroney, 399 U.S. 42, 52–53 (1970) (Fourth Amendment).

33. *See, e.g.*, Rose v. Clark, 478 U.S. 570, 582 (1986) (applying *Chapman* standard to due process violation on federal habeas review during era when same harmlessness standard was used there and on appeal).

34. *See* Brecht v. Abrahamson, 507 U.S. 619, 629. For example, if the prosecution uses racial discrimination to strike a juror, there is no inquiry into harm—so the appellate sensitivity threshold is effectively zero. *See* Batson v. Kentucky, 476 U.S. 79, 100 (1986).

35. *See* KING ET AL., *supra* note 3; *see also* Epps, *Harmless Errors*, *supra* note 4, at 2121 ("Essentially all prior attempts to understand harmless error have proceeded from the premise that it involves a remedies question: what should a court do about a violation of the defendant's constitutional rights?"). There is, however, some dissent bubbling through the academy. Professors Epps and Richard Re have each argued that appellate thresholds for harmful error should be conceptualized as *constitutional* rules of outcome sensitivity. *See* Epps, *Harmless Errors*, *supra* note 4, at 2158–74; Re, *supra* note 7, at 1915–17. I want to bracket, if only momentarily, the positions that Epps and Re take; they will ultimately be important reference points as I move through this Article.

36. 507 U.S. 619 (1993).

post-conviction review of constitutional error.[37] Under that standard, a conviction subject to collateral review must remain intact unless a constitutional error had a substantial and injurious effect on a jury verdict.[38]

Brecht and *Kotteakos* impose outcome-sensitivity rules for scenarios in which federal post-conviction review is otherwise unrestricted by another habeas doctrine.[39] But there are in fact many other procedural restrictions, and many of *those* contain outcome-sensitivity thresholds. 28 U.S.C. § 2254(e)(2), which restricts the availability of federal habeas hearings, nicely illustrates the configuration. A federal habeas hearing based on some new fact or law is generally unavailable unless "the facts underlying the claim would be sufficient to establish . . . that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."[40] Access to a hearing (the requested response) is calibrated by reference to whether the constitutional violation at issue sufficiently affected the factfinder's determination (the outcome of interest).

Similar outcome-sensitivity rules appear throughout federal habeas law, both statutory and decisional. They operate, for example, in the provisions governing the filing of successive federal petitions[41] and in judge-made law for excusing federal claims that are untimely or procedurally defaulted.[42] Such sensitivity rules, moreover, are not the exclusive province of *federal* post-conviction law; they appear in *state* post-conviction statutes too.[43]

3. Independent Source Doctrines

With respect to appellate and post-conviction sensitivity rules, the outcome of interest is the criminal judgment; the effect of the taint on a conviction or sentence dictates relief. There are, however, scenarios when the pertinent outcome is the discovery of evidence and when the sensitivity rule calibrates responsive judicial suppression. More specifically, when the causal link between a constitutional taint

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37. *See id.* at 623.

38. *See id.*

39. The Supreme Court has recently decided that a claimant who lost a merits adjudication in state court must satisfy *Brecht* and 28 U.S.C. § 2254(d). *See* Brown v. Davenport, 142 S. Ct. 1510, 1517 (2022).

40. 28 U.S.C. § 2254(e)(2)(B).

41. *See* 28 U.S.C. § 2244(b)(2)(B)(ii).

42. *See*, *e.g.*, McQuiggin v. Perkins, 569 U.S. 383, 401 (2013) (timeliness); Coleman v. Thompson, 501 U.S. 722, 750 (1991) (procedural default).

43. *See, e.g.*, TENN. CODE ANN. § 40-30-117(a)(4) (West 2011) (permitting a convicted prisoner to reopen a conviction if "the facts underlying the claim, if true, would establish by clear and convincing evidence that the petitioner is entitled to have the conviction set aside or the sentence reduced."); TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a) (West 2015) (permitting a convicted prisoner to initiate successive state post-conviction proceedings if either the constitutional error was, by preponderant evidence, but-for cause of a capital conviction or, by clear and convincing evidence, but-for cause of a capital sentence).

and evidence is attenuated,[44] courts will admit the taint-bearing evidence. These sensitivity rules have a more common name: independent source doctrines.[45]

These doctrines are familiar to anyone who teaches criminal procedure, as well as to those who prosecute or defend the accused. Dating back to 1920, a judge-made independent source doctrine permits a trial court to admit certain evidence bearing a Fourth Amendment taint.[46] Specifically, the trial court may admit tainted evidence if there was a lawful, independent source by which law enforcement acquired it.[47] Inevitable discovery is a parallel, extrapolated judge-made rule for evidence that was not in fact discovered by way of a lawful independent path, but that would have been.[48]

Although the independent source rules are rooted most deeply in the Fourth Amendment, they apply to Fifth and Sixth Amendment taints too.[49] In each scenario, an independent source rule keys the admissibility of taint-bearing evidence to a harm or causation threshold. With respect to juridical status, independent source rules are not considered constitutional law. Courts and commentators generally regard them as (subconstitutional) rules of federal common law that limit an otherwise applicable rule of exclusion.[50]

The same concepts are at work in the Sixth Amendment law of eyewitness identifications, even if that law is not typically described as an independent source rule. After the moment of formal accusation, a Sixth Amendment violation occurs if, in the absence of intelligent waiver, law enforcement places a defendant in a lineup without counsel present.[51] There are rules against admitting the unconstitutional out-

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44. The principle that downstream evidence be suppressed is the "fruit of the poisonous tree" doctrine. *See* Segura v. United States, 468 U.S. 796, 804 (1984).

45. *See generally* Yale Kamisar, *On the "Fruits" of* Miranda *Violations*, *Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929, 990–1004 (1995) (discussing various elements of independent source rule in the context of confessions); *see also* Nix v. Williams, 467 U.S. 431, 443 n.4 (1984) (observing resemblance between independent source and harmless error doctrines).

46. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

47. *See id.*

48. *See Nix*, 467 U.S. at 444; *see also* Murray v. United States, 487 U.S. 533, 539 (1988) ("The inevitable discovery doctrine, with its distinct requirements, is in reality an extrapolation from the independent source doctrine . . . .").

49. *See, e.g.*, *Murray*, 487 U.S. at 539 (independent source rule for the Sixth Amendment); *Nix*, 467 U.S. at 446 (inevitable discovery rule for Sixth Amendment); Kastigar v. United States, 406 U.S. 441, 461 (1972) (independent source rule for Fifth Amendment); State v. Miller, 709 P.2d 225, 242 (Or. 1985) (inevitable discovery rule for Fifth Amendment *Miranda* violation).

50. Disputes about the juridical status of the various exclusionary rules are different from disputes about the juridical status of the rules that limit them. *Compare, e.g.*, Arizona v. Evans, 514 U.S. 1, 10 (1995) ("The exclusionary rule operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect.") *with id.* at 18 (Stevens, J., dissenting) (rejecting proposition that the Fourth Amendment exclusionary rule is just a judge-made remedy in favor of a more "majestic" conception, because "[t]he Amendment is a constraint on the power of the sovereign, not merely on some of its agents").

51. *See* United States v. Wade, 388 U.S. 218, 237 (1967).

of-court identification, but there are also outcome-sensitive constraints on downstream (in-court) identifications—courts decide whether to admit or exclude by reference to whether clear and convincing evidence demonstrates that the *in-court* identification was based on observations other than the *out-of-court* lineup.[52] This rule is one of outcome sensitivity, although it remains at least somewhat unclear whether the sensitivity threshold sets a limit on judicial remedies or defines a second-order constitutional harm.[53]

There is some variation within this category of outcome-sensitivity rules. The disfavored conduct obviously varies across doctrine, and the outcome-of-interest can be the acquisition of evidence, a criminal conviction, or a sentence. What unifies the category is, excepting rules for tainted in-court identifications, the juridical status of its members. Specifically, each of these rules is usually conceptualized as a judge-made limit on relief for some upstream constitutional transgression. I take up normative questions regarding this juridical status—and ultimately endorse it—in Parts II and III.

B. Internal Rules: Constitutional Elements

Several crucial rights of constitutional criminal procedure contain internal sensitivity elements. For a right in this category, sensitivity works not as a limit on *judicial remedies* for completed constitutional wrongs, but as a limit on a finding of constitutional error *itself*. These outcome-sensitive rights subdivide generally into two clusters, involving either defense attorneys or law enforcement.

1. Defense Attorneys

Many of the outcome-sensitivity rules in this category address the conduct of defense lawyers, and most of those trace to the Sixth Amendment's right to counsel.[54] The most conspicuous of these rules is the right to effective assistance of trial counsel, and *Strickland v. Washington*[55] sets forth the modern elements thereof. A *Strickland* violation normally requires a claimant to identify: (1) objectively unreasonable performance of counsel that (2) had a reasonably probable (prejudicial)

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52. *See id.* at 239–40.

53. *Wade* also characterized this standard as an "independent source" rule. *See id.* at 242. A later case, *Gilbert v. California*, also referred to the limit on suppression of tainted in-trial identification as an "independent source" rule that worked like "harmless error." 388 U.S. 263, 272 (1967). *Gilbert*, however, includes a discussion that makes its conception of juridical status quite difficult to discern. At one point the Supreme Court describes the decision to permit a potentially tainted in-court identification as "constitutional error"—that is, a downstream constitutional violation independent of the root transgression. *See id.* But at another point, discussing testimony about constitutionally transgressive out-of-court identifications, the Court suggests that "legislative regulations" could preempt the judge-made rule of exclusion. *See id.* at 273. One might therefore argue reasonably that this outcome rule should go in the third category presented here. *See infra* Section 0.

54. *See* U.S. CONST. amend. VI.

55. 466 U.S. 668 (1984).

effect on a trial outcome.[56] The Supreme Court has made the juridical status of the prejudice rule fairly clear: "Counsel cannot be 'ineffective' unless his mistakes have harmed the defense . . . . Thus, a violation of the Sixth Amendment right to *effective* representation is not 'complete' until the defendant is prejudiced."[57]

Strickland's deficiency prong marks the line between favored and disfavored defense attorney conduct.[58] It specifies minimum standards for defense team composition.[59] It governs all preparation for trial, including decisions about investigation into both guilt- and sentencing-phase issues.[60] *Strickland* also regulates the conduct of defense attorneys before, during, and after trial—including how they pick juries, make pretrial motions, select and prepare experts, examine and cross witnesses, and make post-judgment motions.[61] In each of these contexts, however, deficient performance does not amount to a constitutional violation unless there is a reasonably probable effect on the conviction or sentence.[62] That a claimant must show *Strickland* prejudice to prove a constitutional violation reflects a more general view that "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial[,]"[63] and that "[a]bsent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated."[64]

The outcome-sensitivity rule that defines unconstitutional appellate lawyering is the same. When a defendant seeks to overturn a conviction on appeal, there is a constitutional right—grounded in equal protection and due process (not in the Sixth Amendment)—to the adequate assistance of *appellate* counsel.[65] In *Smith v.*

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56. *See id.* at 687.

57. United States v. Gonzalez-Lopez, 548 U.S. 140, 147 (2006) (citing *Strickland*, 466 U.S. at 685).

58. *But see* Eve Brensike Primus, *Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness*, 72 STAN. L. REV. 1581 (2020) (arguing that *Strickland* is only one of four related categories of ineffectiveness). I nonetheless use "*Strickland*" to refer to the entire body of Sixth Amendment ineffective-assistance-of-trial-counsel law—more out of an interest in explanatory simplicity than anything else. The existence of the differences that Professor Primus explores do not implicate my central thesis.

59. The Sixth Amendment presumptively incorporates, as the standards for adequate performance, the conduct specified by the American Bar Association. *See Strickland*, 466 U.S. at 688–89. The applicable guidelines, for example, set forth the composition of a defense team in a capital case. *See* Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913 (2003).

60. *See* Wiggins v. Smith, 539 U.S. 510, 527 (2003).

61. *See, e.g.*, Reagan v. Norris, 279 F.3d 651, 656 (8th Cir. 2002) (making post-trial motions); Draughon v. Dretke, 427 F.3d 286, 296 (5th Cir. 2005) (retaining expert); Quintero v. Bell, 368 F.3d 892, 893 (6th Cir. 2004) (conducting jury selection); Dixon v. Snyder, 266 F.3d 693, 703 (7th Cir. 2001) (cross-examining witness); Sturgeon v. Quarterman, 615 F. Supp. 2d 546, 572 (S.D. Tex. 2009) (preparing expert); Bynum v. State, 561 S.W.3d 755, 762 (Ark. Ct. App. 2018) (making pretrial motions).

62. *See* supra notes 56–57 and accompanying text.

63. United States. v. Cronic, 466 U.S. 648, 658 (1984).

64. *Id.*

65. The Fourteenth Amendment guarantees counsel to a convicted criminal defendant for an as-of-right appeal. *See* Douglas v. California, 372 U.S. 353, 357–58 (1963) (specifying

Robbins,[66] the Supreme Court nonetheless aligned the elements of an ineffective-assistance-of-appellate-counsel claim with the elements of a *Strickland* claim.[67] In both cases, the claimant must prove deficient performance and prejudice.[68] As a result, the sensitivity rule for objectively unreasonable performance of appellate counsel requires the claimant to show that the disfavored performance had a reasonably probable effect on the appellant's outcome.[69]

There is a different outcome-sensitivity rule when an attorney is impermissibly engaged in "multiple representation"—that is, when a duty of loyalty to one client is compromised by a duty of loyalty to another. In *Cuyler v. Sullivan*,[70] the Supreme Court held that some multiple representation scenarios are not constitutional violations.[71] Instead, "in order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest *adversely affected* his lawyer's performance."[72] *Cuyler*, therefore, required that there be some demonstrable harm before a finding of constitutional error, and it set the sensitivity threshold at "adverse effect."[73]

Finally, some outcome-sensitivity rules for defense attorneys have a sensitivity threshold that is set to zero—effectively, where there is no sensitivity rule at all. Such rules attach to transgressions usually described as "structural error."[74] When error is structural, a constitutional violation occurs without respect to whether the claimant can show an outcome effect. There is structural error, for instance, when "circumstances . . . are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."[75] These circumstances include the

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right to appellate counsel on appeal); *see also* Ross v. Moffit, 417 U.S. 600, 618–619 (1974) (holding that *Douglas* does not guarantee counsel for discretionary appeals). The Supreme Court subsequently interpreted that right to appellate counsel to include the right to the effective assistance of appellate counsel. *See* Evitts v. Lucey, 469 U.S. 387, 396–97 (1985).

66. 528 U.S. 259 (2000).

67. *See id.* at 285.

68. *See id.*

69. *See id.* at 285–86.

70. 446 U.S. 335 (1980).

71. *See id.* at 348.

72. *Id.* at 348 (emphasis added).

73. *Id.* Subsequent decisions have at times made the outcome-sensitivity threshold sound higher. *See, e.g.*, Mickens v. Taylor, 535 U.S. 162, 172–73 (2002) (phrasing the outcome-sensitivity threshold as a requirement that a claimant show that "the conflict has significantly affected counsel's performance—thereby rendering the verdict unreliable").

74. *See generally* Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 FORDHAM L. REV. 2027, 2032–40 (2008) (tracing evolution of structural error and identifying origins in harmless error doctrine).

75. United States v. Cronic, 466 U.S. 648, 658 (1984). Other types of counsel behavior give rise to structural error not because they are exceedingly likely to have adversely affected the result of a trial, but because they go to interests in dignity and autonomy that transcend interests in accurate guilt determinations. *See id.* at 659; *see also, e.g.*, Burdine v. Johnson, 262 F.3d 336, 338–39 (5th Cir. 2001) (en banc) (finding structural error where defense counsel slept through parts of guilt-innocence phase of a capital trial). The lines between these different types of structural error can be fluid, however. *See* Weaver v. Massachusetts, 137 S. Ct. 1899, 1908 (2017).

denial of counsel at a critical stage of trial, and when defense lawyers "entirely fail[] to subject the prosecution's case to meaningful adversarial testing."[76]

The important point is that prejudice matters, and not as a judge-made limit on judicial relief. For many claims in the right-to-counsel family, outcome-sensitivity rules are elements of the substantive constitutional law. And under current law, the omnipresent *Strickland* standard has nothing to say about attorney conduct with an insufficient effect on outcomes.

2. Prosecutors

Outcome-sensitivity rules for disfavored prosecutor conduct also fit the internal model. The biggest category of such rules regulates prosecutor disclosure, and the most important one comes from *Brady v. Maryland*.[77] A *Brady* violation has three elements, the third of which is a sensitivity criterion: (1) suppression of information that is (2) exculpatory and (3) material to the trial court outcome.[78] As with *Strickland* prejudice, *Brady* materiality is defined as a reasonably probable effect on a guilt or sentencing determination.[79] The Supreme Court has held that *Brady* materiality is part of the substantive constitutional law and not merely a limit on judicial remedies: "[T]here is never a real *Brady* violation unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."[80]

In fact, there is a whole family of *Brady*-adjacent violations that contain internal sensitivity elements. The so-called *Giglio* rule[81] requires that prosecutors disclose any potentially impeaching deals with state witnesses, and it uses the same materiality standard that *Brady* does.[82] Satisfaction of the sensitivity rule is an element of the constitutional violation: "[S]uch suppression of evidence amounts to a constitutional violation only if it deprives the defendant of a fair trial [insofar as it satisfies a materiality requirement]."[83] Not all rules for prosecutor disclosure, however, have sensitivity thresholds equivalent to the "reasonable probability" standard specified in the *Brady* cases. For example, with respect to the so-called *Napue* violation[84]—when a state knowingly elicits or fails to correct false testimony—courts generally decline to treat the disfavored conduct as a constitutional violation unless there is a "reasonable likelihood" that the false testimony affected the jury.[85]

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76. *Cronic*, 466 U.S. at 659. *See, e.g.*, *Burdine*, 262 F.3d at 339 (finding structural error where defense counsel slept through parts of guilt-innocence phase of a capital trial).

77. 373 U.S. 83 (1963).

78. *See id.* at 87.

79. *See* Kyles v. Whitley, 514 U.S. 419, 434 (1995). *Brady*'s materiality rule was not self-defining, and it was not clear that *Brady* materiality was equivalent to *Strickland* prejudice until 1985. *See* United States v. Bagley, 473 U.S. 667, 682 (1985).

80. Strickler v. Greene, 527 U.S. 263, 281 (1999) (internal quotation marks omitted).

81. Giglio v. United States, 405 U.S. 150 (1972).

82. *See Bagley*, 473 U.S. at 676, 678–84.

83. *Id.* at 678.

84. *See* Napue v. Illinois, 360 U.S. 264 (1959).

85. *See, e.g.*, Libberton v. Ryan, 583 F.3d 1147, 1164 (9th Cir. 2009) ("A *Napue*

Even for constitutional regulations of prosecutor transgressions unrelated to disclosure, rules of outcome-sensitivity still appear as part of the underlying constitutional law. For example, in *Donnelly v. DeChristoforo*,[86] the Supreme Court held that transgressive prosecutor remarks rise to the level of constitutional violations only if they are "sufficiently prejudicial to violate [defendant's] due process rights."[87] In defining prejudice under *DeChristoforo*, *Greer v. Miller* equated "prejudice" with a "sufficient significance to result in the denial of the defendant's right to a fair trial."[88] In reciting authority on the "right to a fair trial," *Greer* cited *United States v. Bagley*,[89] which in turn equated that standard to the *Brady* materiality requirement.[90] The Court took a circuitous decisional route to get there, but ultimately used the same sensitivity threshold to define prosecutor misconduct as it did to define *Brady* violations.

Finally, the Supreme Court has defined the constitutional requirement of a speedy trial by reference to outcome sensitivity. There are two different constitutional tests, each associated with delay during a different period of the prosecution. First, a claimant seeking to prove that pre-indictment delay violates the Constitution is making a due process argument that requires that the delay have been a "deliberate device to gain an advantage over him *and that it caused him actual prejudice in presenting his defense*."[91] Second, a claimant seeking to prove that post-indictment delay violates the Constitution is making a Sixth Amendment claim that requires a court to consider "prejudice to the defendant."[92]

There is little written about *why* prejudice and materiality rules became internal sensitivity elements rather than external limits on judicial remedies.[93] One explanation, however, makes good intuitive sense. Outcome-sensitivity rules are usually conceptualized as remedial limits when they pair with rights that courts must enforce *both* at trial and thereafter.[94] For these rights, trial and appellate courts must

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violation, however, also requires that the false evidence be material."); Ventura v. Att'y Gen., 419 F.3d 1269, 1283 (11th Cir. 2005) (explaining that the due process violation is contingent upon the claimant satisfying the "reasonable likelihood" standard).

86. 416 U.S. 637 (1974).

87. *Id.* at 639.

88. 483 U.S. 756, 765 (1987) (internal quotation marks and citations omitted).

89. 473 U.S. 667 (1985).

90. *See Greer*, 483 U.S. at 765. A year before *Greer*, however, the Court had framed the question as one about whether the trial was "so infected . . . with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1987) (quoting *DeChristoforo*, 416 U.S. at 643).

91. United States v. Gouveia, 467 U.S. 180, 192 (1984) (emphasis added); *see also* United States v. Lovasco, 431 U.S. 783, 790 (1977) ("[Prior precedent establishes that] proof of prejudice is generally a necessary but not sufficient element of a due process claim . . . .") (discussing *United States v. Marion*, 404 U.S. 307 (1971)).

92. Barker v. Wingo, 407 U.S. 514, 530 (1972).

93. Professor Murray sketches the doctrinal history that might otherwise be expected to reveal the rationale in *Prejudice-Based Rights*, *supra* note 4, at 285–95.

94. By definition, harmless error is a standard for reviewing the violation of right that took place in a lower court. Errors susceptible to a harmless error analysis on direct review are subject to an even more stringent sensitivity rule in collateral proceedings, with that collateral rule typically conceptualized as a remedial limit. *See* Epps, *Harmless Errors*, *supra*

provide different remedies for the same constitutionally disfavored conduct. Accordingly, judges distinguish carefully between the elements of the constitutional right and any remedial limits. After all, the sensitivity rule applies in one place (appeal), but not in another (trial).

By contrast, judges enforce rights in the *Brady* and *Strickland* families almost exclusively in post-conviction postures, where a sensitivity rule of some sort will apply.[95] Unlike rights capable of trial enforcement, these rights force no distinction between, on the one hand, outcome-sensitivity *elements*, and, on the other, outcome-sensitivity rules that simply *restrict remedies*. The typical justification for sensitivity rules applied in collateral postures nonetheless discloses something important. Most people link prejudice and materiality requirements to interests in finality and judicial administration,[96] which are precisely the interests that remedial limits vindicate.[97] Without the need to carefully parse right and remedy, however, it is easy to see how courts allowed the substantive constitutional law to assimilate the sensitivity rule.[98]

C. External Constitutional Violations

The third category of outcome-sensitivity rules sits outside the elements of the root constitutional violation and is not a limit at all. Instead, the sensitivity rule defines a second-order constitutional error. Phrased differently, if an upstream constitutional violation sufficiently taints some downstream decision, then there is a completed constitutional violation when the taint occurs and then a second constitutional error that takes place at the downstream moment.

To understand the category, consider an example outside the outcome-sensitivity context: a Fourth Amendment violation. Sure, there are lots of questions about the constitutional status of the exclusionary remedy,[99] but nobody disputes that at least one Fourth Amendment violation is complete when law enforcement undertakes an

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note 4, at 2184–86.

95. *See* Lee Kovarsky, *Structural Change in State Postconviction Review*, 93 NOTRE DAME L. REV. 443, 456–58 (2017).

96. *See* Capra, *supra* note 21, at 414 (materiality); Maria L. Marcus, *Federal Habeas Corpus After State Court Default: A Definition of Cause and Prejudice*, 53 FORDHAM L. REV. 663, 709 (1985) (prejudice).

97. *See* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 353 (2006) (state post-conviction review); Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 444 (2007) (federal post-conviction review).

98. *Cf.* Greabe, *Epps Response*, supra note 4, at 127 ("[Because neither *Brady* nor *Strickland* can be vindicated in real time, it] may therefore be defensible as a matter of court administration—if not optimal as a normative matter—for the Court to limit the contours of [those] rights to circumstances in which the challenged action or inaction had a tangible impact on the trial's outcome or the defendant's sentence.").

99. The Supreme Court now treats the decision about whether to admit or suppress evidence tainted by a Fourth Amendment violation as a question of federal common law that is distinct from the constitutional question about whether the evidence was obtained in violation of the Fourth Amendment. *See, e.g.*, Davis v. United States, 564 U.S. 229, 236 (2011) (describing the exclusionary rule as a "prudential" doctrine that the Court created to "compel respect for the constitutional guaranty" (omitting internal citations)).

unreasonable search or seizure.[100] Before the Supreme Court settled on the idea that the Fourth Amendment exclusionary rule was a judge-made remedy,[101] at least one Supreme Court justice argued that the downstream admission of evidence was itself a violation of the Fifth Amendment's self-incrimination clause.[102] Relatedly, some scholars argue that the admission of the evidence can be a due process violation.[103] The point is that (under these theories) the unlawful downstream admission represents a second-order constitutional mistake that is distinct from the upstream Fourth Amendment violation.

Now, make the example about outcome sensitivity. There is some upstream constitutional taint, and a sufficiently tainted downstream outcome represents a distinct constitutional violation. Doctrinally, this category is now quite small, depending on how you read the decisional law. The clearest example is one I have identified already—when a defendant is unconstitutionally placed in an out-of-court lineup, and then the same witness is asked to identify the defendant in court.[104] The out-of-court identification would violate either the Sixth or Fourteenth Amendment,[105] and some opinions suggest that a tainted in-court identification

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100. *See* United States v. Leon, 468 U.S. 897, 906 (1984) (describing a constitutional violation as having been "fully accomplished by the unlawful search and seizure itself" (internal quotation marks and citations omitted)).

101. *See, e.g.*, Arizona v. Evans, 514 U.S. 1, 10–12 (1995) (capturing dominance of view that Fourth Amendment exclusionary rule is a judge-made remedy).

102. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 662 (1961) (Black, J., concurring) ("[W]hen the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule.").

103. *See, e.g.*, Re, *supra* note 7, at 1912–18 (theorizing exclusionary rule as "due process remedy"); Thomas S. Schrock & Robert C. Welsh, *Up from* Calandra*: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 372 (1974) ("[T]he defendant has a due process right to exclusion as an expression of both judicial review and judicial integrity.").

104. *See supra* notes 51–53 and accompanying text.

105. There is a completed Sixth Amendment violation if the line-up identification occurs after the defendant has been indicted and without counsel or waiver of the right thereto. *See* Maine v. Moulton, 474 U.S. 159, 176 (1985) ("[T]he Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent."). There is a completed Fourteenth Amendment violation when the state sets up any unnecessary and impermissibly suggestive identification. *See* Manson v. Brathwaite, 432 U.S. 98, 114 (1977); *see also* Sexton v. Beaudreaux, 138 S. Ct. 2555, 2559 (2018) ("[T]he Due Process Clause requires courts to assess, on a case-by-case basis, whether improper police conduct created a substantial likelihood of misidentification." (internal quotation marks and citations omitted)); Neil v. Biggers, 409 U.S. 188, 198 (1972) ("It is the likelihood of misidentification which violates a defendant's right to due process . . . ."); Kirby v. Illinois, 406 U.S. 682, 691 (1972) ("The Due Process Clause[s] . . . forbid[] a lineup that is unnecessarily suggestive and conducive to irreparable mistaken identification."); Foster v. California, 394 U.S. 440, 442 (1969) ("[We have] recognized that, judged by the totality of the circumstances, the conduct of identification procedures may be so unnecessarily suggestive and conducive to irreparable mistaken identification as to be a denial of due process of law." (internal quotation marks omitted)); *id.* at 443 ("This procedure so undermined the reliability of the eyewitness

represents a distinct due process violation.[106] After all, the due process clauses restrict eyewitness identifications that result from state action,[107] and in-court identifications belong in that category. The substantive standard for the admission of the in-court identification is a sensitivity rule: whether there is clear and convincing evidence that the out-of-court violation did not taint it.[108]

Outcome-sensitivity rules go by different names but are omnipresent in the constitutional law of criminal procedure. They describe any doctrine that keys judicial response to the effect that a constitutional error had on an outcome—usually, a verdict. The puzzles center on some basic questions. If these sensitivity rules are performing the same basic function, and if they share justifications sounding in finality and judicial administration, then why does their juridical status vary radically from context to context? Is any inconsistency justified and, if not, what should the standard be?

II. INTERNAL SENSITIVITY RULES

Part II answers some of these questions in order to make my central argument against internal sensitivity elements: they should not be part of substantive constitutional law. To explain why, I adapt the famous framework developed by Professor Meir Dan-Cohen, which distinguishes "conduct rules" addressed to potential transgressors and "decision rules" addressed to judges who dispense legal responses.[109] Internal sensitivity rules—rules that make some outcome effect a

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identification as to violate due process.").

106. *See, e.g.*, Gilbert v. California, 388 U.S. 263, 272 (1967) ("The admission of the in-court identifications without first determining that they were not tainted by the illegal lineup but were of independent origin was constitutional error."); Stovall v. Denno, 388 U.S. 293, 301–02 (1967) (in a case with both in-court and out-of-court identifications, determining whether "confrontation conducted in this case was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law").

107. *Cf.*, *e.g.*, Perry v. New Hampshire, 565 U.S. 228, 248 (2012) (rejecting proposition that due process clause restricts eyewitness identification when law enforcement did not arrange it).

108. Formally, this is the substantive standard for downstream admission of identifications bearing a Sixth Amendment taint; although the Supreme Court has not formally declared an identical standard for suppressing in-court identifications resulting from Fourteenth Amendment violations, "most courts have regarded the question as settled." Evan J. Mandery, *Due Process Considerations of In-Court Identifications*, 60 ALB. L. REV. 389, 399 n.83 (1996).

109. Many modern works of academic significance rely on Professor Dan-Cohen's distinction between conduct rules and decision rules. *See generally, e.g.*, Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 8 (2004) (developing taxonomy for talking about separate normative messaging); Stephen McG. Bundy & Einer Elhauge, *Knowledge About Legal Sanctions*, 92 MICH. L. REV. 261, 327 (1993) (repurposing taxonomy for the purposes of rational actor modeling); Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 180 (1996) (using constructions to map understanding of so-called subsidized speech); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1651 (2005) (deploying framework to explain how judicial practices become reinterpreted as part of constitutional law); Lawrence B. Solum, *Procedural Justice*,

condition of the constitutional violation itself—should be abandoned. They corrupt the prescriptions that the law transmits to potential transgressors and degrade secondary enforcement against disfavored conduct.

A. Conduct and Decision Rules

When the law tells a regulated community how to act, it necessarily prescribes different conduct for different audiences.[110] The idea that lawmakers might transmit distinct prescriptions to distinct audiences is usually credited to Professor Dan-Cohen, who divided the substantive criminal law into conduct rules that define public transgression and decision rules that specify official enforcement.[111]

The dichotomy between conduct and decision rules exists by necessity. A criminal law against disfavored conduct X prescribes certain conduct (no X-ing!) for a certain audience (the public), but that prescription gives no guidance to judges who must enforce that rule.[112] Therefore, the criminal law also transmits a second set of instructions to a distinct audience (judges).[113] Whereas rules against disfavored conduct X transmitted to the public are conduct rules, the instructions that the law transmits to judges are decision rules for enforcement.[114] Those decision rules include analytic steps necessary to conclude that punishment-eligible conduct has occurred, as well as responsive penalties.

That the law transmits different prescriptions to different audiences does not mean that the transmissions are unrelated. "No Sasquatch hunting" could be the public-facing conduct rule associated with decision rules (1) about what constitutes a hunt for Bigfoot and (2) authorizing the punishment of repeat offenders with two years in prison. Indeed, a condition for judicial response will often include a conclusion that disfavored conduct X took place.[115] Nevertheless, it is improperly reductive to conclude that conduct rules are nothing more than abridged versions of decision rules, shorn of the instructional elements that tell officials how to go about the business of enforcement. Conduct rules have independent normative force as anchors for multifaceted legal and nonlegal enforcement.[116] Most pertinently, they originate, anchor, and amplify prescriptive norms across regulated communities.[117]

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78 S. CAL. L. REV. 181, 209 (2004) (using distinction to explore the concept of procedural justice); Malcolm Thorburn, *Justifications, Powers, and Authority*, 117 YALE L.J. 1070, 1097 (2008) (relying on the constructs to consider the theoretical structure of justification defenses in the criminal law).

110. The intended audiences are sometimes referred to as the norm-subjects. *See* Andrei Marmor, *The Rule of Law and Its Limits*, 23 LAW & PHIL. 1, 9 (2004).

111. *See* Dan-Cohen, *supra* note 11. The dichotomy between conduct and decision rules tracks older concepts advanced by Jeremy Bentham, between "imperative" and "punitory" rules. *See* JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 430 (Wilfrid Harrison ed., 1948).

112. *See* Dan-Cohen, *supra* note 111, at 628.

113. *See id.*

114. One might also conceptualize decision rules as conduct rules for a specific norm-subject: judges. Nevertheless, I will usually speak in terms of decision rules and conduct rules.

115. *See* Dan-Cohen, *supra* note 11, at 629.

116. *See id.* at 626–30.

117. *See id.*; *cf., e.g.*, John E. Taylor, *Using Suppression Hearing Testimony to Prove Good*

The conduct/decision-rule dichotomy endures as a useful tool for analyzing other areas of the law. Academics have used it to develop insights in noncriminal contexts, including corporate, environmental, and contract law.[118] Some have used the distinction to understand certain areas of criminal procedure—Professor Carol Steiker, for example, has used the dichotomy to explore the development of policing law after the Warren Court's criminal procedure revolution.[119]

I press the distinction into service here to explore outcome sensitivity. As Part I demonstrates, outcome-sensitivity elements marble criminal procedure, from rules about the conduct of defense attorneys and law enforcement to standards for appellate relief.[120] And as I explain below, these sensitivity elements are quintessential decision rules. When the law treats sensitivity as an internal element of a criminal procedure violation, it undermines compliance with, and enforcement of, corresponding conduct rules.

B. Degrading Conduct Rules

To explore outcome sensitivity in the constitutional law of criminal procedure, I tweak Professor Dan-Cohen's heuristic in one important respect: I alter the audience profiles receiving the relevant prescriptions. Dan-Cohen analyzes a political

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Faith Under United States v. Leon, 54 U. KAN. L. REV. 155, 171 (2005) ("Fourth Amendment norms regarding such topics as the warrant requirement, probable cause, and reasonable suspicion are conduct rules telling police officers how they should conduct criminal investigations.").

118. *See, e.g.*, Gregory Scott Crespi, *Standards of Conduct and Standards of Review in Corporate Law: The Need for Closer Alignment*, 82 NEB. L. REV. 671, 671–72 (2004) (corporate law); Christopher H. Schroeder, *Rights Against Risks*, 86 COLUM. L. REV. 495, 556–57 (1986) (environmental law); Emily L. Sherwin, *Law and Equity in Contract Enforcement*, 50 MD. L. REV. 253, 300–07 (1991) (contract law).

119. *See* Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2532–40 (1996); *see also* Josh Bowers, *Annoy No Cop*, 166 U. PA. L. REV. 129, 147 (2017) (referring to Fourth Amendment requirements as "conduct rules for cops" (emphasis omitted)); Epps, *Harmless Errors*, *supra* note 4, at 2171–72 (considering acoustic separation of trial judges); Mary D. Fan, *The Police Gamesmanship Dilemma in Criminal Procedure*, 44 U.C. DAVIS L. REV. 1407, 1413–14 (2011) (evaluating "conduct rule gaming" of police); Wayne A. Logan, *Police Mistakes of Law*, 61 EMORY L.J. 69, 92 (2011) (arguing that allowing police to make "reasonable" legal mistakes allows a police conduct rule to be trumped by a decision rule); John E. Taylor, *Using Suppression Hearing Testimony to Prove Good Faith Under* United States v. Leon, 54 U. KAN. L. REV. 155, 171 (2005) (applying conduct-rule construct to analyze Fourth Amendment exclusionary rule case).

120. I rely on the distinction between conduct and decision rules because it allows me to capture nicely the role that outcome sensitivity plays in the judicial regulation of primary conduct. I am not, however, treating a right as an identifiable and fixed platonic ideal and assuming that the remedial matrix is instrumentally adapted to enforcement thereafter. *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999) (criticizing rights essentialism). I have no problem with the proposition that remedies and limits thereupon influence the specification of the underlying rule. Even those most critical of rights essentialism admit that there is nonetheless value in disentangling conduct and decisional specifications. *See, e.g.*, *id.* at 905.

community subdivided into the general public and official enforcers in order to explain certain features of substantive criminal law.[121] By contrast, the audience I analyze subdivides into official entities *regulated* by constitutional criminal procedure (e.g., police) and those who *enforce* it (judges).[122] The rub is this: when constitutional law has internal sensitivity elements, it transmits decision rules that degrade compliance with corresponding conduct rules.[123]

1. Audiences in Criminal Procedure

The law makes choices about how to transmit different behavioral prescriptions to different audiences. In the context of criminal procedure, the audiences include defense attorneys, prosecutors, police, and judges at different phases of the criminal punishment sequence. The problem with internal sensitivity rules, I later explain, is that the law is engaged in suboptimal transmission. I keep my sketch of relevant audiences brief because I have already mentioned many of the constitutional rules at issue.

Police are the audience for many of criminal procedure's conduct rules. In the Fourth Amendment context, the constrained conduct might be a pat down of a person on the street,[124] a vehicle stop,[125] surveillance,[126] or some other familiar policing practice. The Fifth and Fourteenth Amendments contain multiple rules against certain elicitations from potential defendants, including confessions.[127] The same is true for the Sixth Amendment, after the moment of formal accusation.[128] Police are also subject to Sixth and Fourteenth Amendment rules that constrain how officers arrange and administer eyewitness identifications.[129] In each case, a constitutional

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121. *See* Dan-Cohen, *supra* note 11, at 636–65.

122. *Cf.* Steiker, *supra* note 119, at 2532–40 (making a similar alteration).

123. In such scenarios, I assume that the law should worry more about the degradation of the conduct rules than about the degradation of the decision rules because the judicial audience will be much better at isolating the normative message intended for it. There are nevertheless problems associated with telling trial courts that outcome-sensitivity rules are elements of constitutional violations. *See* Greabe, *Epps Response*, *supra* note 4, at 124–27.

124. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 30 (1968) (setting forth basic "stop and frisk" rule for seizures supported by reasonable suspicion).

125. *See, e.g.*, Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977) (recognizing broad police authority to order driver and passengers out of car during a traffic stop).

126. *See, e.g.*, United States v. Jones, 565 U.S. 400, 404 (2012) (declaring that GPS attachment and monitoring is a Fourth Amendment event).

127. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 444 (1966) (announcing canonical rule that, once in custody, police must prophylactically warn a suspect in order to guarantee the Fifth Amendment right against self-incrimination); Watts v. Indiana, 338 U.S. 49, 54 (1949) (grounding conduct rule against coercing confessions in accusatorial system of American justice).

128. *See, e.g.*, Massiah v. United States, 377 U.S. 201, 205–06 (1964) (synthesizing conduct rule that police may not deliberately elicit incriminating information from a suspect that has been formally accused through information or indictment, outside the presence of counsel).

129. *See, e.g.*, Stovall v. Denno, 388 U.S. 293, 301–02 (1967) (specifying rule against unnecessarily suggestive eyewitness identification); United States v. Wade, 388 U.S. 218, 237

doctrine prescribes a policing constraint: do not search or seize unreasonably, do not seek voluntary confessions in custodial settings without providing fair warning, do not seek involuntary confessions under any circumstances, do not use unnecessarily suggestive lineups, and so forth.

Criminal procedure's conduct rules constrain prosecutor conduct, too. The constitutional law for custodial interrogation applies the same way to prosecutors as it does to police and other law enforcement.[130] Prosecutors are similarly restricted from arranging and administering impermissible lineups.[131] They may not selectively prosecute based on an impermissible characteristic,[132] or construct a jury by reference to the race of the potential jurors.[133] They may not suppress exculpatory information,[134] including information that undermines the credibility of state witnesses.[135] At trial, they may not knowingly elicit false testimony or make comments that are unnecessarily egregious or inflammatory.[136] This list of regulated prosecutor behavior is quite incomplete, but it sufficiently demonstrates the breadth of constitutional conduct rules directed at attorneys who represent the state.

Perhaps less intuitively, and as Section 0 has already mentioned, the Constitution regulates the conduct of defense attorneys.[137] "Less intuitively" because many do not realize that defense attorneys are officers of the court, and are therefore engaged in state action when they represent defendants.[138] Attorneys must respect the strategic preferences of competent clients, they must not labor under conflicts of interest, and they must not provide unreasonable representation.[139] The Constitution constrains behavior for defense attorneys during all phases of the litigation, starting with their appointment and running through appeal.[140]

Courts are audiences for criminal procedure rules, too—although we often, but not always, think of the prescriptions transmitted to trial courts as decision rules. For

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(1967) (holding that counsel must be present during lineup administered after the moment of formal accusation).

130. *See* Fare v. Michael C., 442 U.S. 707, 718 (1979).

131. *See, e.g.*, People v. Yut Wai Tom, 422 N.E.2d 556, 561 (N.Y. 1981) (describing Sixth Amendment right to counsel at lineup engineered by prosecutor as "settled").

132. *See* Wayte v. United States, 470 U.S. 598, 608 (1985) (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)).

133. *See* Batson v. Kentucky, 476 U.S. 79, 85–86 (1986).

134. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963).

135. *See* Giglio v. United States, 405 U.S. 150, 154–55 (1972).

136. *See* Donnelly v. DeChristoforo, 416 U.S. 637, 639 (1974).

137. *See supra* Section 0.

138. *See* Cuyler v. Sullivan, 446 U.S. 335, 342–45 (1980).

139. *See id.* at 348 (conflicts of interest); McCoy v. Louisiana, 138 S. Ct. 1500, 1505 (2018) (strategic preferences); Wiggins v. Smith, 539 U.S. 510, 521 (2003) (reasonable representation).

140. *See, e.g.*, *Wiggins*, 539 U.S. at 521–22 (finding violation of Sixth Amendment right to effective assistance of counsel resulting from unreasonable pretrial investigation); Evitts v. Lucey, 469 U.S. 387, 396–97 (1985) (determining that there is a Fourteenth Amendment right to adequate assistance of counsel on appeal); *see also* Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (explaining that right to counsel on direct appeal does not extend into post-conviction proceedings).

example, a trial court cannot give an unconstitutional jury instruction,[141] and it may not direct a verdict in the prosecution's favor.[142] Most would probably think of these as conduct rules for courts.[143] And the law prescribes a trial court response to the constitutionally disfavored conduct of out-of-court actors. A quintessential decision rule often requires trial judges to decide whether to suppress evidence tainted by Fourth Amendment or *Miranda* violations, or by an out-of-court identification that violates due process. Courts exercising appellate and post-conviction powers receive decision rules instructing them to revise trial court judgments only under certain conditions.[144]

The important point about judges as the audience for decision rules is that they are called upon to fix legal consequences for the transgression of someone belonging to some other audience. In so doing, they necessarily proceed in two steps. First, a judge decides whether the upstream audience has violated a prescribed conduct rule. Second, applying a paired decision rule, the judge decides what the judicial response to the disfavored upstream conduct must be.

2. Outcome Sensitivity as Decision Rule

Outcome sensitivity doctrines should be treated as decision rules. Professor Dan-Cohen's famous heuristic—"acoustic separation"—helps determine whether a prescription is a conduct rule, a decision rule, or both.[145] In the heuristic, a political community has two separate, acoustically sealed chambers; one contains the general public, and the other contains officials that enforce laws.[146] Each group must be given complementary-but-separate instructions.[147] The general public hears prescriptions for out-of-court conduct (conduct rules), and officials hear prescriptions for enforcement (decision rules).[148] Neither audience hears the prescription earmarked for the other unless that message is transmitted to it separately.[149]

In order to determine the status of real-life rules, one needs to simply determine which combination of audiences would receive the prescription in the acoustically separated world.[150] Recall that, for the purposes of my analysis, the audience is not separated into the general public and state officials. It is instead a set of officials that are separated into judicial and nonjudicial entities. My assumption going forward

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141. *See, e.g.*, Sandstrom v. Montana, 442 U.S. 510, 524 (1979) ("[B]ecause either interpretation [of the instruction at issue] would have deprived defendant of his right to the due process of law, we hold the instruction given in this case unconstitutional.").

142. *See* United States v. Martin Linen Supply Co., 430 U.S. 564, 572 (1977).

143. *See supra* note 114.

144. *See, e.g.*, Kotteakos v. United States, 328 U.S. 750, 765 (1946) (setting forth standard for reversible constitutional error in post-conviction proceedings).

145. *See* Dan-Cohen, *supra* note 11, at 630–34.

146. *See id.* at 630.

147. *See id.*

148. *See id.* at 626–30.

149. *See id.* at 630.

150. *See id.* at 632.

(and defended below) is that, in the acoustically separated world, the law would almost never transmit an outcome-sensitivity rule to the nonjudicial chamber.[151]

One reason centers on an epistemic problem. An outcome-sensitivity instruction cannot be transmitted to nonjudicial audiences—defense attorneys, prosecutors, and police—because outcome effects cannot be known at the moment of transmission. Even under conditions of perfect information, the effect of disfavored conduct on an outcome can, by definition, only be known after the outcome materializes. At the moment the nonjudicial actor is engaged in out-of-court conduct, however, the outcome effects of that conduct are formally unknowable and, under most circumstances, quite difficult to predict.[152] Whether a mental health lead ignored (*Strickland*) or witness impeachment suppressed (*Brady*) had a reasonably probable effect on a trial outcome is a backwards-looking inquiry, and not a prescription for behavior.

One might respond that outcome-sensitivity instructions qualify as nonjudicial conduct rules because, whatever their formal phrasing, they really function as rules forbidding egregious out-of-court transgression. I have two responses. First, outcome-sensitivity rules are phrased as prescriptions not against conduct that *tends to* affect outcomes, but against conduct that *in fact* had a sufficiently probable effect on them.[153] Second, such imaginative interpretation of the rules seems especially inappropriate because many of them already contain, for lack of a better term, egregiousness requirements. The deficiency prong of *Strickland*'s Sixth Amendment inquiry, for example, requires that trial counsel's performance have been objectively unreasonable—well outside the bounds of professional judgment.[154] The same is true of the deficiency prong of the Fourteenth Amendment standard for effective appellate counsel.[155] And before a court can even reach questions about whether an in-court identification should be suppressed, it must conclude that any upstream constitutional taint was unnecessarily suggestive and tended to produce misidentification.[156]

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151. I am not assuming that the content of a decision rule would *never* be transmitted to nonjudicial norm-subjects. There may be good reasons to communicate the consequences of transgression, especially in environments of uncertain enforcement. But as I explain below, the premise of such transmission would be that the decision rule *complements* the conduct prescription. In the case of internal sensitivity elements, the decision rule undercuts the conduct rule.

152. *See* Murray, *Prejudice-Based Rights*, *supra* note 4, at 306–12.

153. *See, e.g.*, Strickler v. Greene, 527 U.S. 263, 289–96 (1999) (emphasizing that reasonable-probability inquiry is fact specific and performing that inquiry with respect to *Brady* claim); Sullivan v. Louisiana, 508 U.S. 275, 279 (1993) ("The [harmless error] inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (emphasis in original)); Kimmelman v. Morrison, 477 U.S. 365, 390 (1986) (reflecting case-specific prejudice inquiry, remanding case for fact-specific prejudice determination as to whether trial counsel's deficient failure to move for suppression would have sufficiently affected outcome).

154. *See* Bell v. Cone, 535 U.S. 685, 698–702 (2002).

155. *See* Smith v. Robbins, 528 U.S. 259, 285 (2000).

156. *See supra* note 53.

Finally, outcome-sensitivity requirements should be analyzed as decision rules because they perform functions typical of that category. Conduct rules set out broad behavioral prescriptions, and decision rules make judicial enforcement more sensitive to the equitable and administrative nuances of individual cases.[157] Outcome sensitivity clearly performs the latter function, reconciling broader behavioral exhortations with competing interests in, among other things, finality and judicial administration.[158] These oft-cited interests in finality and judicial administration are, so to speak, the big tell—this is not the stuff of conduct rules. In his classic article on underenforced constitutional norms, Professor Larry Sager put it this way: "When the federal courts restrain themselves for reasons of competence and institutional propriety rather than reasons of constitutional substance, it is incongruous to treat the products of such restraint as authoritative determinations of constitutional substance."[159]

3. Signal Pollution

The real world is different from the stylized heuristic. Acoustic separation is at best partial—the law does not transmit perfectly differentiated prescriptions to siloed audiences. Conduct and decision rules, moreover, often appear within a single set of legal instructions.[160]

But acoustic separation is not zero. Different prescriptions can register differently with different audiences, so different groups within a single community are capable of "hearing" different things from the same body of law. Lawmakers can therefore produce social value by transmitting different messages to different groups under conditions of partial separation.[161] In Professor Dan-Cohen's sketch of the substantive criminal law, for example, conduct rules specify broad prescriptions for the public, which does not hear fully the more complicated, but socially productive, decision rules for enforcers.[162]

The problem is when there are lower levels of acoustic separation—where one audience can hear the prescriptive message appropriate for another—and where the two messages conflict. Professor Dan-Cohen and others have identified this

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157. *See* Dan-Cohen, *supra* note 11, at 650–51; *see also* Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 267 (2012) ("Categorical substantive conduct rules are intended to shape lay behavior and reflect moral intuitions, while procedurally oriented decision rules are intended to optimally constrain state power and/or soften rigid application of conduct rules."); Paul MacMahon, *Good Faith and Fair Dealing as an Underenforced Legal Norm*, 99 MINN. L. REV. 2051, 2080 (2015) ("Where constitutional conduct rules extend to a broader degree of circumstances than those reached by the corresponding decision rule, the effect is an underenforced constitutional norm.").

158. *See, e.g.*, *supra* notes 93–98 and accompanying text (explaining that prejudice and materiality primarily realize a finality interest).

159. Sager, *supra* note 14, at 1226.

160. *See* Dan-Cohen, *supra* note 11, at 631.

161. *See id.* at 635; *see also* Bundy & Elhauge, *supra* note 109, at 265 (developing more robust model for when selective transmission strategy is socially desirable).

162. *See* Dan-Cohen, *supra* note 11, at 651.

phenomenon,[163] and I call it "signal pollution." Signal pollution occurs where, among other things, the audience of the conduct rule hears and internalizes a decision rule that degrades the conduct prescription. Lawmakers can reduce signal pollution in at least two ways. First, they might change one of the rules in order to remove the dissonance. Second, they might engage in what Dan-Cohen has called "selective transmission"—finding ways to prevent the wrong audience from hearing a prescription intended for another.[164]

When a sensitivity rule is internal to the substantive constitutional law, there is enormous signal pollution. The dissonance between the conduct rule (don't transgress by X-ing) and the decision rule (no judicial relief for X-ing without a showing of outcome effect) is unavoidable, so lawmakers can really address signal pollution only through selective transmission. And the selective transmission of sensitivity rules is a spectacular failure. By phrasing sensitivity rules as substantive constitutional law, the legal system degrades the compliance with paired conduct rules.[165] In other words, under conditions of partial acoustic separation, the law is transmitting a decision rule to an audience that should not hear it.

Much of the pertinent signal pollution involves the degradation of norms. A conduct rule supplies instructions that can be enforced in various ways. Enforcement can occur through legal process, as well as through the social incorporation of institutional and occupational norms.[166] A conduct rule without legal enforcement is an exhortation, but it is an exhortation that plays an important role. There is a rich literature on norm development in different institutional and occupational communities.[167] Police departments are a key subject of such analysis and, albeit to

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163. *See, e.g.*, Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437, 463 (1993) ("In practice, therefore, conduct rules normally have decisional side effects and decisional rules normally have conduct side effects.").

164. *See* Dan-Cohen, *supra* note 11, at 634–36.

165. *Cf.* Sager, *supra* note 14, at 1227 (explaining that separation of implementing decision rule from constitutional norm would facilitate greater official compliance).

166. *Cf.* W. Bradley Wendel, *Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities*, 54 VAND. L. REV. 1955, 1961 (2001) (discussing within the context of lawyering norms); *see also, e.g.*, Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2032 (1996) (using an example involving laws barring littering and requiring people to pick up after their dogs).

167. *See, e.g.*, Wendel, *supra* note 166 (providing a survey and criticism of several norm-based models of attorney behavior); *cf. also* Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 455–56 n.6 (2004) (explaining how norms can work either organizationally or institutionally).

a lesser extent, so are prosecutors' offices[168] and the criminal-defense bar.[169] In professional environments where constitutionally disfavored conduct is difficult to detect externally, compliance with conduct rules is especially dependent on internal norm enforcement.[170] Without delving too deeply into norm theory here, suffice it to say that any degradation in the conduct rule transmitted to the nonjudicial audiences will severely disrupt norm compliance.[171]

Let me be more concrete. Consider *Strickland*, under which a Sixth Amendment right to effective counsel violation occurs only when some objectively unreasonable legal representation results in prejudice—when the deficiency has a reasonably probable effect on the trial outcome.[172] The conduct rule directed to the primary actors (trial counsel) is obviously about their lawyering, not about prejudice. It is something akin to "thou shalt not render deficient performance." The prejudice component functions quite naturally as a decision rule that instructs courts about when, considering interests in finality and judicial administration, they are to void convictions based on the constitutionally disfavored conduct.

Defense lawyers, however, hear the outcome-sensitivity instruction and do not disentangle the conduct and decision rules. What the defense-lawyer audience receives is a normative message against engaging in unreasonable representation *that is prejudicial*. Cutting large corners is okay, they hear, unless it seriously jeopardizes a guilt or sentencing verdict. The problem, moreover, is not just about the failure of a particular defense attorney to take and internalize the appropriate prescription on her own; it is a more complex, but important, story about how the signal pollution compromises the defense community's ability to self-regulate.[173] Indeed, the idea of a prejudice requirement comprehensively pollutes the competing norm signals that come from the American Bar Association's (ABA) standards for defense counsel, which make no reference to outcome sensitivity.[174]

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168. *See, e.g.*, Armacost, *supra* note 167, at 456 (exploring relationship between organizational culture and police misconduct); Lee Kovarsky, *The American Execution Queue*, 71 STAN. L. REV. 1163, 1198–1200 (2019) (explaining how the absence of certain norm enforcement in prosecutor offices affects the pace of executions); Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 129 (2008) (evaluating internal regulation of prosecutor offices); JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 108–12 (1993) (describing the refusal of police officers to report the misconduct of one another).

169. *See, e.g.*, Darryl K. Brown, *Criminal Procedure Entitlements, Professionalism, and Lawyering Norms*, 61 OHIO ST. L.J. 801, 803 (2000) (probing how norms regulate behavior of lawyers during criminal proceedings).

170. *See, e.g.*, Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 348 n.43 (1997) (offering example involving truth-telling in jury service). Prosecution is one such environment. *See* Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 758 (2001).

171. *Cf.* Bennett L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 534 (2007) (noting effect that unclear *Brady* rules have on norm development).

172. *See* Strickland v. Washington, 466 U.S. 668, 694 (1984).

173. Richard McAdams is responsible for the theory of norms built around the withholding of esteem. *See* McAdams, *supra* note 170, at 355–76.

174. *See Criminal Justice Standards for the Defense Function*, A.B.A. (2017),

And when compared to *Brady*, *Strickland* is a happy signal pollution story. The presence of outcome sensitivity as an element of *Brady* and its adjacent law severely degrades the transmission of, and compliance with, conduct rules for law enforcement. In the *Strickland* context, the pertinent conduct rule exists to improve the listener's agency on behalf of a principal with which the agent is already aligned: the criminal defendant. In the *Brady* context, however, the conduct rule—disclose exculpatory information—exists to prevent the primary listener from undermining a party to which it otherwise has no fiduciary obligation.[175] In other words, the degradation of the conduct signal is particularly consequential, because there is other friction opposing the norms that it embeds.[176]

Brady noncompliance is rampant,[177] due in no small part to the fact that the nonjudicial actor who is supposed to be hearing an instruction to disclose all exculpatory information is instead hearing an instruction about materiality.[178] Studies of prosecutors' offices routinely disclose that lower-level personnel do not understand or regularly execute their *Brady* obligations,[179] and that office leadership insufficiently emphasizes them.[180] The presence of a materiality rule is part of the problem.[181] Law enforcement hears that it is behaving permissibly when it suppresses information that does not have a reasonably probable effect on a trial outcome. Setting aside the epistemic problem—materiality is unknowable at the moment of transgression—law enforcement simply experiences this as a rule that they need to disclose information to the defense only when, in the estimation of law enforcement itself, that information is a sufficiently big deal. The cognitive bias against disclosure, rooted in low-skewed estimates of materiality, can be quite powerful.[182] Such signal pollution undermines community self-regulation as well—

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https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/ [https://perma.cc/P887-28AY].

175. *See* Adam M. Gershowitz, *The Challenge of Convincing Ethical Prosecutors That Their Profession Has a Brady Problem*, 16 OHIO ST. J. CRIM. L. 307, 320 (2019).

176. It is nonetheless true that certain *Brady* cases seem expressly to contemplate a conduct rule in which prosecutors disclose information when they consider it material, in combination with other defense-favorable evidence in possession of prosecutors and other state actors. *See* Kyles v. Whitley, 514 U.S. 419, 438 (1995).

177. *See* Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2087–88 (2016); Jason Kreag, *The* Brady *Colloquy*, 67 STAN. L. REV. ONLINE 47, 48 (2014); Anthony C. Thompson, *Retooling and Coordinating the Approach to Prosecutorial Misconduct*, 69 RUTGERS U. L. REV. 623, 659 (2017). The Ninth Circuit's former chief judge, Alex Kozinski, rather famously referred to an "epidemic of *Brady* violations." United States v. Olsen, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., dissenting from denial of rehearing en banc).

178. *See* Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215, 2245 (2010).

179. *See* Gershowitz, *supra* note 175, at 312.

180. *See, e.g.*, Thompson, *supra* note 177 at 659–60 (reviewing phenomenon at the Orleans Parish District Attorney's Office).

181. *See* Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1098 (2017).

182. *See* Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of*

the ABA guidelines for prosecutors reject a materiality rule.[183] Declaring a need to align state ethics regulations with constitutional law, many states have interpreted the ABA rule to include a materiality requirement, notwithstanding the ABA conclusion that it does not.[184]

In short, internal sensitivity elements degrade the conduct rules that are supposed to guide defense attorneys and law enforcement. Instead of hearing that they are behaving unlawfully whenever they provide objectively unreasonable representation (defense lawyers) or suppress evidence (law enforcement), they hear that their behavior is unlawful only when it is sufficiently egregious—when it has a reasonably probable effect on outcomes. Indeed, one major reason why the law does not treat harmless error as an internal sensitivity element is that it would communicate the wrong message to trial courts.[185] To take but one example, the admission of unconfronted testimony is disfavored,[186] outcome effect or not.[187]

I do not dispute that, as they are currently configured, *Strickland*, *Brady*, and *Brady*-adjacent doctrine reflect more than an interest in suppressing disfavored out-of-court conduct. They are secondarily about, among other things, finality and judicial administration. The point is that these secondary values are usually and prudently realized through what I have described as *external* decision rules that limit remedies—not through rules that define the constitutional law itself. Of course, external rules still create some signal pollution. In an acoustic environment that is only partially separated, defense attorneys and law enforcement will know that there are limits on judicial remedies for constitutionally disfavored conduct, and that may cause them to behave more transgressively. But there is still a world of difference between a law that tells an audience that it breaks laws when it engages in disfavored conduct, and one that tells an audience that it breaks laws only when the disfavored conduct sufficiently affects an outcome.

Acoustic separation, however partial, presents an opportunity to realize social value.[188] The legal system can rely on a body of law to transmit separate instructions to different audiences, but selective transmission only works when the right

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Cognitive Science, 47 WM. & MARY L. REV. 1587, 1611–12 (2006).

183. *See* MODEL RULES OF PRO. CONDUCT r. 3.8 (AM. BAR ASS'N 1983).

184. *See* Justin Murray & John Greabe, *Disentangling the Ethical and Constitutional Regulation of Criminal Discovery*, HARV. L. REV. BLOG (June 15, 2018), https://blog.harvardlawreview.org/disentangling-the-ethical-and-constitutional-regulation-of-criminal-discovery/ [https://perma.cc/NAU5-UUXA].

185. *See* Greabe, *Epps Response*, *supra* note 4, at 124–27. *Cf.* Epps, *Harmless Errors*, *supra* note 4, at 2171–72 (conceding that expressly defining constitutional violations using harm elements would send problematic messages to trial courts).

186. *See* Delaware v. Van Arsdall, 475 U.S. 673, 680 (1986) (holding that Sixth Amendment violation is complete at the moment a trial court admits an unconfronted accusation). *Van Arsdall* is the doctrinal site of much discussion between Professors Epps and Greabe, and I take up the content of that discussion momentarily. *Compare* Epps, *Right Approach*, *supra* note 4, at 3–5 (arguing that *Van Arsdell* can be harmonized with Epp's view of harmless error as an internal rule of outcome sensitivity) *with* Greabe, *Epps Response*, *supra* note 4, at 124–27 (arguing that the rule of *Van Arsdall* shows why harmless error cannot be conceptualized as an internal sensitivity rule).

187. *See* Greabe, *Epps Response*, *supra* note 4 at 125–26.

188. *See supra* note 161 and accompanying text.

prescriptions get to the right people. Some criminal procedure doctrines do a better job of selective transmission than others. Whatever questions there are about the exclusionary rule or harmless error doctrine, the law clearly communicates that police transgress by effectuating unreasonable searches or seizures and that courts transgress by incorrectly applying legal rules. This is not so, however, for defense lawyers and prosecutors, or for other law enforcement personnel subject to constitutional rules of evidence disclosure.[189] People in these professional communities receive a signal polluted with decision rules that should be transmitted only to courts.

C. Secondary Enforcement

Thus far, I have discussed the effects of internal sensitivity elements on conduct rules, but they corrupt related decision rules as well. When disfavored conduct must sufficiently taint an outcome before the law deems a constitutional violation to have occurred, then other criminal and any noncriminal enforcement pegged to that violation likewise depends on that outcome effect. In other words, there can be multiple downstream decision rules—in the form of criminal and civil enforcement—connected to each conduct rule.[190] Making outcome-sensitivity part of the underlying constitutional violation heightens the showing necessary for secondary enforcement.[191]

1. In Individual Cases

Start with trial enforcement itself—but enforcement that comes prophylactically rather than curatively. Internal sensitivity elements make the prophylactic work much harder. For rules in the *Brady* family, the presence of internal sensitivity elements (e.g., materiality) reduces the ability of trial courts to order preventative disclosure of all defendant-favorable information and to enforce compliance.[192] A similar dynamic can arise in the *Strickland* context, albeit with considerably less frequency. These situations usually materialize when a criminal defendant moves pro se for a new attorney, and the motion for substitution succeeds or fails by reference to whether a constitutional violation has taken place.[193]

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189. These are the audiences for rules in the second category of outcome sensitivity, described in Section I.B.

190. *See generally* Laurin, *supra* note 14, at 1006 (discussing difficulties that arise when a constitutional right of criminal procedure is enforced in varied remedial contexts).

191. *Cf.* Greabe, *Epps Response*, *supra* note 4, at 119 ("[T]he narrower constitutional precedent that would result from [constitutionalizing harmless error (a sensitivity rule)] would cause mischief when translated into other adjudicatory and lawmaking contexts.").

192. Specifically, Professor Murray identifies at least three strategies that would be foreclosed: orders requiring presumptive disclosure without regard to outcome effect, in camera review for compliance, and sanctions. *See* Murray, *Prejudice-Based Rights*, *supra* note 4, at 302–03.

193. *See id.* at 305–06.

Constitutional elements of outcome sensitivity also diminish, substantially, the ability of injured parties to recover in collateral damages actions,[194] including in 42 U.S.C. § 1983 claims against municipalities (*Monell* liability).[195] These claims for compensation require the existence of a constitutional violation,[196] and the presence of internal sensitivity elements therefore narrows the category of remediable loss considerably. The dynamic also works against the claimant when suing a state official who asserts some immunity,[197] which is often applied by reference to the reasonableness of constitutional compliance.[198]

2. Structural Reform

When a constitutional violation contains an internal sensitivity element, structural reforms also suffer. Any reformer using impact litigation against systematic transgressors[199]—for example, a claim under § 1983—must prove that some quantum of unconstitutional activity has taken, is taking, or will take place.[200] Such structural reform litigation, usually in the form of *Monell* suits against municipalities, is necessarily more difficult when plaintiffs must show an outcome effect on top of the disfavored conduct.[201]

Because impact litigation is typically conceptualized as litigation against state actors, one might think that the effects of the sensitivity classification are limited to structural reform cases against police, prosecutors, and other law enforcement entities. Not so. Structural reform litigation can be a crucial strategy for reforming indigent defense, especially when indigent representation is a function carried out by under-funded public defender organizations.[202] For such litigation, having to prove sensitivity makes a major difference to the success of the enterprise.

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194. *Cf.* Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907, 933 (1989) (discussing futility of suits on unconstitutional lineups where the constitutional violation to be complete only when it sufficiently tainted the trial process).

195. Under *Monell v. Department of Social Services of New York*, § 1983 plaintiffs can recover monetary damages against municipalities and other local instrumentalities for policies or customs that cause constitutional violations. 436 U.S. 658, 691 (1978)*; see also, e.g.*, Alvarez v. City of Brownsville, 904 F.3d 382, 389 (5th Cir. 2018) (en banc) (evaluating claim for *Monell* liability based on *Brady* violation).

196. *See* City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986).

197. *See* Susan R. Klein, Aleza S. Remis & Donna Lee Elm, *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 110 (2015).

198. *See* Scheck, *supra* note 178, at 2219.

199. *See* Anthony O'Rourke, *The Political Economy of Criminal Procedure Litigation*, 45 GA. L. REV. 721, 737 (2011).

200. *See* Murray, *Prejudice-Based Rights*, *supra* note 4 at 303–05.

201. *Cf.* Los Angeles Cty. v. Humphries, 562 U.S. 29, 37–38 (2010) (holding that *Monell* applies to claims for damages and injunctive relief).

202. *See* Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 478 (2009) (tracing history of impact litigation seeking to reform indigent defense, with a conclusion that viability of the strategy has improved over time); Daniel S. Medwed, *Anatomy of A Wrongful Conviction: Theoretical Implications and Practical Solutions*, 51 VILL. L. REV. 337, 373 (2006) (collecting various attempts to use

As a means of structural reform, legislation is usually favored over litigation, but internal sensitivity elements affect nonjudicial change too. Especially when Congress acts pursuant to its authority under Section Five of the Fourteenth Amendment, legislative power can be keyed to the volume of constitutional harm.[203] There is far more constitutional harm—harm that Congress must find to justify remedial legislation under Section Five—when sensitivity rules are remedial limits and not elements of substantive constitutional law.[204] Even when the formal powers of the legislature scale to the incidence of constitutional transgression, consensus building is more effective when the underlying conduct can be characterized as a constitutional violation.

Courts have failed to grapple meaningfully with the problems that internal rules of outcome sensitivity present.[205] As I mentioned in Section 0, the presence of internal sensitivity elements is probably path dependent. Courts simply announced these sensitivity rules in procedural postures that did not require judges to clarify whether the rules were elements of substantive constitutional law or limits on judicial remedies.[206] Were these constitutional rules capable of robust trial-moment elaboration, courts may have developed the sensitivity rules differently.

There is a closing observation to make before turning to the subject matter in Part III. Whereas *Strickland*, *Brady*, and *Brady*-adjacent decisions have nurtured internal sensitivity rules, the harmless error doctrine remains broadly understood as an external limit on judicial remedies.[207] If one believes (as I do) that signal pollution is less problematic when *courts* are the audience for a conduct rule,[208] then American

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litigation mechanisms to achieve reform).

203. *See* Tennessee v. Lane, 541 U.S. 509, 518–20 (2004) (explaining the traditional understanding of congressional power to enact prophylactic civil rights legislation, subject to requirements of congruence and proportionality).

204. *See* Greabe, *Epps Response*, *supra* note 4, at 130–31. *But see* Epps, *Right Approach*, *supra* note 4, at 6–7 (dismissing concern about reduced Section Five power on ground that there is unlikely to be support for remedial legislation). Especially in light of evolving attitudes about law enforcement, I consider the prospect of remedial legislation sometime over the next several decades a nontrivial possibility, so I believe Professor Epps imprudently discounts the Section Five concerns.

205. *Cf.* Murray, *Prejudice-Based Rights*, *supra* note 4, at 282-95 (sketching the current status of what I call internal sensitivity elements). Credit to Professor Epps, however, who sees the problem. In proposing that harmless error doctrine be treated as an internal sensitivity rule, he perceives a risk that such an approach might pollute the prescriptions transmitted to lower courts. *See* Epps, *Harmless Errors*, *supra* note 4, at 2170–71. And in a footnote, he expresses concern about how materiality pollutes what seems to be *Brady*'s intended conduct rule. *See id.* at 2172 n.317.

206. *See supra* notes 93–98 and accompanying text.

207. *See* Fallon & Meltzer, *supra* note 3, at 1771.

208. The signal pollution is almost certainly less problematic when trial courts are the audience for the conduct rule. Trial judges are far more likely to have an instinctive grasp of the distinction between rights and remedies, and are far better positioned to disentangle conduct and decision rules appearing in the same legal instructions. The adjudicative practices of publication, reason giving, and review by senior entities in the judicial hierarchy makes it much easier to enforce conduct norms across courts than it is to enforce conduct norms across other nonjudicial actors.

law seems to have juridical classification perfectly backwards. American law tends to disentangle conduct and decision rules the least when the social cost of signal pollution is greatest.

III. JURIDICAL STATUS AND EXTERNAL SENSITIVITY

Having concluded that substantive constitutional law should retire internal sensitivity, I use Part III to consider the preferred juridical status of *external* sensitivity rules. When the sensitivity rule is external—and so there is a completed constitutional violation without any inquiry into outcome effects—another question arises. Should the law treat external thresholds rules as subconstitutional limits on judicial remedies or as the contents of discrete, downstream constitutional rights? I ultimately argue for the former.

A. Dominant Theories of Juridical Status

Because outcome-sensitivity rules tend to develop in doctrinal silos, common form does not follow from common function. Instead, there are different disputes about juridical status playing out in different doctrinal spaces—for harmless error rules, for *Brady* and *Strickland* claims, and so forth. Across these silos, there are the three by-now-familiar juridical models for sensitivity rules: (1) internal sensitivity, (2) external sensitivity as a limit on judicial remedies, and (3) external sensitivity that defines a distinct downstream constitutional wrong (usually due process).

Declaring a specific doctrinal rule to conform to a specific model would be misleading, or at least a touch presumptuous, because there exists no authoritative classification. There is at least rough decisional consensus about the juridical status of most sensitivity rules, but disagreement lurks in the academy. For example, some scholars view harmless error as an internal sensitivity rule, others treat it as an external constitutional limit on recognition of convictions, and still others conceptualize it as federal common law.[209] I organize Section 0 around different outcome sensitivity rules, believing that example-driven discussion will leave readers with the best understanding of each model's strengths and weaknesses. These examples track the general doctrine presented in Part I, except the focus here is much more granular: on disputes over the juridical status of sensitivity rules.

1. Juridical Status: Harmless Error

The concept of harmless error is almost certainly the site of the most developed dispute over outcome sensitivity's juridical status. Although there are some early Supreme Court decisions that improvisationally exercised authority to affirm convictions tainted by constitutional error, these decisions hardly established what one would call rules—and they certainly did not contemplate anything like a rule's juridical status.[210] The rule-ified version of harmless error was initially a creature of

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209. *See supra* Section 0 (discussing juridical models of harmless error rule).

210. *See, e.g.*, Motes v. United States, 178 U.S. 458, 474 (1900) (reversing several convictions because of Confrontation Clause violations but affirming one because the

statute, with Congress passing the first harmless error provision in 1919: "On the hearing of any [appellate proceeding], civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."[211] Congress adopted an ornamental change in 1949,[212] but the Court never gave the provision much work to do, at least with respect to constitutional error.[213] And in state court, state statutes set harmless error thresholds.[214]

Mapp v. Ohio (1963)[215] is a significant moment in the story of harmless error's juridical status and in the history of outcome sensitivity more generally. As a doctrinal matter, *Mapp* held that the Fourth Amendment exclusionary rule applied in state courts.[216] Because *Mapp* was initially understood as a rule running directly from the Fourth Amendment, through the Fourteenth, and against the states,[217] it required a radical change to the way state courts enforced the constitutional text barring unreasonable searches and seizures.[218] *Mapp* error was voluminous, so the Supreme Court had to figure out a rule for reversing guilty verdicts bearing the Fourth Amendment taint. *Mapp* thereby accelerated the Court's need to settle on a theory of harmless constitutional error. *Chapman* (1967) was that settlement—and it is no accident that the Warren Court decided *Chapman* when it was dramatically expanding the reach of constitutional criminal procedure.[219]

Known primarily for the substantive standard of harmlessness that it announced, *Chapman* included another holding about the juridical status of the harmless error rule:

> [W]e cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights. We have no hesitation in saying that the right of these petitioners not to be punished for exercising their Fifth and Fourteenth Amendment right to be silent—expressly created

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conviction rested on "peculiar grounds").

211. Act of Feb. 26, 1919, Pub. L. No. 65-281, 40 Stat. 1181, 1181 (amending Judicial Code § 269, 36 Stat. 1163 (1911)).

212. *See* Act of May 24, 1949, Pub. L. No. 81--72, § 110, 28 U.S.C. § 2111.

213. *See* TRAYNOR, *supra* note 27, at 42. The primary role of the statute is as a source of authority for the constraint on relief for nonconstitutional error. *See* Kotteakos v. United States, 328 U.S. 750, 762–64 (1946).

214. *See* Epps, *Harmless Errors*, *supra* note 4 at 2128.

215. 367 U.S. 643 (1963).

216. *See id.* at 655.

217. Sometimes the Supreme Court conceptualized *Mapp* as a combination of the Fourth Amendment "implemented by the self-incrimination clause of the Fifth." *See, e.g.*, Ker v. California, 374 U.S. 23, 30 (1963) (explaining *Mapp* this way).

218. *See* U.S. CONST. amend. IV.

219. 386 U.S. 18, 21 (1967); *see generally* Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 210 (2002) (discussing the political fallout of the Warren Court procedure decisions); Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 763–66 (1991) (articulating a political process justification for Warren Court's criminal procedure innovations).

> by the Federal Constitution itself—is a federal right which, *in the absence of appropriate congressional action, it is our responsibility to protect by fashioning the necessary rule*.[220]

Chapman, then, unmistakably held that the harmless error rule that it announced, although not "expressly created by the Federal Constitution itself,"[221] was amenable to formulation by federal judges. Moreover, the justificatory account for the exercise of such power was that states could not be permitted to formulate the pertinent remedies.[222]

Chapman's theory of judicial power had a "volcanic effect" on the distribution of state and federal authority.[223] That effect would have been easier to understand and justify had *Chapman* elected to present harmless error as a constitutional rule. But *Chapman* insisted that harmless error was a different juridical animal. In terms of the three models identified above, it positioned harmless error as subconstitutional federal common law—that is, a judge-made rule that Congress could overturn, but that preempted inconsistent state law. Most academics have embraced this particular understanding of *Chapman*, including leading federal-court scholars Daniel Meltzer and Richard Fallon.[224]

In the years that followed, the Supreme Court adjusted the outcome-sensitivity threshold that a harm finding required[225] but did not meaningfully undermine the rule's juridical status. In *United States v. Hasting* (1983),[226] for example, the Court styled the harmless error rule as a nonconstitutional limitation on the supervisory power of appellate judges.[227] But the justices were not always unanimous. In *United States v. Lane* (1986),[228] Justice Brennan concurred to argue that the harmless error

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220. Chapman, 386 U.S. at 21 (1967) (emphasis added).

221. *Id.*

222. Justice Harlan dissented on precisely this issue—on the idea that the remedial question was distinct from the underlying substance and that state courts had latitude to enforce the remedies in the manner of their choosing. *See id.* at 45 (Harlan, J., dissenting). Shortly after *Chapman*, some academics began to express concern over the theory of power that the decision assumed but failed to robustly articulate. *See*, *e.g.*, Philip J. Mause, *Harmless Constitutional Error: The Implications of* Chapman v. California, 53 MINN. L. REV. 519, 521, 527, 528 (1969).

223. *Id.* at 527.

224. *See* Fallon & Meltzer, *supra* note 3, at 1771; Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1, 5 (1994); *see also* Craig Goldblatt, *Harmless Error As Constitutional Common Law: Congress's Power to Reverse* Arizona v. Fulminante, 60 U. CHI. L. REV. 985, 986 (1993) ("Instead, the harmless constitutional error rule is only 'constitutional common law'—a judicially created prophylactic rule designed to protect constitutional rights, but not itself an interpretation of the Constitution."); John M. Greabe, *Riddle*, *supra* note 4, at 62 ("Alternatively, is it a subconstitutional rule that serves as an example of what Professor Henry P. Monaghan calls 'constitutional common law'?").

225. *See* Jason M. Solomon, *Causing Constitutional Harm: How Tort Law Can Help Determine Harmless Error in Criminal Trials*, 99 NW. U. L. REV. 1053, 1059 (2005).

226. 461 U.S. 499 (1983).

227. *See id.* at 505–06.

228. 474 U.S. 438 (1986).

doctrine involved a due process question—albeit without much elaboration.[229] Several academics have filled out a supporting theory, and I discuss those momentarily.[230] In 2006, a four-Justice dissent treated the harmless error rule as a feature of Federal Rule of Criminal Procedure 52(a), which tracks the definition of the largely-ignored federal statute.[231] The Supreme Court continued to treat harmless error doctrine as a judge-made phenomenon when it reformulated the concept as a limit on post-conviction relief. In *Brecht v. Abrahamson*,[232] the Court held that the *Chapman* standard did not apply during collateral review of a conviction. Instead, the Court held, the less exacting standard from *Kotteakos* did: a "substantial and injurious effect on the verdict."[233] Riffing on *Chapman*'s theory about why the Court had authority to develop the rule, *Brecht* noted that, "[i]n the absence of any express statutory guidance from Congress, it remains for this Court to determine what harmless-error standard applies . . . . We have filled the gaps of the habeas corpus statute with respect to other matters."[234]

The model of harmless error as subconstitutional federal common law has a distinguished pedigree,[235] but what about the other models? The external model of harmless error as content of a discrete, downstream constitutional violation traces, at least in judicial decisions, to Justice Brennan's *Lane* concurrence—although the opinion itself was under-theorized. Professor Richard Re has proposed a similar and much more analytically robust framework for thinking about the role of the Fourth Amendment exclusionary rule.[236] Re's big-picture argument is that the admission of sufficiently tainted evidence reflects two different constitutional violations: the root Fourth Amendment violation from an unreasonable search or seizure and a downstream due process harm from the tainted judgment.[237] Re recognizes that such a relationship between due process and the Fourth Amendment might not be exclusive; one can think of harmless error as a distinct due process constraint on the recognition of convictions bearing any sufficient upstream legal taint.[238] As two scholars put a similar argument almost a half-century ago, there is "a due process right not to have the judicial wrong of admission committed in the government's prosecution."[239]

Finally, Professor Epps champions the model of harmless error as an internal sensitivity rule. In a memorable turn of phrase, Professor Philip Mause once referred to this model as the "part and parcel" theory—the harmless error rule is "part and parcel" of the underlying constitutional right.[240] Professor Epps's part and parcel

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229. *See id. at* 460 (Brennan, J., concurring).
230. *See infra* notes 236–238 and accompanying text.
231. *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 157 (2006) (Alito, J., dissenting).
232. 507 U.S. 619 (1993).
233. *Id.* at 637.
234. *Id.* at 633.
235. *See supra* note 224.
236. *See* Re, *supra* note 7, at 1893.
237. *See id.* at 1912–13.
238. *See id.* at 1915–17.
239. Thomas S. Schrock & Robert C. Welsh, *Up from* Calandra*: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 369 (1974).
240. *See* Mause, *supra* note 222, at 532.

argument is premised on the idea that all sensitivity rules should be treated the same way; he consistently returns to the idea that harmless error should be treated like *Strickland* prejudice and *Brady* materiality.[241] One of Epps's primary arguments for transsubstantive, internal rules is that such juridical status is necessary to justify their ongoing bite in state criminal proceedings.[242] Harmless error sets a ceiling for appellate relief because, without a showing of sufficient sensitivity, there is no constitutional violation to relieve.

Professor Epps's position on harmless error is a more particularized case for treating all sensitivity rules as internal elements of substantive constitutional law. Although I ultimately disagree with his conclusion, I consider his arguments to be especially worthy of response; theories of outcome sensitivity do not hold together unless they provide a more satisfactory explanation for why they apply in state proceedings. I return to this issue momentarily.

2. Juridical Status: Prejudice and Materiality

There is little *decisional* dispute over the juridical status of the sensitivity elements appearing in the *Strickland* and *Brady* families; they are constitutional law. Although the concepts of materiality and prejudice developed recently, the Supreme Court has consistently referred to them as elements of the underlying constitutional violation—i.e., as internal sensitivity rules.[243] To date, Professor Murray has written the most substantial work contesting that classification,[244] arguing that these internal

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241. *See, e.g.*, Epps, *Harmless Errors*, *supra* note 4, at 2160 (suggesting that all criminal procedure rights should be conceptualized as having outcome-sensitivity elements along the lines of *Strickland* prejudice and *Brady* materiality); *id.* at 2173 n.321 (characterizing resistance to the inclusion of *Strickland* prejudice and *Brady* materiality elements as objections to the stringency of the outcome-sensitivity threshold rather than to the more general presence of an outcome-sensitivity rule).

242. *See id.* at 2163–64. I do not mean to suggest that the state-forum argument is the only one that Professor Epps makes in favor of his preferred model of juridical status. Professor Epps also argues that his model, among other things, is more easily reconciled with the application of the federal harmless error statute. *See id.* at 2164–69.

243. *See, e.g.*, Strickler v. Greene, 527 U.S. 263, 281 (1999) ("[S]trictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."); United States v. Agurs, 427 U.S. 97, 108 (1985) ("For unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside . . . ."). In fact, the very act of reviewing materiality and prejudice findings on *collateral* review also indicates that courts consider the outcome-sensitivity rules to be part of the underlying violation. *See, e.g.*, Williams v. Taylor, 529 U.S. 362, 396–98 (2000) (analyzing *Strickland* prejudice in federal habeas posture). On the other hand, lower federal courts will also review the harmlessness findings of state courts, but that practice depends on a stilted reading of a short per curiam opinion of the Supreme Court. *See* Mitchell v. Esparza, 540 U.S. 12, 18 (2003) (holding that a state-court decision to ignore harmless error rule was not an unreasonable application of federal law within the meaning of 28 U.S.C. § 2254(d)). *But see, e.g.*, Mansfield v. Sec'y, Dep't of Corr., 679 F.3d 1301, 1307 (11th Cir. 2012) (interpreting *Esparza* to permit federal habeas review of the harmless error determination).

244. *See* Murray, *Prejudice-Based Rights*, *supra* note 4, at 279.

elements should be reconceptualized as judge-made limits on remedies for disfavored prosecutor and defense-attorney conduct.[245]

Professor Murray makes several persuasive arguments in favor of remedial classification. In many respects, an abstracted phrasing of his argument resonates with my own: sensitivity rules give form to administrative interests that attach when courts consider whether to vacate final convictions, and such interests do not exist in other enforcement contexts.[246] Moreover, trial courts have a harder time enforcing rights containing sensitivity elements *ex ante,*[247] and such elements degrade non-accuracy interests such as dignity and transparency.[248]

Professor Murray's arguments work better as a more general case for doing away with internal sensitivity rules than they do as a case for reclassifying them as subconstitutional limits on remedies. Murray articulates benefits that remain whether the external rule is treated as a remedial limit or as a part of some separate, downstream constitutional constraint. Murray does have preferences, though. He suggests, for example, that any orphaned *Brady* materiality element be reclassified as a limit on judicial remedies.[249] What I offer is a more theoretical, generalizable account for treating external sensitivity rules as subconstitutional and limiting.

3. Juridical Status: Independent Source

The juridical status of independent source doctrine[250] is only lightly theorized, in part because courts often fail to present or talk about it alongside other sensitivity rules. What distinguishes independent source doctrine from other sensitivity rules is that the outcome of interest is not a conviction, but an evidentiary event—something like the moment of eyewitness identification or the discovery of documentary evidence.[251]

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245. *See id.* at 281. At least some others have taken the position that the Court should orphan sensitivity elements and reclassify them as remedial limitations. *See, e.g.*, Janet C. Hoeffel & Stephen I. Singer, *Activating A* Brady *Pretrial Duty to Disclose Favorable Information: From the Mouths of Supreme Court Justices to Practice*, 38 N.Y.U. REV. L. & SOC. CHANGE 467, 469–73 (2014) (reaching this conclusion as to *Brady* on the grounds that the materiality discussions in the Supreme Court cases can be conceptualized as dictum). Two of the three juridical models are therefore present in the decisional law and academic work on rights falling under the *Strickland* and *Brady* umbrellas. The last juridical model—of outcome-sensitivity as an external rule of constitutional law—appears sparingly and only in a smattering of lower-court opinions. *See id.* at 480–86 (collecting such material); *see also, e.g.*, United States v. Safavian, 233 F.R.D. 12, 16 (D.D.C. 2005) ("Because the definition of 'materiality' discussed in . . . appellate cases is a standard articulated in the post-conviction context for appellate review, it is not the appropriate one for prosecutors to apply during the pretrial discovery phase.").

246. *See* Murray, *Prejudice-Based Rights*, *supra* note 4, at 296.

247. *See id.* at 306–12.

248. *See id.* at 312–18.

249. *See id,* at 319–23.

250. In this Subsection, I include inevitable discovery rules in the category of independent source rules.

251. *See supra* Section 0.

The juridical status of independent source doctrine varies. Courts and academics generally assume that the independent source doctrine for Fourth Amendment violations is federal common law; I can locate no decision analyzing it as a constitutional rule. Independent source doctrine that bars in-court identifications sufficiently tainted by upstream constitutional violations, by contrast, is often considered a separate constitutional rule.[252]

The best (but by no means convincing) explanation for the differential treatment of the independent source rule might involve the juridical status of the corresponding suppression rule. If federal common law is what requires suppression, which is the dominant modern view of the Fourth Amendment exclusionary rule,[253] then there is no felt need to classify the limit on that remedy as constitutional law. If the suppression rule is conceptualized as a downstream remedy required by the federal constitution—as is the case with sufficiently tainted eyewitness identifications[254]—then outcome sensitivity is more likely to be understood as an element of that constitutional suppression rule.

Independent source rules operate in state court, usually because state courts or state legislatures have declared that they must.[255] That some states do not impose independent source rules, however, presents no meaningful question of federal supremacy. That is because an independent source rule limits federal suppression that sets a remedial floor. A watered-down independent source rule simply means that the state has not dropped below the floor of suppression required by federal law.[256] Phrased another way, when a state *underenforces* an independent source rule, it permissibly *overenforces* the underlying federal right. There is no legal problem with *that*[257]—or at least there is no federal supremacy sufficient to force a probing discussion about the juridical status of the independent source rule.

Courts have worked through the juridical status of outcome-sensitivity rules in substantive silos. Within each silo, the juridical status of those rules remains doctrinally stable, albeit path dependent and academically contested. Even that academic disagreement, however, tends to treat sensitivity as a doctrine-specific question. Given both common form and function, however, sensitivity rules should have transsubstantive juridical status.

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252. *See supra* notes 53, 106.

253. *See generally* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 785 (1994) (describing and criticizing modern doctrine regarding judge-made Fourth Amendment exclusionary rule); Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse Than the Disease*, 68 S. CAL. L. REV. 1, 42–56 (1994) (disagreeing with Amar's concern with judge-made status of rule).

254. *See supra* notes 53, 106.

255. *See* Alan Copelin, *A Time to Act: Statutory Exceptions to State-Created Exclusionary Rules*, 20 AM. J. CRIM. L. 339, 349 (1993).

256. Texas and Indiana, for example, have rejected the inevitable discovery exception outright. *See* Ammons v. State, 770 N.E.2d 927, 935 (Ind. Ct. App. 2002); Garcia v. State, 829 S.W.2d 796, 798 (Tex. Crim. App. 1992).

257. *See infra* note 277.

B. A Subconstitutional Limit on Judicial Remedies

A legal regime would realize social value by eliminating internal sensitivity rules. There are then two external options: treating sensitivity rules (1) as subconstitutional limits on judicial remedies or (2) as defining downstream constitutional violations. For the reasons that follow, the former is the more desirable—and doctrinally viable—option. That is, sensitivity rules should be treated as subconstitutional, federal common-law limits on judicial remedies, applicable by operation of federal supremacy in state court but subject to congressional revision.

1. Subconstitutional Common Law

The most important doctrinal innovation is, as Part II explains, to eliminate all internal sensitivity elements. Such a change would throttle signal pollution, promote more constitutionally compliant professional norms, and enhance secondary enforcement against constitutionally disfavored conduct.[258] The law should also reclassify most external sensitivity rules as subconstitutional limits on judicial remedies.[259] The only exceptions should be those sensitivity rules that already define distinct violations of the rights to counsel and due process, and against self-incrimination.[260]

Almost fifty years ago, Professor Henry Monaghan argued that the best way to understand the Fourth Amendment exclusionary rule and *Miranda* requirements was as species of subconstitutional federal common law.[261] These rules, Monaghan argued, lack the "dignity" of "constitutional text itself."[262] They operate interstitially, as federal common law essential to the implementation of some underlying constitutional right.[263] They are common law substructures that federal judges make in order to "carry out the purposes and policies of [certain constitutional] guarantees."[264] Per that understanding, (1) the implementing substructure applies in state court, (2) Congress can override the common law rules, and (3) there is room for judicial innovation. The Supreme Court has largely acceded to Monaghan's view of the Fourth Amendment exclusionary rule. And although it long held that *Miranda*

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258. *See supra* Sections 0 (signal pollution) and 0 (secondary enforcement).

259. Professor Murray does not include in his argument a broader theoretical defense of constitutional common law. Although I agree with much of what Professor Murray has to say about what he calls prejudice-based rights, I supply some support for certain theoretical propositions that were not his primary concern.

260. *See* U.S. CONST. amend. V (self-incrimination and due process); *id.* amends. VI (right to counsel), XIV (due process). So, for example, the line-up cases treating tainted in-court identifications as a separate line-up capable of violating the Constitution would continue to define a violation separate from the constitutional constraint on the tainting, out-of-court identification. *See supra* notes 53, 106. *See generally* Section 0 (defining existing doctrinal category).

261. *See* Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 26–30 (1975).

262. *Id.* at 2.

263. *See id.* at 27.

264. *Id.* at 18.

was super-constitutional law,[265] the Court moved back toward a subconstitutional-law paradigm in a major 2022 case taking away the ability to seek relief for *Miranda* violations under § 1983.[266]

Outcome sensitivity should be conceptualized as subconstitutional federal common law, on the theory that it is bound up with the enforcement of the Constitution's express rights of criminal procedure.[267] On that understanding, sensitivity defines neither the root constitutional violation nor some downstream constitutional harm.[268] The federal common law would apply by operation of federal supremacy in state court but would be subject to congressional revision.[269] Indeed, and as mentioned above, a prominent theory about the juridical status of harmless error rules tracks precisely this framework.[270] That understanding should be extended as the default for all sensitivity rules, including those currently conceptualized as internal elements of constitutional rights—such as *Strickland* prejudice and *Brady* materiality.[271]

The case for a federal common law to implement the Constitution's criminal procedure rights is already stronger than the more generalized case for much post-*Erie* federal common law,[272] but the case for classifying outcome sensitivity that is

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265. *See* Dickerson v. United States, 530 U.S. 428, 431–32 (2000).

266. *See* Vega v. Tekoh, 142 S. Ct. 2095 (2022). The language the Court used to describe the not fully constitutional status of the *Miranda* warnings was that they were "constitutionally based with constitutional underpinnings." *Id.* at 2108 (internal quotation marks omitted).

267. *See generally* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 54–59 (1985) (insisting that subconstitutional common law power is legitimate only in a limited set of circumstances); Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479 (2010) (arguing that swaths of administrative law should be understood to have this status); Monaghan, *supra* note 261 (providing what is generally credited as the first comprehensive account of the phenomenon); Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117 (1978) (comprehensively rejecting the theory of subconstitutional common law articulated by Monaghan, *supra* note 261).

268. For the exception, *see supra* note 260 and accompanying text.

269. *See* Lawrence Crocker, *Can the Exclusionary Rule Be Saved?*, 84 J. CRIM. L. & CRIMINOLOGY 310, 339 (1993) ("A federal common law exclusionary rule applies to the states via the Supremacy Clause."); Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1073–80 (1967) (surveying the practice of federal common law decision-making and concluding that its operation against in state courts by way of the Supremacy Clause is "settled in practice"); James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 288 n.437 and accompanying text (2004) (collecting cases in support of the generally accepted proposition that Congress can override federal common law).

270. *See supra* note 222. For whatever reason, Professor Monaghan did not, at least initially, clearly identify harmless error doctrine as belonging to the very category of federal common law that he was defining. *See*, *e.g.*, Monaghan, *supra* note 261, at 33 n.32, 143 (mentioning harmless error without assigning it to category). He later recognized that status, however. *See* Henry P. Monaghan, *Harmless Error and the Valid Rule Requirement*, 1989 SUP. CT. REV.195, 200 n.30.

271. *See supra* Section 0 (defining category).

272. *See generally* 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE, § 4514 (3d ed. 2002) (setting forth the contours of and

stronger still. The justification for recognizing a distinct federal body of common law criminal procedure rests on several related propositions: American judicial review has taken liberty protection as one of its central functions, Congress is uniquely willing to defer to the Supreme Court's expertise on ancillary questions of rights implementation, congressional inaction is especially difficult to interpret as a desire for varied state law to control those questions of implementation, and the idea that there is some important interest in varied implementation of unitary rights seems far-fetched.[273]

These normative premises support my preferred classification of sensitivity rules at least as much as they support the common law status of a more general implementing procedure; and sometimes, the support is stronger. Nothing about such a classification undermines either the legitimacy drawn from the federal judiciary's subject-matter expertise or the plausibility of congressional deference thereto.[274] The notion that Congress might have legislatively abstained in order to preserve nonuniform sensitivity thresholds is particularly implausible, and it is difficult to discern policy-laboratory justifications for permitting state sensitivity thresholds to drop below a certain floor.[275]

When the law denominates a sensitivity rule as a feature of substantive constitutional law, the reason why it applies in state court is straightforward. If the Fourteenth Amendment incorporates the right against the state,[276] and if the sensitivity rule is an implementing feature of the substantive right, then federal supremacy means that the rule applies there.[277] If a sensitivity rule is not constitutional law, however, then some additional explanation is in order. For example, if *Chapman*'s harmless error doctrine is a remedial sensitivity rule, then why should it apply as a floor for constitutional enforcement in state courts?[278] Under

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justification for post-*Erie* federal common law).

273. *See* Monaghan, *supra* note 261, at 18–19.

274. *Cf.* Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1246 (1988) ("Moreover, the courts are widely recognized to have particular expertise, in comparison with the other branches of government, in matters of criminal procedure . . . .").

275. I do not believe that there should be uniform criminal procedure; I believe that procedural rules essential to a root guarantee of criminal procedure found in the U.S. Constitution generate a strong uniformity interest.

276. *See generally* MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 179–96 (1986) (discussing incorporation doctrine).

277. *See* U.S. CONST., art. VI, cl. 2.

278. I operate on the widely shared view that federal law of criminal procedure is a floor for enforcing rights in state court. *See, e.g.*, William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 550 (1986) ("[S]tate experimentation may flourish in the space above this floor . . . .); Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1148 (1993) ("[B]eyond this legal floor, federal courts have nothing to say about the way in which state courts exercise their authority to interpret state constitutionalism."); Barry Latzer, *A Critique of Gardner's Failed Discourse*, 24 RUTGERS L.J. 1009, 1017 (1993) ("Thus, a person's federal constitutional rights . . . cannot be subverted by rights-narrowing state constitutional interpretations."). *See also, e.g.*, Danforth v. Minnesota, 552 U.S. 264, 282 (2008) (affirming that states have authority to give greater remedial effect than what is

traditional rules for conflicts of law, a forum court ordinarily applies its own procedure, even when it resolves substantive legal questions under foreign legal rules.[279] The answer is that such rules belong to the federal common law substructure necessary to enforce the constitutional rights to which they pertain.[280] They still have the status of federal law, and principles of federal supremacy still require that state laws inconsistent with the implementing function be displaced.[281]

2. The Legitimacy of Subconstitutional Procedure

Professor Epps, who prefers that harmless error be reclassified as an internal sensitivity element—i.e., as part and parcel of the linked constitutional harm—would be skeptical of my position. He identifies a question of legitimacy that looms over the entire federal common law enterprise, which remains "sharply disputed."[282] One can restate his objections to a remedial phrasing of harmless error rules as a broader critique of sensitivity's juridical status.

His concerns are, at least in my view, overstated.[283] Subconstitutional common lawmaking is at its most controversial in contexts where it is used to regulate the conduct of out-of-court actors,[284] and where it is used to create damage actions for

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required by federal nonretroactivity law); Montgomery v. Louisiana, 136 S. Ct. 718, 729 (2016) (distinguishing *Danforth* on grounds that the federal law of remedy can be a floor without operating as a ceiling).

279. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 127 (1971).

280. *See supra* note 224 and accompanying text.

281. *See supra* note 269 and accompanying text; *see also* Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359, 361 (1952) (holding that, in the context of a dispute over procedural rights adjacent to a federal statutory right, "[s]tate laws are not controlling in determining what the incidents of this federal right shall be").

282. *See* Epps, *Harmless Errors*, *supra* note 4, at 2150–51.

283. In what follows, I deal primarily with the legitimacy of subconstitutional federal common law, but Professor Epps has leveled other criticisms at a remedial harmless error model espoused by Professor Greabe. *See* Epps, *Right Approach*, *supra* note 4, at 9–12. I do not find them entirely persuasive. For example, Epps is concerned that courts applying a subconstitutional outcome sensitivity rule would be "at sea" with respect to reversal criteria. *Id.* at 10. Although a subconstitutional limitation would produce, over the long haul, slightly more varied appellate behavior than an internal sensitivity element, appellate judges would not be "at sea." The criteria that courts use to decide whether to afford judicial relief in a criminal proceeding are still the same under both paradigms; the difference is just the juridical status of the outcome sensitivity rule.

284. Here I am referring to the Supreme Court's decision-making in *Miranda v. Arizona*, 384 U.S. 36 (1966), which imposed certain requirements on custodial interrogation, and *Dickerson v. United States*, 530 U.S. 428, which held that Congress could not scale those requirements back). *See* Brandon L. Garrett, *Constitutional Law and the Law of Evidence*, 101 CORNELL L. REV. 57, 76 (2015) (documenting academic confusion over *Miranda*'s juridical status); Yale Kamisar, *Postscript: Another Look at* Patane *and* Seibert*, the 2004* Miranda *"Poisoned Fruit" Cases*, 2 OHIO ST. J. CRIM. L. 97, 114 (2004) (noting questions about the juridical status that arose out of *Dickerson*'s apparent reclassification of *Miranda*); Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4, 134 (2001) ("*Miranda*'s interpretation of the Fifth Amendment had been controversial from the start, an argument that dragged on long after police adjusted to the new regime."); Monaghan,

constitutional torts.[285] Outcome-sensitivity rules, however, are quite removed from these more controversial strains of subconstitutional common law. As set forth in Part II, *Strickland*, *Brady*, and *Brady*-adjacent rights have elements that are indeed designed to constrain out-of-court behavior—but their outcome-sensitivity elements are not.

The federal common lawmaking enterprise is not inherently suspect. There are, of course, the four traditional enclaves of federal common lawmaking, which are broadly accepted and relatively uncontroversial: cases involving federal interests, interstate conflicts, admiralty and maritime disputes, and foreign affairs.[286] But even aside from those enclaves of substantive law, interstitial federal common lawmaking is everywhere.[287] Most first-year law students learn about *Klaxon Co. v. Stentor Electric Manufacturing Co.*,[288] which sets forth a rule that is uncontroversially understood as federal common law—that a federal court exercising diversity jurisdiction must conduct its choice of law inquiry the same way that a geographically aligned state court would.[289] Every student taking federal courts learns about a judge-created cause of action to enjoin state behavior in violation of federal law, which has been accepted for over a century.[290]

Nor is there anything particularly exceptional about the idea that such common law would apply in state court. For each of the four traditional enclaves, the judge-made federal rules apply in state and federal courts alike.[291] Some of the most basic procedural rules in our federalist system of overlapping judicial power—finality and

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supra note 261, at 20–23 (assigning subconstitutional common law status to *Miranda*).

285. Here I am referring to the Supreme Court's decision-making associated with *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). *See* Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. CALIF. L. REV. 289, 329 (1995); *see also, e.g.*, Merrill, *supra* note 267, at 52 ("In contrast, the Supreme Court, by suggesting that a federal remedy should be created even where it would not be necessary to preserve the right, enunciated a standard that sanctions illegitimate judicial lawmaking."); Monaghan, *supra* note 261, at 23–24 (assigning subconstitutional common law status to *Bivens*).

286. *See* Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1250 (1996).

287. *See* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 890 (1986); Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805 (1989).

288. 313 U.S. 487 (1941).

289. *See id.* at 496; *see also* William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 STAN. L. REV. 1371, 1413 (2012) (explaining why *Klaxon* requirements that federal courts apply state choice-of-law rules is a rule of federal common law).

290. *See* Daniel J. Meltzer, *The* Seminole *Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 38 (1996). This understanding traces generally to *Ex parte* Young, 209 U.S. 123 (1908). *See* PETER W. LOW, JOHN C. JEFFRIES JR. & CURTIS A. BRADLEY, FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS (9th ed. 2018). *But see* John Harrison, *Ex Parte* Young, 60 STAN. L. REV. 989, 1014 (2008) (disputing the standard account).

291. *See* Anthony J. Bellia Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825, 837 & n.53 (2005) (collecting cases).

preclusion—are rules of subconstitutional common law.[292] When preclusion is asserted as a defense in state court, federal common law dictates the preclusive effect of any prior federal judgment, whether that prior federal judgment was pursuant to federal question or diversity jurisdiction.[293]

Aside from its four classic enclaves, the legitimacy of federal common law nears a zenith when it provides implementing substructure for constitutional rights.[294] And outcome-sensitivity rules have all the qualities of the substructural federal common law that are uncontroversial—lacking the qualities of its disputed forms. Sensitivity rules are unlike the understanding of *Miranda* that the Court first revised in *Dickerson v. United States*[295] and then again in *Vega v. Tekoh*,[296] and they are unlike the general federal common law that *Erie* vaporized,[297] because sensitivity rules do not regulate out-of-court conduct; they are procedural parameters for processing federal claims. As implementing substructure, they are the purest form of interstitial lawmaking, quieting the separation-of-powers and federalism objections that dog federal common lawmaking elsewhere.[298] Nor are subconstitutional sensitivity limits vulnerable to criticism leveled at so-called *Bivens* claims: judge-made damage actions for constitutional torts.[299] A *Bivens* claim creates a federal cause of action where the Constitution indicates no remedy; an outcome-sensitivity rule simply implements a federal right that a defendant may already assert in federal court.

With respect to subconstitutional federal common law, perhaps the biggest modern debacle involves state sovereign immunity.[300] That decisional law has too

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292. *See* Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 989 (1998); *see also* Univ. of Tenn. v. Elliott, 478 U.S. 788, 794 (1986) ("However, we have frequently fashioned federal common-law rules of preclusion in the absence of a governing statute.").

293. *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 508 (2001).

294. *See* Monaghan, *supra* note 261, at 36.

295. *See supra* note 284 and accompanying text.

296. 142 S. Ct. 2095 (2022); *see also supra* note 266 (explaining shift).

297. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 ("There is no federal general common law.").

298. *See* Merrill, *supra* note 267, at 13–24.

299. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). There exists widespread criticism of *Bivens* as a moment of ill-advised judicial activism that damaged a separated-powers interest. *See, e.g.*, Carlson v. Green, 446 U.S. 14, 32 (1983) (Rehnquist, J., dissenting) ("To dispose of this case as if *Bivens* were rightly decided would in the words of Mr. Justice Frankfurter be to start with an 'unreality.'") (internal alterations omitted); *see also* Gene R. Nichol, Bivens, Chilicky, *and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1122–29 (1989) (collecting criticisms). For these reasons, the Supreme Court has become a notoriously hostile forum for *Bivens* claimants. *See, e.g.*, Hernandez v. Mesa, 140 S. Ct. 735 (2020) ("In later years, we came to appreciate more fully the tension between this practice and the Constitution's separation of legislative and judicial power."); *see also* James E. Pfander, Alexander A. Reinert & Joanna C. Schwartz, *The Myth of Personal Liability: Who Pays When Bivens Claims Succeed*, 72 STAN. L. REV. 561, 569 (2020) ("Indeed, over the past thirty-five years, the Court has expressed hostility to *Bivens* actions at every opportunity.").

300. *See, e.g.*, Andrew B. Coan, *Text as Truce: A Peace Proposal for the Supreme Court's Costly War over the Eleventh Amendment*, 74 FORDHAM L. REV. 2511, 2537 (2006)

many twists and turns to canvass here,[301] but suffice it to say that there was a period in which many understood certain state sovereign immunity as something less than full constitutional law.[302] Under such conditions, Congress could override that immunity in federal-question cases.[303] *Seminole Tribe of Florida v. Florida* retired this understanding in 1996,[304] expressly reclassifying the sovereign immunity doctrine as a formal rule of constitutional law.[305] The vexing juridical status of the subconstitutional form appears to have played a role in the decision to reclassify.[306]

But the problems in the sovereign immunity cases are not present here. Unlike the work that implementing rules had been doing in the sovereign immunity context—vindicating amorphous structural principles about the distribution of power between state and national governments[307]—the constitutional rules that outcome-sensitivity elements vindicate are much more straightforward. Those rules are express textual

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(describing the Supreme Court's path in sovereign immunity decision-making as "a disaster for the Court and for the rule of law"); Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 445 (2002) (referring to "the morass of Eleventh Amendment doctrine"); John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 47–48 (1998) (savaging the doctrine as a "home of self-contradiction, transparent fiction, and arbitrary stops in reasoning" and as "an intellectual disaster"); Ernest A. Young, Alden v. Maine *and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1602 (2000) (observing that state sovereign immunity doctrine has always had a fraught relationship with constitutional text and that the decision to constitutionalize state sovereign immunity in state court was a "disaster" for textualists).

301. *See generally*, Coan, *supra* note 300, at 2512–27 (providing helpful doctrinal history); Carlos Manuel Vazquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1693–1708 (1997) (same); Young, *supra* note 300, at 1606–17 (same).

302. *See, e.g.*, George D. Brown, *Has the Supreme Court Confessed Error on the Eleventh Amendment? Revisionist Scholarship and State Immunity*, 68 N.C. L. REV. 867, 883–84 (1990) (expressing this view of sovereign immunity before the Supreme Court held that Congress could not abrogate it except pursuant to constitutional authority that post-dates the Eleventh Amendment); Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. PA. L. REV. 1203, 1261 (1978) (same); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 6 (1988) (same).

303. The view that Congress could always override state sovereign immunity animated the Supreme Court's since-overturned decision in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 19 (1989), *overturned by* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 66 (1996).

304. 517 U.S. 44 (1996).

305. *See id.* at 72–73.

306. Indeed, *Seminole Tribe* includes an unusually strong set of references to the academic literature disputing the juridical status of sovereign immunity. *See, e.g.*, *id.* at 110 n.8 (Souter, J., dissenting) (collecting authority pertinent to dispute over juridical status); *id.* at 68 (disparaging theory of subconstitutional common law cited by Justice Souter as "a theory cobbled together from law review articles and its own version of historical events").

307. The principles themselves continue to inflect the post-*Seminole Tribe* law. *See*, *e.g.*, Alden v. Maine, 527 U.S. 706, 730 (1999) (reciting two such structural justifications for the Supreme Court's state sovereign immunity rules); Va. Off. for Prot. & Advoc. v. Stewart, 563 U.S. 247, 253 (2011) ("[W]e have understood the Eleventh Amendment to confirm the structural understanding that States entered the Union with their sovereign immunity intact, unlimited by Article III's jurisdictional grant.").

provisions of the First through Eighth and Fourteenth Amendments. Classifying all sensitivity rules as substructure that implements these textually specified rights presents few of the problems hounding doctrine that implements structural principles untethered to constitutional text.[308]

In sum, concerns about the legitimacy of the federal common lawmaking enterprise do not meaningfully dent the case in favor of sub-constitutional outcome sensitivity. The need for implementing rules is traceable directly to constitutional text, and sensitivity rules are necessary to enforce the textually specified right. The justification for the operation of sensitivity rules in state court is straightforward, and it entails neither fraught reliance on concepts like general federal common law nor major questions about the institutional competence of judges.

3. A Note on Cumulative Error

For the most part, the juridical status I propose here would have little effect on enforcement that happens at trial or appellate moments. Most of the benefits arise by way of effects on primary conduct and improved secondary enforcement.[309] There is, however, one small exception involving so-called cumulative error.[310] Existing cumulative error doctrine, where it is recognized,[311] usually requires that any error be of "constitutional dimension" before it may be subject to cumulation.[312]

When a constitutional error is no longer defined using an internal sensitivity element, there is no need to locate a constitutional source for a cumulative error rule. The constitutional error preexists the cumulation, which simply affects access to judicial remedies. Lowering the threshold for completed constitutional error, therefore, triggers greater authority to reverse convictions when, measured cumulatively, those errors have a sufficiently probable effect on outcomes.

In most *Brady*- and *Strickland*-type cases, cumulative-error doctrine now does nothing; there is no *Brady* or *Strickland* violation without the type of fair-trial impact that would be necessary to warrant membership in a cumulated assessment. Reclassifying sensitivity elements as limits on relief means that there will be more

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308. *See generally* John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1 (2014) (offering widely-cited criticism of "new structuralism"). Professor Manning includes sovereign immunity in the category of new structuralist interpretation. *See id.* at 38 n.230; *see also* Thomas B. Colby, *Originalism and Structural Argument*, 113 NW. U. L. REV. 1297, 1301 (2019) (highlighting tension between originalism and new structuralism).

309. *See supra* Sections 0 (primary conduct) and 0 (secondary enforcement).

310. *See*, *e.g.*, Rogers v. State, 957 So. 2d 538, 553 (Fla. 2007), *as modified on denial of reh'g* (May 24, 2007) ("It is appropriate to evaluate claims of error cumulatively to determine if the errors collectively warrant a new trial."); *see generally* John H. Blume & Christopher Seeds, *Reliability Matters: Reassociating Bagley Materiality, Strickland Prejudice, and Cumulative Harmless Error*, 95 J. CRIM. L. & CRIMINOLOGY 1153 (2005) (reviewing cumulative error doctrine and arguing for cumulation across *Strickland* and *Brady* errors, but without focus on juridical status of prejudice and materiality rules).

311. *See* 5 AM. JUR. 2D *Appellate Review* § 624 (2022) (noting that recognition of cumulative error doctrine is not universal).

312. Derden v. McNeel, 978 F.2d 1453, 1454 (5th Cir. 1992); *see also* Young v. Sirmons, 551 F.3d 942, 972 (10th Cir. 2008) ("Notably, in the federal habeas context, cumulative error analysis applies only to cumulative constitutional errors.").

completed constitutional violations that are insufficient, in and of themselves, to trigger relief. Cumulative error analysis will, at least potentially, have more work to do.

The doctrine of cumulative error presents many difficult questions, including how to cumulate prejudice within a category of constitutional violation,[313] and then across categories. Whether a social engineer would prefer a cumulative error doctrine is largely beyond the scope of this Article. I will allow, however, that it is difficult to understand why two equally tainted convictions would be treated differently depending on whether there were single or multiple categories of tainting conduct.[314]

C. The Constitutional Alternative

One might argue that, if the law is going to externalize outcome-sensitivity rules, then the sensitivity rules ought not be limiting at all; they should define a downstream constitutional wrong.[315] For example, what is now the *Brady* right would involve two constitutional violations. There would be one completed violation when the state suppresses information favorable to the defense, and another when the jury convicts in violation of the sensitivity rule. This theory mirrors Professor Re's Fourth Amendment preference, which is to have courts treat the exclusionary rule as a distinct due process constraint on the use of tainted evidence.[316]

This juridical classification is a considerable improvement over the existing understanding of *Strickland*, *Brady*, and *Brady*-adjacent rights, as it reduces the degree to which the decision rule interferes with the message intended for the conduct-rule audience.[317] In my view, however, a remedial paradigm remains superior. Under the remedial framework, sensitivity rules remain *limits*,[318] and that approach largely coheres existing practice. Reclassifying internal sensitivity rules as distinct downstream constitutional violations, by contrast, means that the sensitivity rule is no limit at all. I doubt the constitutionalized model produces additional

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313. For the purposes of *Brady* analysis, courts already cumulate prejudice across violations. *See* Kyles v. Whitley, 514 U.S. 419, 436 (1995).

314. *Cf.* United States v. Allen, 269 F.3d 842, 847 (7th Cir. 2001) ("Cumulative errors, while individually harmless, when taken together can prejudice a defendant as much as a single reversible error and violate a defendant's right to due process of law."); United States v. Rivera, 900 F.2d 1462, 1469 (10th Cir. 1990) ("The cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error.").

315. *See supra* Section 0.

316. *See* Re, *supra* note 7, at 1912–13.

317. *See supra* Section 0.

318. I am not confident that the juridical reclassification would necessarily produce more enforcement of federal rights on appeal or in post-conviction proceedings—in both models, the outcome-sensitivity rule limits relief for a root transgression. In this respect I agree with a similar point that Professor Epps made about harmless error. *See* Epps, *Harmless Errors*, *supra* note 4, at 2172–73. Classifying harmless error as a remedial phenomenon means that the underlying constitutional rights include no outcome-sensitivity rule, but the increased breadth of the substantive rule is ultimately offset by the presence of the remedial limit on appeal, which does much the same work.

benefits,[319] and it certainly entails costs.[320] There is nothing wrong with calls for doctrinal reform—my preference involves some adjustment—but the presence of more substantial change invites practical questions about how likely judges are to accept it, and normative questions about its wisdom and legitimacy.

Someone urging a constitutional rule against sufficiently tainted outcomes might point out that any subconstitutional rules would be statutorily defeasible.[321] What's to stop Congress from ratcheting up the outcome-sensitivity threshold, or even eliminating it? For the most part, nothing.[322] But such vulnerability is no unique mark against the remedial model; Congress can restrict remedies for due process violations too. True, *trial courts* might more aggressively enforce rules against upstream taints that link to downstream due process harm. A due process rule against tainted convictions, however, does not require remedies in *appellate or post-conviction proceedings*—which are the major sites of remediation.

Consider appellate remedies first. Even if there is a constitutional right to an appellate forum, such a right does not imply a specific harmless-error metric.[323] Moreover, the orthodox view is that the Constitution does not guarantee an appeal in criminal cases.[324] If the Constitution does not require appellate courts at all, how can it require that there be an appellate remedy with certain content? Finally, if there is a convincing theory that the presence of a constitutionally nonmandatory forum gives rise to a constitutional obligation to honor certain harm thresholds, then I have not seen it.[325]

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319. *See, e.g.*, *infra* notes 321–334 and accompanying text (explaining that this model does little better at guaranteeing judicial review).

320. *See, e.g.*, *infra* notes 335–336 and accompanying text (explaining that this model effectively constitutionalizes state evidence law).

321. *See, e.g.*, Re, *supra* note 7, at 1915 (expressing this concern); *cf.*, Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1169 n.202 (1986) (underscoring defeasible status).

322. I say "for the most part" because there are theories suggesting that Congress may be restricted in displacing federal common law that implements a textually specified constitutional right. *See, e.g.*, Merrill, *supra* note 267, at 58 ("Congress may override preemptive lawmaking based on the Constitution, but only if the federal courts independently conclude that Congress has enacted a statute that provides roughly the same degree of protection for constitutional policies as the federal common law rule.").

323. *See* Meltzer, *supra* note 224 at 10–11; *cf., e.g.*, Greabe, *Riddle*, *supra* note 4, at 87 ("Moreover, even if there were a constitutional right to appeal a criminal judgment, *Chapman* imposes obligations that make it to impossible to characterize . . . as a logical extension of any such right.").

324. *See* Greabe, *Riddle*, *supra* note 4 at 82 ("The conventional view that there is no constitutional right to appeal a criminal judgment is grounded in the Constitution's text and history."); Meltzer, *supra* note 224, at 2–3 & nn.9–10 (collecting cases in support of the conclusion that the absence of a constitutional right to appeal in criminal cases is a "profound conceptual difficulty" for those seeking to ground harmless error rule in Constitution).

325. *Cf.* Greabe, *Riddle*, *supra* note 4 at 87 ("[T]he *Chapman* principle cannot plausibly be traced to any doctrine that constrains government in the provision of constitutionally gratuitous benefits."); Meltzer, *supra* note 224, at 12–18 (concluding that "other possible constitutional limits on state power" cannot support a constitutional harmless error rule).

The idea that external sensitivity rules might constitutionally entitle a defendant to a post-conviction remedy is even harder to envision. Congress has recognized power to severely limit post-conviction remedies for constitutional wrongs—for example, by limiting certain state-prisoner relief to scenarios in which no fair-minded jurist would endorse the state decision,[326] by restricting evidentiary development,[327] and by subjecting successive and procedurally defaulted claims to prejudice requirements.[328] Congress did not even guarantee a federal habeas forum to state prisoners until 1867.[329] States do not have to provide collateral review at all.[330]

Professor Re seems to perceive this problem. He suggests that the due process violation does not end at the moment of tainted conviction, but that some constitutional harm remains ongoing as long as the prisoner is in custody.[331] A failure to remediate the due process violation at the trial moment, the argument goes, is itself an ongoing due process violation that triggers a constitutional right to harm-calibrated judicial process on appeal.[332] Even assuming that the constitutional violation can be characterized as "ongoing," however, such a due process problem has never been sufficient, as a constitutional matter, to require unrestricted review of the conviction and custody.[333] The easiest way to understand the problem is to think about it in terms of post-conviction remedies—if an "ongoing" due process violation entitled a convicted person to unrestricted collateral review, then centuries of settled assumptions about federal habeas law are wrong.[334]

The other major problem with identifying a due process right to sufficiently taint-free convictions is that such a right admits of no easy distinction between constitutional and non-constitutional taints. Professor Re's preferred due process rule, after all, is pegged to convictions sufficiently tainted by *unlawful* upstream trial conduct.[335] If due process is really a right to a sufficiently taint-free conviction, and

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326. *See* 28 U.S.C. § 2254(d); Cullen v. Pinholster, 563 U.S. 170, 188 (2011) (interpreting § 2254(d)).

327. *See* 28 U.S.C. § 2254(e)(2); Holland v. Jackson, 542 U.S. 649, 653 (2004) (holding that statutory restrictions on hearings apply to all methods of introducing evidence in federal court).

328. *See* 28 U.S.C. § 2244(b)(2)(B)(ii) (discussing successive petitions); Coleman v. Thompson, 501 U.S. 722, 750 (1991) (discussing procedural default).

329. *See* Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385.

330. *See* Pennsylvania v. Finley, 481 U.S. 551, 556–57 (1987).

331. *See, e.g.*, Re, *supra* note 7, at 1912–13 (referring to a prisoner convicted in violation of the Due Process Clause as subject to an "ongoing deprivation of liberty"); *id.* at 1915–16 (attributing a constitutional right to reversals to the presence of ongoing due process violations).

332. *See id.* at 1916.

333. *See supra* notes 323–330 and accompanying text.

334. *See id.*

335. *See, e.g.*, Re, *supra* note 7, at 1916 (explaining rule in terms of "defendant convicted based on *illegally admitted* evidence") (emphasis added); *id.* (referring to due process problem as "insufficient *lawful* evidence to authorize conviction") (emphasis added). Setting aside the specific language Professor Re uses to describe it, there seems to be no principled way to argue that a second-order due process rule against sufficiently tainted convictions applies only to *constitutional* taints.

if there is not a theory for distinguishing constitutional and non-constitutional taints, then the paradigm constitutionalizes otherwise non-constitutional error. Evidence admitted in violation of state law can affect the result of a trial just as much as a constitutional transgression, so every violation of state evidence law would give rise to a second-order due process claim—to be asserted in every appellate and post-conviction proceeding thereafter. Such a conversion would swamp courts with new constitutional litigation and would create enormous pressure to shrink state evidence restrictions in order to preserve a manageable remedial equilibrium.[336]

To be clear, Professor Re's main argument—that courts should anchor the Fourth Amendment exclusionary rule to a theory of due process harm[337]—actually creates few of these problems. My concerns arise only when Re's specific position is transformed into a more general argument for an ongoing right to harm-calibrated judicial review of sufficiently tainted convictions. There is no need to invite these doctrinal questions when the same upside is more comfortably realized by treating outcome-sensitivity rules as remedial limits.

CONCLUSION

It may go by several different names, but outcome-sensitivity pervades criminal procedure. Almost always reflecting interests in finality and judicial administration, a sensitivity rule pegs a judicial response to the effect that some constitutionally disfavored conduct has on an outcome. Despite such extreme functional similarity, sensitivity rules have varied juridical status. Depending on doctrinal context, they might operate as elements of constitutional violations, as judge-made limits on remedies, or as the showing necessary to demonstrate a second-order constitutional violation.

That state of affairs ought to change, and constitutional violations should never include internal sensitivity elements. Internal sensitivity rules transmit signals that needlessly undermine compliance with preferred conduct norms, and they degrade secondary enforcement—undercutting important constraints on the behavior of police, prosecutors, and defense lawyers. As between the two external possibilities, moreover, courts should embrace the view that sensitivity rules are subconstitutional limits on judicial relief. That status provides a satisfying explanation for why the rules constrain state adjudication and avoids the doctrinal disruption that the alternative entails.

336. *See supra* note 121.

337. *See* Re, *supra* note 7, at 1917–18.