2023

Outcome Sensitivity and the Constitutional Law of Criminal Procedure

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

Follow this and additional works at: https://www.repository.law.indiana.edu/ilj

Part of the Common Law Commons, Constitutional Law Commons, and the Criminal Procedure Commons

Recommended Citation
Available at: https://www.repository.law.indiana.edu/ilj/vol98/iss2/3

This Article is brought to you for free and open access by the Maurer Law Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact kdcogswe@indiana.edu.
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 subconstitutional 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.
INTRODUCTION .................................................................................................................. 430
I. SENSITIVITY IN LEGAL DOCTRINE .................................................................................. 433
   A. EXTERNAL RULES: REMEDIAL LIMITS ................................................................. 434
      1. APPELLATE REVIEW DOCTRINES .................................................................... 434
      2. COLLATERAL REVIEW DOCTRINES ............................................................... 435
      3. INDEPENDENT SOURCE DOCTRINES ......................................................... 436
   B. INTERNAL RULES: CONSTITUTIONAL ELEMENTS .................................................. 438
      1. DEFENSE ATTORNEYS ..................................................................................... 438
      2. PROSECUTORS .................................................................................................. 441
   C. EXTERNAL CONSTITUTIONAL VIOLATIONS ......................................................... 443
II. INTERNAL SENSITIVITY RULES .................................................................................... 445
   A. CONDUCT AND DECISION RULES ....................................................................... 446
   B. DEGRADING CONDUCT RULES ........................................................................... 447
      1. AUDIENCES IN CRIMINAL PROCEDURE ......................................................... 448
      2. OUTCOME SENSITIVITY AS DECISION RULE ............................................... 450
      3. SIGNAL POLLUTION .......................................................................................... 452
   C. SECONDARY ENFORCEMENT ................................................................................ 457
      1. IN INDIVIDUAL CASES ...................................................................................... 457
      2. STRUCTURAL REFORM ..................................................................................... 458
III. JURIDICAL STATUS AND EXTERNAL SENSITIVITY .................................................... 460
   A. DOMINANT THEORIES OF JURIDICAL STATUS .................................................... 460
      1. JURIDICAL STATUS: HARMLESS ERROR ....................................................... 460
      2. JURIDICAL STATUS: PREJUDICE AND MATERIALITY ..................................... 464
      3. JURIDICAL STATUS: INDEPENDENT SOURCE ............................................. 465
   B. A SUBCONSTITUTIONAL LIMIT ON JUDICIAL REMEDIES ................................... 467
      1. SUBCONSTITUTIONAL COMMON LAW ......................................................... 467
      2. THE LEGITIMACY OF SUBCONSTITUTIONAL PROCEDURE ......................... 470
      3. A NOTE ON CUMULATIVE ERROR .................................................................. 474
   C. THE CONSTITUTIONAL ALTERNATIVE .................................................................. 475
CONCLUSION .................................................................................................................... 478

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). 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. 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).

Several recent, high-profile articles analyze different sensitivity rules in a more siloed way, and the conclusions diverge sharply. Professor Justin Murray argues that certain sensitivity elements now conceptualized as substantive constitutional law should instead be treated as subconstitutional limits on remedies. 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. 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.

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
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; (2) internal sensitivity rules that limit relief because constitutional violations remain incomplete unless the sensitivity rule is satisfied; and (3) sensitivity rules that are not limiting at all because they define distinct, downstream constitutional harms.

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. When an internal sensitivity rule says that there is no constitutional violation without sufficient harm, it confounds the behavioral signals transmitted to nonjudicial actors, and it promotes sub-optimal levels of secondary enforcement. The stakes are considerable: internal sensitivity rules promote constitutionally disfavored conduct in prosecutor, police, and defense-counsel communities.

---

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.
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.\textsuperscript{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.\textsuperscript{16} These include harmless-error doctrines that restrict appellate relief,\textsuperscript{17} as well as independent source rules that limit the exclusion of evidence bearing some constitutional taint.\textsuperscript{18} The second category consists of sensitivity rules that operate as internal elements of constitutional law.\textsuperscript{19} An internal sensitivity rule, such as “materiality” or “prejudice,”\textsuperscript{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.\textsuperscript{21} In each context, there is some

\textsuperscript{15} See supra note 7 and accompanying text.
\textsuperscript{16} See infra Section 0.
\textsuperscript{17} See infra Section 0.
\textsuperscript{18} See infra Section 0.
\textsuperscript{19} See infra Section 0.
\textsuperscript{20} See infra Sections 0 (prejudice), 0 (materiality).
\textsuperscript{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.\textsuperscript{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.\textsuperscript{23}

\section*{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,\textsuperscript{24} as well as related restrictions on post-conviction relief.\textsuperscript{25} It also includes independent source rules that permit the admission of certain taint-bearing evidence.\textsuperscript{26}

\subsection*{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.\textsuperscript{27} In

\textit{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 \textit{Brady}'s effect on the “adversary system,” noting that “[a]n interpretation of \textit{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 \textit{Brady} materiality rule. See, e.g., Daniel J. Capra, \textit{Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review}, 53 \textit{Fordham} L. Rev. 391, 414 (1984) (“Of course, the major reason for a materiality standard (as opposed to the full effectuation of \textit{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.


23. \textit{See supra} note 21 and \textit{infra} notes 95–98 and accompanying text.

24. \textit{See infra} Section 0.

25. \textit{See infra} Section 0.

26. \textit{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 \textit{Harv. L. Rev.} 152, 156 (1991); \textit{see also} Roger J. Traynor, The Riddle of Harmless Error
Kotteakos v. United States, the Supreme Court declared that a nonconstitutional error was to be treated as harmless when “the judgment was not substantially swayed by the error.” In Chapman v. California, 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.”

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 and in many cases when a conviction is tainted by a due process violation. (So-called structural error remains exempt from Chapman’s harmless error rule.) 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.

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, the Supreme Court held that the Kotteakos sensitivity threshold for appellate review of nonconstitutional mistakes also applied to federal

29. 328 U.S. at 765.
31. See id. at 24.
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.
post-conviction review of constitutional error.\textsuperscript{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.\textsuperscript{38}

\textit{Brecht} and \textit{Kotteakos} impose outcome-sensitivity rules for scenarios in which federal post-conviction review is otherwise unrestricted by another habeas doctrine.\textsuperscript{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.”\textsuperscript{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\textsuperscript{41} and in judge-made law for excusing federal claims that are untimely or procedurally defaulted.\textsuperscript{42} Such sensitivity rules, moreover, are not the exclusive province of \textit{federal} post-conviction law; they appear in \textit{state} post-conviction statutes too.\textsuperscript{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

\textsuperscript{37} See id. at 623.

\textsuperscript{38} See id.

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

\textsuperscript{40} 28 U.S.C. § 2254(e)(2)(B).


\textsuperscript{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, courts will admit the taint-bearing evidence. These sensitivity rules have a more common name: independent source doctrines.

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. Specifically, the trial court may admit tainted evidence if there was a lawful, independent source by which law enforcement acquired it. 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.

Although the independent source rules are rooted most deeply in the Fourth Amendment, they apply to Fifth and Sixth Amendment taints too. 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.

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. There are rules against admitting the unconstitutional out-


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”).

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. 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.

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. The most conspicuous of these rules is the right to effective assistance of trial counsel, and Strickland v. Washington 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)

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.
effect on a trial outcome. 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.”

Strickland’s deficiency prong marks the line between favored and disfavored defense attorney conduct. It specifies minimum standards for defense team composition. It governs all preparation for trial, including decisions about investigation into both guilt- and sentencing-phase issues. 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. 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. 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[.]” and that “[a]bsent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated.”

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. In Smith v.

56. See id. at 687.
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).
62. See supra notes 56–57 and accompanying text.
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, the Supreme Court nonetheless aligned the elements of an ineffective-assistance-of-appellate-counsel claim with the elements of a Strickland claim. In both cases, the claimant must prove deficient performance and prejudice. 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.

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, the Supreme Court held that some multiple representation scenarios are not constitutional violations. 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.” Cuyler, therefore, required that there be some demonstrable harm before a finding of constitutional error, and it set the sensitivity threshold at “adverse effect.”

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.” 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.”

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).

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”).
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.”

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. 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. As with
Strickland prejudice, Brady materiality is defined as a reasonably probable effect on
a guilt or sentencing determination. 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.”

In fact, there is a whole family of Brady-adjacent violations that contain internal
sensitivity elements. The so-called Giglio rule requires that prosecutors disclose
any potentially impeaching deals with state witnesses, and it uses the same
materiality standard that Brady does. 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].” 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—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.

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
82. See Bagley, 473 U.S. at 676, 678–84.
83. Id. at 678.
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 \textit{Donnelly v. DeChristoforo},\textsuperscript{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.”\textsuperscript{87} In defining prejudice under \textit{DeChristoforo}, \textit{Greer v. Miller} equated “prejudice” with a “sufficient significance to result in the denial of the defendant’s right to a fair trial.”\textsuperscript{88} In reciting authority on the “right to a fair trial,” \textit{Greer} cited \textit{United States v. Bagley},\textsuperscript{89} which in turn equated that standard to the \textit{Brady} materiality requirement.\textsuperscript{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 \textit{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.”\textsuperscript{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.”\textsuperscript{92}

There is little written about why prejudice and materiality rules became internal sensitivity elements rather than external limits on judicial remedies.\textsuperscript{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 \textit{both} at trial and thereafter.\textsuperscript{94} For these rights, trial and appellate courts must

\textsuperscript{86} 416 U.S. 637 (1974).
\textsuperscript{87} \textit{Id.} at 639.
\textsuperscript{88} 483 U.S. 756, 765 (1987) (internal quotation marks and citations omitted).
\textsuperscript{89} 473 U.S. 667 (1985).
\textsuperscript{90} \textit{See Greer}, 483 U.S. at 765. A year before \textit{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.” \textit{Darden v. Wainwright}, 477 U.S. 168, 181 (1987) (quoting \textit{DeChristoforo}, 416 U.S. at 643).
\textsuperscript{92} \textit{Barker v. Wingo}, 407 U.S. 514, 530 (1972).
\textsuperscript{93} Professor Murray sketches the doctrinal history that might otherwise be expected to reveal the rationale in \textit{Prejudice-Based Rights}, supra note 4, at 285–95.
\textsuperscript{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. \textit{See} \textit{Epps}, \textit{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

---


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. Before the Supreme Court settled on the idea that the Fourth Amendment exclusionary rule was a judge-made remedy, 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. Relatedly, some scholars argue that the admission of the evidence can be a due process violation. 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. The out-of-court identification would violate either the Sixth or Fourteenth Amendment, and some opinions suggest that a tainted in-court identification

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)).


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) (“[W]e 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. After all, the due process clauses restrict eyewitness identifications that result from state action, 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.

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. Internal sensitivity rules—rules that make some outcome effect a

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”).


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. 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. 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. Therefore, the criminal law also transmits a second set of instructions to a distinct audience (judges). 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. 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. 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. Most pertinently, they originate, anchor, and amplify prescriptive norms across regulated communities.


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

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, a vehicle stop, surveillance, or some other familiar policing practice. The Fifth and Fourteenth Amendments contain multiple rules against certain elicitations from potential defendants, including confessions. The same is true for the Sixth Amendment, after the moment of formal accusation. Police are also subject to Sixth and Fourteenth Amendment rules that constrain how officers arrange and administer eyewitness identifications. In each case, a constitutional

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).
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).
Constitutional law 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

\(^{130}\) 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”).
\(^{134}\) See Brady v. Maryland, 373 U.S. 83, 87 (1963).
\(^{137}\) See supra Section 0.
\(^{140}\) 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, and it may not direct a verdict in the prosecution’s favor. Most would probably think of these as conduct rules for courts. 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.

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. 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. Each group must be given complementary-but-separate instructions. The general public hears prescriptions for out-of-court conduct (conduct rules), and officials hear prescriptions for enforcement (decision rules). Neither audience hears the prescription earmarked for the other unless that message is transmitted to it separately.

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. 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.

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.”).
143. See supra note 114.
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.\textsuperscript{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.\textsuperscript{152} Whether a mental health lead ignored (\textit{Strickland}) or witness impeachment suppressed (\textit{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 \textit{tends to affect} outcomes, but against conduct that \textit{in fact} had a sufficiently probable effect on them.\textsuperscript{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 \textit{Strickland}’s Sixth Amendment inquiry, for example, requires that trial counsel’s performance have been objectively unreasonable—well outside the bounds of professional judgment.\textsuperscript{154} The same is true of the deficiency prong of the Fourteenth Amendment standard for effective appellate counsel.\textsuperscript{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.\textsuperscript{156}

\textsuperscript{151} I am not assuming that the content of a decision rule would \textit{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 \textit{complements} the conduct prescription. In the case of internal sensitivity elements, the decision rule undercut the conduct rule.

\textsuperscript{152} See Murray, \textit{Prejudice-Based Rights}, supra note 4, at 306–12.

\textsuperscript{153} See, e.g., \textit{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 \textit{Brady} claim); \textit{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 \textit{this} trial was surely unattributable to the error.” (emphasis in original)); \textit{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).


\textsuperscript{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.\footnote{157} Outcome sensitivity clearly performs the latter function, reconciling broader behavioral exhortations with competing interests in, among other things, finality and judicial administration.\footnote{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.”\footnote{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.\footnote{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.\footnote{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.\footnote{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

\footnote{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.").}

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

\footnote{159. Sager, supra note 14, at 1226.}

\footnote{160. See Dan-Cohen, supra note 11, at 631.}

\footnote{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).}

\footnote{162. See Dan-Cohen, supra note 11, at 651.}
phenomenon,\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{167} Police departments are a key subject of such analysis and, albeit to

\textsuperscript{163}. See, e.g., Melvin Aron Eisenberg, \textit{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.”).

\textsuperscript{164}. See Dan-Cohen, \textit{supra} note 11, at 634–36.

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


\textsuperscript{167}. See, e.g., Wendel, \textit{supra} note 166 (providing a survey and criticism of several norm-based models of attorney behavior); cf. also Barbara E. Armacost, \textit{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\textsuperscript{168} and the criminal-defense bar.\textsuperscript{169} In professional environments where constitutionally disfavored conduct is difficult to detect externally, compliance with conduct rules is especially dependent on internal norm enforcement.\textsuperscript{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.\textsuperscript{171}

Let me be more concrete. Consider \textit{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.\textsuperscript{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 \textit{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.\textsuperscript{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.\textsuperscript{174}


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

\textsuperscript{174} See \textit{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—

---


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).


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).


182. See Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of
the ABA guidelines for prosecutors reject a materiality rule.\textsuperscript{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.\textsuperscript{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.\textsuperscript{185} To take but one example, the admission of uncontradicted testimony is disfavored,\textsuperscript{186} outcome effect or not.\textsuperscript{187}

I do not dispute that, as they are currently configured, \textit{Strickland}, \textit{Brady}, and \textit{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.\textsuperscript{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

\textsuperscript{183} See \textit{Model Rules of Prof. Conduct} r. 3.8 (Am. Bar Ass’n 1983).


\textsuperscript{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 uncontradicted accusation). \textit{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, \textit{Right Approach}, supra note 4, at 3–5 (arguing that \textit{Van Arsdall} can be harmonized with Epp’s view of harmless error as an internal rule of outcome sensitivity) with Greabe, \textit{Epps Response}, supra note 4, at 124–27 (arguing that the rule of \textit{Van Arsdall} shows why harmless error cannot be conceptualized as an internal sensitivity rule).


\textsuperscript{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. 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. Making outcome-sensitivity part of the underlying constitutional violation heightens the showing necessary for secondary enforcement.

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. 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.
Constitutional elements of outcome sensitivity also diminish, substantially, the ability of injured parties to recover in collateral damages actions, including in 42 U.S.C. § 1983 claims against municipalities (Monell liability). These claims for compensation require the existence of a constitutional violation, 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, which is often applied by reference to the reasonableness of constitutional compliance.

2. Structural Reform

When a constitutional violation contains an internal sensitivity element, structural reforms also suffer. Any reformer using impact litigation against systematic transgressors—for example, a claim under § 1983—must prove that some quantum of unconstitutional activity has taken, is taking, or will take place. 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.

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. For such litigation, having to prove sensitivity makes a major difference to the success of the enterprise.


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).


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


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


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. 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. 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. 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. 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. If one believes (as I do) that signal pollution is less problematic when courts are the audience for a conduct rule, then American litigation mechanisms to achieve reform).


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.\(^\text{209}\) 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.\(^\text{210}\) The rule-ified version of harmless error was initially a creature of

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

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.
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.
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 required225 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

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’?”).
227. See id. at 505–06.
doctrine involved a due process question—albeit without much elaboration. Several academics have filled out a supporting theory, and I discuss those momentarily. 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. 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, 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.” 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.”

The model of harmless error as subconstitutional federal common law has a distinguished pedigree, 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. 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. 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. 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.”

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.
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.\footnote{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.\footnote{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 \textit{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.\footnote{243} To date, Professor Murray has written the most substantial work contesting that classification,\footnote{244} arguing that these internal

\begin{footnotes}
\item[241] See, e.g., Epps, \textit{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); \textit{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).

\item[242] See \textit{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. \textit{See id.} at 2164–69.

\item[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. \textit{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. \textit{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)). \textit{But see}, e.g., Mansfield v. Sec’y, Dep’t of Corr., 679 F.3d 1301, 1307 (11th Cir. 2012) (interpreting \textit{Esparza} to permit federal habeas review of the harmless error determination).

\item[244] See Murray, \textit{Prejudice-Based Rights}, supra note 4, at 279.
\end{footnotes}
elements should be reconceptualized as judge-made limits on remedies for disfavored prosecutor and defense-attorney conduct.  

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. Moreover, trial courts have a harder time enforcing rights containing sensitivity elements *ex ante*, and such elements degrade non-accuracy interests such as dignity and transparency. 

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. 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 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.

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 outcomesensitivity 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 identifications254—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 that257—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.

252. See supra notes 53, 106.
254. See supra notes 53, 106.
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.
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.\footnote{258}{See supra Sections 0 (signal pollution) and 0 (secondary enforcement).} The law should also reclassify most external sensitivity rules as subconstitutional limits on judicial remedies.\footnote{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.} 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.\footnote{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).}

Almost fifty years ago, Professor Henry Monaghan argued that the best way to understand the Fourth Amendment exclusionary rule and \textit{Miranda} requirements was as species of subconstitutional federal common law.\footnote{261}{See Henry P. Monaghan, \textit{Foreword: Constitutional Common Law}, 89 HARV. L. REV. 1, 26–30 (1975).} These rules, Monaghan argued, lack the “dignity” of “constitutional text itself.”\footnote{262}{Id. at 2.} They operate interstitially, as federal common law essential to the implementation of some underlying constitutional right.\footnote{263}{See id. at 27.} They are common law substructures that federal judges make in order to “carry out the purposes and policies of [certain constitutional] guarantees.”\footnote{264}{Id. at 18.} 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 \textit{Miranda}
was super-constitutional law, 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.

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. On that understanding, sensitivity defines neither the root constitutional violation nor some downstream constitutional harm. The federal common law would apply by operation of federal supremacy in state court but would be subject to congressional revision. Indeed, and as mentioned above, a prominent theory about the juridical status of harmless error rules tracks precisely this framework. 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.

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, but the case for classifying outcome sensitivity that is

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.
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 denounces 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

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.


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) (“Beyond 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. The answer is that such rules belong to the federal common law substructure necessary to enforce the constitutional rights to which they pertain. 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.

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.” 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. Subconstitutional common lawmaking is at its most controversial in contexts where it is used to regulate the conduct of out-of-court actors, and where it is used to create damage actions for

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. 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. But even aside from those enclaves of substantive law, interstitial federal common lawmaking is everywhere. Most first-year law students learn about Klaxon Co. v. Stentor Electric Manufacturing Co., 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. 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.

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. Some of the most basic procedural rules in our federalist system of overlapping judicial power—finality and

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).


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).


preclusion—are rules of subconstitutional common law. 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.

Aside from its four classic enclaves, the legitimacy of federal common law nears a zenith when it provides implementing substructure for constitutional rights. 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* and then again in *Vega v. Tekoh*, and they are unlike the general federal common law that *Erie* vaporized, 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.

Nor are subconstitutional sensitivity limits vulnerable to criticism leveled at so-called *Bivens* claims: judge-made damage actions for constitutional torts. 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. That decisional law has too
many twists and turns to canvass here, 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. Under such conditions, Congress could override that immunity in federal-question cases. Seminole Tribe of Florida v. Florida retired this understanding in 1996, expressly reclassifying the sovereign immunity doctrine as a formal rule of constitutional law. The vexing juridical status of the subconstitutional form appears to have played a role in the decision to reclassify.

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—the constitutional rules that outcome-sensitivity elements vindicate are much more straightforward. Those rules are express textual


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).


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 inflct 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.\footnote{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.\footnote{309} There is, however, one small exception involving so-called cumulative error.\footnote{310} Existing cumulative error doctrine, where it is recognized,\footnote{311} usually requires that any error be of “constitutional dimension” before it may be subject to cumulation.\footnote{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 \textit{Brady}- and \textit{Strickland}-type cases, cumulative-error doctrine now does nothing; there is no \textit{Brady} or \textit{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


309. See \textit{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, \textit{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 \textit{Strickland} and \textit{Brady} errors, but without focus on juridical status of prejudice and materiality rules).


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, 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.

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. 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.

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. In my view, however, a remedial paradigm remains superior. Under the remedial framework, sensitivity rules remain limits, 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

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, and it certainly entails costs. 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. What’s to stop Congress from ratcheting up the outcome-sensitivity threshold, or even eliminating it? For the most part, nothing. 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. Moreover, the orthodox view is that the Constitution does not guarantee an appeal in criminal cases. 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.

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).


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, by restricting evidentiary development, and by subjecting successive and procedurally defaulted claims to prejudice requirements. Congress did not even guarantee a federal habeas forum to state prisoners until 1867. States do not have to provide collateral review at all.

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. A failure to remedy 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. 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. 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.

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. If due process is really a right to a sufficiently taint-free conviction, and

326. See 28 U.S.C. § 2254(d); Cullen v. Pinholster, 563 U.S. 170, 188 (2011) (interpreting § 2254(d)).
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 harm337—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.