Rights Translation and Remedial Disequilibrium in Constitutional Criminal Procedure

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Criminal procedure rights are widely understood both as individual constitutional guarantees and as conduct-regulating norms, enforcement of which guides the behavior of criminal justice actors. This regulatory dynamic of constitutional criminal procedure flows from both criminal and civil litigation, and as a consequence criminal procedure rights are shaped and adjudicated in recursive remedial regimes. Little notice has been paid, however, to the fact that the contours of criminal procedure rights are not consonant across the criminal and civil remedial regimes. Instead, courts in civil actions reshape criminal procedure doctrine in a manner that erects new, conflicting, and often more lenient conduct norms for law enforcement.

This Article contends that this reformulation of recursively litigated rights is not accidental but rather flows from the role of remedial context in shaping constitutional doctrine—a role that is brought into complicated relief when adjudication of a right spans remedial realms. Drawing from emerging schools of thought in constitutional implementation scholarship, the Article provides a thick description of the problems of cross-remedial adjudication in criminal procedure, focusing in particular on how unprincipled or incoherent approaches undermine the regulatory force of constitutional criminal procedure. The Article then proposes and applies a framework of “rights translation” to ameliorate these deficiencies. While rights translation in criminal procedure involves certain unique remedial and systemic dynamics, the model of adjudication developed in the Article promises to illuminate other cross-remedial arenas of constitutional adjudication.
A crime occurs. An investigation ensues. Evidence is gathered, witnesses are interviewed, and an arrest is made. An indictment is issued, a trial occurs, and a conviction is obtained. Through some course of events—a witness’s misgivings, an investigator’s pavement-pounding—new facts come to the attention of the defense attorney, facts of an “exculpatory” nature. An appeal is litigated: The state’s failure to disclose favorable evidence that was known to it during the trial is found to have violated the constitutional protection against deprivation of liberty without due process of law—the Fourteenth Amendment right announced in *Brady v.*
Maryland. The defendant has vindicated her individual constitutional interest in obtaining a fair criminal trial, and may obtain reversal of her conviction.

But there is more. Litigation of the constitutional claim also serves a regulatory mechanism: The state is taxed with the loss of a conviction, and, perhaps, a public censure, aimed at deterring future transgressions of the constitutional duty to disclose exculpatory evidence. In this fashion, which plays out similarly with the other criminal procedure rights embodied in the Fourth, Fifth, Sixth, and Fourteenth Amendments, criminal adjudication drives the creation of constitutional doctrine and, concomitantly, the generation of conduct-regulating norms within the criminal justice system. Thus, as has been widely remarked, criminal procedure rights are as much regulatory mechanisms as they are individual constitutional guarantees.

The interrelationship between the content of criminal procedure rights and behavioral incentives for law enforcement has been widely theorized in the context of criminal adjudication, but less attention has been devoted to the role of civil rights litigation as an engine driving the development of constitutional doctrine in the field of criminal procedure. Our hypothetical defendant, her freedom having been obtained, might bring

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3 See supra note 2.
a civil suit under 42 U.S.C. § 1983 (or, if against federal authorities, through its judicially created analog the Bivens action\(^4\)), to obtain damages for the constitutional violations committed in the course of her prosecution. In her new capacity as civil rights plaintiff, she would “offensively” assert the Brady claim that was litigated “defensively” in the course of her criminal litigation.\(^5\) The consequence of a successful civil suit would be both an application of constitutional doctrine to a particular fact setting – *i.e.*, pronouncement of a constitutional norm and a corresponding instruction to law enforcement that certain conduct violates that norm – and a penalty in the form of damages. Civil rights litigation thus introduces an additional, parallel track along which the constitutional constraints imposed upon law enforcement are developed and enforced.

To the extent that identical constitutional criminal procedure guarantees are adjudicated in civil and criminal litigation, and that law enforcement conduct is thereby regulated in dual remedial arenas, we would plausibly expect that doctrinal development would be consonant across the two spheres. But therein lies an under-examined fallacy. Courts adjudicating civil claims for criminal procedure violations have struggled to determine the contours and application of the asserted right in the “offensive” civil context, and have frequently erected different burdens for proving deprivations of rights than those faced in the “defensive” criminal context. Our hypothetical defendant-turned-plaintiff might have obtained reversal of her criminal conviction simply by proving that she never obtained evidence that was favorable to her and might have made a difference in the jury’s consideration of her case; but should she attempt to obtain civil damages for this violation her task will be more difficult, requiring proof of, among other matters, *who* in law enforcement knew of the evidence, and whether that individual *intended* that the evidence be concealed. These different—and often higher—standards of proof do not mean simply that plaintiffs might not obtain compensation for apparent


rights violations. If we understand constitutional criminal procedure as importantly regulatory in nature, then we should be concerned about asymmetries arising in the definitions of these rights across remedial contexts, which may create dissonant regulatory signals to law enforcement actors, as well as to citizens seeking to understand the constitutional parameters of their encounters with the criminal justice system. This may occur, for example, through the development of conflicting standards of conduct, or through bleed-back to the criminal adjudicatory realm of rights that are redefined in civil litigation.

Little systematic attention has been paid to this dynamic of recursive criminal procedure litigation, its causes, and its consequences. Even less examination has been devoted to the perplexing question of how courts should conceptualize constitutional criminal procedure rights as they are adjudicated across distinctive remedial contexts. This Article begins to fill both gaps.

Focusing on civil litigation of criminal procedure in three areas—the Brady due process right, due process violations stemming from unduly suggestive identifications, and Fifth Amendment claims under Miranda v. Arizona—I offer a thick description of the doctrinal problems faced by courts in shifting from criminal to civil litigation as the forum for defining and adjudicating rights. Two contentions emerge from these portraits. First, I assert that these interpretative difficulties are not merely coincident to but arise from the change in remedial context. In other words, the definitions of rights that emerge from constitutional litigation are shaped by doctrinal, institutional, and administrative concerns that are unique to that adjudicatory arena. Efforts to “apply” those rights in a new remedial context are apt to be thwarted by what might be thought of as “language barriers”: Distinctive concerns are brought to bear on adjudication in the new arena which are not accounted for in, or perhaps conflict with, the received right.

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6 See Klein, supra note 2, at 1323-24; Stephanos Bibas, Transparency and Participation in Criminal Procedure, 81 N.Y.U. L. Rev. 911 (2006) (lamenting the gulf between criminal procedure “insiders”—law enforcement actors and courts—and “outsiders”—citizens—with respect to criminal procedure rights); Steiker, supra note 2, at 2532-40 (discussing disparity in understanding between government officials and citizenry concerning the actual content and operation of criminal procedure rights).

7 Exceptions to this general rule include work by Professor Pam Karlan, Professor Daniel Meltzer, and Professor Brandon Garrett. See generally Pamela S. Karlan, Race, Rights, and Remedies in Criminal Adjudication, 96 Mich. L. Rev. 2001 (1998); Meltzer, supra note 5; Brandon Garrett, Innocence, Harmless Error and Federal Wrongful Conviction Law, 2005 Wisc. L. Rev. 35.
This gives way to the second primary contention advanced herein. Some mechanism of “rights translation” must be employed by courts in order to make sense of rights when recursive remedial opportunities exist, as they do in the field of criminal procedure. Indeed, as will be seen, courts routinely do engage in translation of some sort, even when not acknowledging such a process, but both the technique and the result are often incoherent, unprincipled, or both. These deficiencies flow both from a failure to recognize the above-described importance of remedial context, as well as from misconceptions about the nature of constitutional rights themselves. As to the latter assertion, I contend that courts mistakenly fail to embrace a conception of “rights” as consisting of a bundle of at least three doctrinal components: statements of constitutional meaning, which I will refer to as “operative propositions”; tests for applying that meaning to facts, referred to as “decision rules”; and tests for determining the consequences of a finding that constitutional meaning has been transgressed, which I will call “remedial rules.”\(^8\) A shift in the remedial context in which a criminal procedure right is adjudicated might well require redefining some of these doctrinal components, but selection of where the reshaping should occur is significant. Failure to attend to the locus of translation and its affect on the status of the criminal procedure right in toto breeds doctrinal incoherence across the adjudicatory realms—a remedial disequilibration—that threatens to undermine criminal procedure’s conduct-governing force.

While this Article brings new insights to bear on the specific field of constitutional criminal procedure, it both contributes to and draws from more general examinations of the nature of constitutional meaning and adjudication. In particular, the project stands astride what have been described and widely accepted as two schools of thought in constitutional adjudication literature: “pragmatism,” which asserts that constitutional rights per se have no meaning independent of the tests courts develop to enforce them through litigation;\(^9\) and the “decision rules model,” which

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\(^8\) I employ terminology developed by Professor Mitchell Berman and increasingly deployed by those scholars who align themselves with the “decision rules model” of constitutional adjudication. See Mitchell N. Berman, Constitutional Decision Rules, 90 Va. L. Rev. 1, 9-12 (2004) (developing the taxonomies of operative propositions and decision rules, and positing that other components of constitutional doctrine might be identified, including remedial rules); see also Kermit Roosevelt III, Aspiration and Underenforcement, 119 Harv. L. Rev. Forum 193, 193 (2006) (discussing the “decision rules” school of thought).

\(^9\) Berman, supra note 8, at 50; see also Roderick M. Hills, Jr., The Pragmatist’s View of Constitutional Implementation and Constitutional Meaning, 119 Harv. L. Rev. Forum
conceives of “rights” as consisting of a bundle of conceptually distinct elements including judicially determined “constitutional meaning” and “judge-crafted tests bearing an instrumental relationship to that meaning.”

Though they are presented as opposing views in much of the literature, this project draws from both camps. On the one hand, the notion that remedial context distinctively shapes the contours of rights echoes the notion of “remedial equilibration” advanced by pragmatist Professor Daryl Levinson. But on the other hand, “rights translation” runs contrary to the pragmatist’s view of the tautological relationship between “right” and “remedy”: The metaphor deliberately harks to a notion of fidelity to some core conception of constitutional meaning, even as remedial context might work some change to a right’s contours.

The decision rules model, for its part, provides a powerful analytical tool for conceptualizing how this fidelity might be maintained across the remedial divide, and indeed I rely heavily on this model in constructing a translation approach. Importantly, however, prior scholarly deployment of the decision rules model has focused primarily, if not exclusively, on only two facets of constitutional doctrine—meaning and rules for applying that meaning. This Article, by examining constitutional adjudication across distinctive remedial contexts, affords elaboration of “remedial rules” as an additional, distinct doctrinal component, and thus offers a deeper engagement with the decision rules model.

The balance of the Article proceeds as follows. Part I briefly situates this project within the broader constitutional adjudication literature and introduces a vocabulary that will aid in discussing the doctrinal difficulties that arise in recursive litigation of criminal procedure rights. Part II introduces the problem of constitutional meaning and remedial context by examining courts’ approaches to civil rights claims in three areas of criminal procedure—the Brady due process right, due process violations stemming from unduly suggestive identifications, and Fifth Amendment violations stemming from unduly suggestive identifications, and Fifth Amendment

173, 175 (2006) (asserting, in defense of the pragmatist position, that “the meaning of a constitutional provision is its implementation”).


11 See, e.g., id.

12 See Daryl J. Levinson, Rights Essentialism and Remedial Equilibration, 99 Colum. L. Rev. 857, 858 (1999) (rejecting the “rights essential[ist]” conception of “pure” constitutional rights separable from remedies, and propounding the theory of “remedial equilibration” to capture the reality that “rights and remedies are inextricably intertwined,” with “[r]ights . . . dependent on remedies not just for their application to the real world, but for their scope, shape, and very existence”).
claims under *Miranda v. Arizona*. In each area of litigation, interpretative challenges that arise in the move from the criminal to the civil remedial realm will be manifest. In particular, the analysis will demonstrate that distinctive and remedial-context-specific roles played by notions of government *fault* in shaping constitutional doctrine complicate courts’ efforts to adjudicate criminal procedure rights in civil suits. Courts’ efforts to navigate the language barriers thereby posed will be examined and critiqued.

Part III proposes a model to address the deficiencies identified in Part II, by outlining a mechanism of “rights translation” and demonstrating its application in the areas of criminal procedure litigation discussed previously. Critically, this discussion will not and could not provide definitively “correct” answers for how these or other cases should be resolved—although I contend that rights translation provides criteria for assessing better and worse answers. But the rights translation model does offer adjudicatory *principles* that, if attended to, will ameliorate some of the systemically deleterious consequences of courts’ current efforts at recursive remedial adjudication. Part IV concludes by addressing potential objections to the rights translation project in general and to the specific model proposed in Part III, and discusses how the lessons of translation, though examined here with an eye to criminal procedure concerns, may prove useful in other areas of law that pose similarly complex questions concerning rights and remedies.

I. TRANSLATION IN CONTEXT: MODELS OF CONSTITUTIONAL IMPLEMENTATION

The work of this Article is undertaken within a broader academic literature examining constitutional guarantees as products of an adjudicatory process and judicial pronouncement. Indeed scholarly inquiry premised on the proposition that “[i]dentifying the ’meaning of the Constitution’ is not the Court’s only function” and that “[a] critical mission of the Court is to implement the Constitutional successfully,”\(^\text{13}\) has been one of the primary developments in constitutional scholarship in recent decades. This Part provides a brief genealogy of that literature’s development, with a primary focus on what have fairly widely come to be understood as two distinctive schools of thought within it: pragmatism, and the decision rules model. This account is partial rather than exhaustive, and the aim is more to explain than to persuade—to make clear and explicit my

\(^{13}\) Richard H. Fallon, Jr., Implementing the Constitution, 111 Harv. L. Rev. 56, 56 (1997).
own analytical starting points, and to offer a window into the broader debate for which my own analysis carries implications. Nevertheless, though primarily summary in nature, this review advances two analytical objectives. First, it advances a critique of pragmatism, namely that the dynamics of recursive remedies reveal flaws in the model’s accuracy and utility. Second, it sets the stage for rights translation as a device for vindicating and operationalizing the best insights of both the pragmatist and decision rules models.

A. Constitutional Doctrine “Discovered”

Constitutional law scholarship was long characterized by a rarefied understanding of the nature and importance of constitutional guarantees, with substantial thought devoted to proper interpretations of constitutional text and far less attention to how constitutional meaning actually emerges—i.e., an institutionally (often court-) driven process involving considerations quite apart from those memorialized in the Constitution itself. That academic trend was disrupted, if not entirely broken, in the 1970s. Professor Henry Monaghan’s 1975 Harvard Law Review Forward, Constitutional Common Law,14 followed by then-Professor Larry Sager’s Fair Measure,15 are often cited as the earliest scholars to characterize constitutional law as importantly adjudicatory in nature, and to conceptualize constitutional meaning as multi-layered and driven by far more than an abstract interpretation of “rights.”16

Thus, Monaghan’s central thesis was “that a surprising amount of what passes as authoritative constitutional ‘interpretation’ is best understood as something of a quite different order—a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions.”17 Moreover, contrary to then-emerging critiques of Supreme Court doctrine that “over-enforced” constitutional rights—the then-recent dictates of Miranda v. Arizona perhaps being chief among these—Professor Monaghan defended this “substructure” as a legitimate feature of constitutional adjudication.18

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16 See, e.g., Kermit Roosevelt III, Constitutional Calcification: How the Law Becomes What the Court Does, 91 Va. L. Rev. 1649, 1656 (2005); Levinson, supra note 12, at 867-60.
17 Monaghan, supra note 14, at 2-3.
18 Monaghan, supra note 14, at 10-30.
Sager, too, suggested a view of constitutional doctrine as actually and legitimately encompassing both constitutional meaning and tests employed by courts to apply that meaning—the latter of which only approximated the true “right” to which they corresponded. Sager’s central defense was in a sense the converse of Monaghan’s: These tests can only hope to achieve some “fair measure” of constitutional meaning and in fact frequently “under-enforce” it; but because that “true” meaning subsists despite the inability of courts to vindicate it, non-judicial actors remain bound by it. Nevertheless, Sager and Monaghan shared a view that while the core of constitutional law had long been thought of as only involving abstracted “rights,” it must in fact be understood also to encompass the extra-constitutional, adjudication-driven standards that implement the Constitution’s dictates.

Over time, these voices were gradually joined by others in the legal academy seeking to build on their conceptualization of a process-driven and multi-layered constitutional doctrine—in contrast to a primarily textual focus on the meaning of rights—and to probe how that doctrine is and should be generated and understood. This literature has been well-excavated elsewhere, and I need not re-mine that ground here. The point for present purposes is that, while the views of Monaghan and Sager were highly unconventional when they first emerged, the subsequent generation of scholarship has come to accept as relatively uncontroversial a view of constitutional doctrine as co-existing with, and often only approximating, constitutional meaning. This is not to assert the existence of a consensus view concerning the nature, meaning, or significance of such doctrine. But it is to say that the notion of an actual and legitimate gap between a right’s “meaning” and the expression of that meaning through the process of adjudication has gained the status of a pervasive background assumption to much constitutional legal thinking. In other words, as Professor Kermit Roosevelt has nicely formulated, the fallacies of “direct” and “perfect” enforcement have largely fallen by the wayside of constitutional scholarship.

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19 Sager, supra note 15, at 1213.
21 See, e.g., Richard H. Fallon, Jr., Judicially Manageable Standards and Constitutional Meaning, 119 Harv. L. Rev. 1274, 1299-1306 (reviewing literature addressing judicially manageable standards in constitutional implementation); Roosevelt, supra note 16, at 1655-57 & nn.16-23 (providing an historical overview of scholarly and judicial attention to constitutional doctrine); Berman, supra note 8, at 5-6 & nn.9-16 (reviewing literature that Berman describes as suggesting a “metadoctrinal ascendance”).
22 Roosevelt, supra note 16, at 1652-55 (describing the rejected “fallacy of direct
Indeed, it is only with the emergence of a critical mass of scholarship addressed to constitutional doctrine that distinctive views within that mass may be identified, grouped, and classified. I turn now to examine two camps whose broad contours and ideological juxtaposition have become widely accepted: the pragmatist and decision-rules models.

B. The Pragmatist Challenge

The pragmatist view of constitutional doctrine encompasses a number of scholars with slightly varying views, however it is perhaps most closely identified with the work of Professor Daryl Levinson. The opening line of his 2003 article *Rights Essentialism and Remedial Equilibration*, asserting that “[t]here is no such thing as a constitutional right, at least not in the sense that courts and constitutional theorists often assume,”23 was a provocative expression of the central insight of the pragmatist approach in this arena.

Levinson’s project criticized the predominant tendency of constitutional thought, including that of the “doctrinal” trailblazers Monaghan and Sager, to “sharply separate[e] the realm of rights from the realm of remedies” and “emphasiz[ing] the priority of” the “Platonic idea of” the former concept over the pragmatically and functionally constructed latter.24 Levinson rejected this traditional modality of “rights essentialism,” and urged that in fact the contours of rights are inevitably and inextricably bound up in the remedial contexts from which they emerge—a model he dubbed “remedial equilibration.”25 This paradigm, in Levinson’s view, more accurately describes the process of rights development, a contention argued through examination of structural reform litigation concerning education, prison conditions, and apportionment. In each arena, Levinson demonstrated that the very contours of the right at issue—equal protection in the first and third structural reform arenas, and the right against cruel and unusual punishment in the second—were shaped and reshaped in response to the remedial options facing courts at any given point in time.26 In other words, the success or failure of a suit claiming unconstitutional segregation,

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23 Levinson, supra note 12, at 857.
24 Id. at 857, 873.
25 Id.
26 Id. at 874-89.
inhuman prison conditions, or malapportionment did not simply result in a remedy being granted or denied, but amounted to an enlargement or constriction of the constitutional right at issue.

Terminology aside, the insight of remedial equilibration can fairly be understood as the unifying principle of pragmatist scholars. As pragmatist Professor Roderick Hill has stated, notions of “the meaning of a constitutional provision is its implementation.” Professor Richard Fallon provides a more detailed formulation of what he perceives as the characteristic pragmatist view: “a denial that it is useful or even meaningful to talk about rights apart from the judicial tests or doctrines through which courts enforce rights,” “an affirmation that doctrine both is and should be shaped in light of practical, instrumental concerns,” and “an insistence that practical, instrumental, and forward-looking considerations are sources of constitutional meaning standing on the same plane as, for example, the language of the Constitution and its original historical understanding.”

C. The Decision Rules Model

If the core of the pragmatist position is that constitutional doctrine is a unified field of guarantees that are refined and reformed through the sieve of adjudication, the decision rules model endeavors to “reverse engineer” a mass of doctrine into distinguishable components of constitutional meaning on the one hand, and the tests developed by courts to implement that meaning on the other.

The model derives its name in part from Professor Mitchell

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27 See Berman, supra note 8, at 48-49 & nn.153-159 (reviewing the work of “a phalanx of scholars” typifying the pragmatist view).
28 Hills, supra note 9, at 175.
29 Fallon, supra note 21, at 1313 n.173; see also David A. Strauss, The Ubiquity of Prophylactic Rules, 55 U. Chi. L. Rev. 190, 207-08 (1988) (“As a theoretical exercise, one could try to identify what the real, noumenal Constitution would require if governments had different tendencies or the courts had different capacities. But usually that would be a pointless task. Why should we care what doctrines would govern if courts could always accurately assess legislators’ motives, or the facts underlying legislation? Courts cannot always make those determinations with accuracy, and it is obviously legitimate for them to take that fact about their own limitations into account. Under any plausible approach to constitutional interpretation, the courts must be authorized--indeed, required--to consider their own, and the other branches’, limitations and propensities when they construe doctrine to govern future cases. . . . [I]t makes much more sense to read into the Constitution a general requirement that its various provisions be interpreted in light of institutional realities than to insist that those realities be ignored.”).
30 See Berman, supra note 8, at 78.
Berman’s comprehensive scholarly effort to construct a “taxonomy” of various strands of constitutional scholarship and adjudicatory approaches.\(^31\) The result of Berman’s effort divided constitutional doctrine into two components representing the work product of courts in adjudicating a constitutional dispute. Under the model, a court first determines the meaning of the constitutional guarantee claimed to have been violated. The resulting statement of meaning is the “constitutional operative proposition.”\(^32\) Second, the court adopts a “decision rule” to implement the operative proposition.\(^33\) In the simplest of cases, say a case involving the citizenship requirements for the presidency, the decision rule might be a “preponderance of the evidence” burden of proof. In harder cases, say those requiring implementation of the guarantee of “equal protection,” courts will develop more complex tests.\(^34\) Furthermore, Berman observed that constitutional doctrine might be further sub-divided. In addition to operative propositions and decision rules, a category of “remedial rules” might also be identified as the standards by which courts determine what relief follows from identifying a violation of constitutional meaning (through application of decision rules to particular facts).\(^35\)

The terminology developed by Professor Berman to describe this process is now commonly employed and indeed is essentially synonymous with the decision rules model. Yet as is often the case in intellectual history the model’s adherents predate and are not confined by its predominant nomenclature. Thus, for example, the early work of Monaghan and Sager both exhibit features of the decision rules model by endorsing the conceptual feasibility of under- and over-enforcing constitutional adjudicatory rules. Professor Fallon’s work on constitutional implementation and the dynamics of enforcement “gaps” is also identified with the decision rules camp.\(^36\)

As with the pragmatist view, the decision rules model is advanced by its adherents as a normative approach as well as a descriptive one. Thus, Berman urges that greater attention by legal actors—judges and litigants among others—to the distinction between operative propositions and decision rules, and to the considerations justifying the line drawn in any

\(^{31}\) See Berman, supra note 8, at 7.

\(^{32}\) See id. at 9-12.

\(^{33}\) See id. at 9-12.

\(^{34}\) See id. at 9-12.

\(^{35}\) See id. at 12.

\(^{36}\) See Fallon, supra note 21, at 1275-79, and 1313-17 (discussing “gaps” between “judicially manageable standards” and “the meaning of constitutional guarantees,” and rejecting the core conclusions of pragmatism).
given circumstance, will yield a variety of benefits from the standpoint of constitutional doctrine, political culture, and inter-branch dialog. \footnote{Berman, supra note 8, at 13.} Professor Kermit Roosevelt, too, has urged as well that the decision rules approach illuminates important doctrinal missteps. \footnote{Roosevelt, supra note 16, at 1692-1720.} And Professor Fallon and Dean Sager have both urged that identification of and attention to the existence of gaps between constitutional meaning and implementation permits non-judicial actors to comply with their own ethical duties, even if not legally enforceable, to uphold the Constitution. \footnote{Fallon, supra note 21, at 1299; Sager, supra note 15, at 1220-21.}

An intellectual divide between the pragmatist and decision rules models thus emerges. If pragmatists and decision-rulesers part company, it is over the latter group’s efforts to draw conceptual lines between constitutional meaning and the tests that enforce it, and the former group’s contention that such efforts are nonsensical or, perhaps, undesirable. That is not to identify the decision rules model with a particular metaphysical understanding of constitutional rights, although, to be sure, one might advocate a decision rules model that corresponded to the “Platonic” view of rights derided by Levinson. \footnote{Levinson, supra note 12, at 873; see also Berman, supra note 8, at 15 (“[T]o recognize the distinction between operative propositions and decision rules does not depend upon (though is not incompatible with) an assumption that courts derive ‘constitutional meaning’ in a fashion uninfluenced by pragmatic or instrumental calculations . . . .”).} The impetus to classify the constitutional output of courts might just as plausibly be justified on positivist grounds—Fallon, for example, criticizes pragmatism for failing adequately to explain what courts do or think they’re doing \footnote{Richard H. Fallon, Jr., supra note 21, at 1315.}—or on other functional bases—Berman and Roosevelt both point to salubrious effects on constitutional doctrine and culture that a decision rules approach might yield. \footnote{See Kermit Roosevelt III, Forget the Fundamentals: Fixing Substantive Due Process, 8 U. Pa. J. Const. L. 983, 984-1004 (2006) (offering the decision rules model as a tool for critiquing and “fixing” the Supreme Court’s substantive due process jurisprudence); Berman, supra note 8, at 78-113 (arguing that the decision rules model advances cultural, doctrinal, and institutional interests).} But whatever the rationale motivating the classificatory efforts of the decision rules model, it is the very process of attempting to cleave constitutional meaning from implementation that pragmatists reject as fruitless.

At the same time, some within the decision rules camp understand the model as accommodating at least a portion of the pragmatist critique. Thus, returning to Professor Fallon’s three-part typology of pragmatism,
while the “denial that it is useful or even meaningful to talk about rights apart from the judicial tests or doctrines through which courts enforce rights” is irreconcilable with the decision rules model, the “an affirmation that doctrine both is and should be shaped in light of practical, instrumental concerns,” and “an insistence that practical, instrumental, and forward-looking considerations are sources of constitutional meaning standing on the same plane as, for example, the language of the Constitution and its original historical understanding,” are not. Professor Roosevelt has more categorically posited the compatibility of the pragmatist and decision rules models, describing decision rules as “straddl[ing] the right-remedy divide that Professor Levinson attacks,” as they exist neither as “statements about the actual contours of rights” nor “entirely [as] rules about when remedies will be awarded.” Moreover, the process of cleaving operative propositions from decision rules is agnostic as to the considerations that lie beneath the definitions of those two components. Thus the pragmatist insight that “constitutional doctrine “is functional . . . all the way up” can readily be vindicated by permitting institutional, administrative, or other functional concerns to drive constitutional meaning as well as its implementing tests.

D. A Summary

This Part has described two schools of thought as separate and in important ways mutually exclusive. The balance of the Article, however, will bring together these competing perspectives. Before stepping out from the domain of theory into that of application, however, it is well to consider how the aims of this Article are situated both within and against the pragmatist and decision rules camps.

43 Fallon, supra note 21, at 1313 n.173; see also Strauss, supra note 29, at 207-08 (“As a theoretical exercise, one could try to identify what the real, noumenal Constitution would require if governments had different tendencies or the courts had different capacities. But usually that would be a pointless task. Why should we care what doctrines would govern if courts could always accurately assess legislators' motives, or the facts underlying legislation? Courts cannot always make those determinations with accuracy, and it is obviously legitimate for them to take that fact about their own limitations into account. Under any plausible approach to constitutional interpretation, the courts must be authorized—indeed, required—to consider their own, and the other branches', limitations and propensities when they construct doctrine to govern future cases. . . . [I]t makes much more sense to read into the Constitution a general requirement that its various provisions be interpreted in light of institutional realities than to insist that those realities be ignored.”).


45 Levinson, supra note 1212, at 873.

46 See Roosevelt, supra note 44, at 195; Berman, supra note 8, at 50-51.
As should be clear even at this juncture, I find much of the pragmatist view compelling, at least from a descriptive standpoint. Specifically, the insight that rights and remedies are inextricably intertwined strikes me as imminently true, and indeed in Part II of this Article I aim to push that insight further by developing a framework for understanding how concerns intrinsic to remedial regimes can shape rights that span a variety of substantive concerns. Moreover, I agree with the normative assertion that “doctrine both is and should be” shaped by remedial context, and that courts should expressly acknowledge as much. For the fallacy of separate and independent “right” and “remedial” realms lets courts off the hook when they refine—most importantly when they reduce—the protections afforded by a constitutional guarantee through the stealth mechanism of cabining enforcement.47

But here I part company with both the descriptive and the normative thrust of the pragmatist project. To affirm the importance of remedial concerns, from the standpoint of what courts do and what they ought to do, does not demand a conclusion that it is not “useful or meaningful to talk about rights apart from” tests that enforce them. The dynamic of recursive remedies in the context of criminal procedure rights—a dynamic not considered in Levinson’s study of remedial equilibration—demonstrates why it may be both useful and quite meaningful to draw distinctions in that regard. For, as will be seen, the quite real imperatives of remedial context prompt courts in civil actions to redraw the contours of criminal procedure rights in ways that conflict with and at times undermine the norms embodied in those very same rights as they are litigated in criminal proceedings. This is a deleterious and incoherent result, a phenomenon of disequilibrium if you will, and the tautology of pragmatism enables it rather than cabining it.

By contrast, the decision rules model of conceptualizing constitutional doctrine offers the seed of an approach to a coherent regime of recursively litigated rights. This Article aims to germinate that seed through development of the rights translation framework.

II. 
RECURSIVE REMEDIES AND INTERPRETATIVE GAPS

This Part examines three types of constitutional criminal procedure

47 See Levinson, supra note 12, at 889-99 (discussing remedial deterrence); infra Part II.
claims that are litigated both in criminal proceedings and in civil rights actions, focusing on the challenges facing courts in adjudicating civil claims premised on violation of a right developed in the criminal realm. Each of the three areas—due process violations stemming from concealment of exculpatory evidence and unduly suggestive identification procedures, and Fifth Amendment violations under *Miranda* doctrine—presents a variation on a two-part theme: Constitutional criminal procedure rights erected in the criminal remedial context minimize considerations of fault and duty in ways that can been seen only when constitutional meaning is disaggregated from the rules developed for its implementation; on the other hand, functional considerations intrinsic to the civil context demand that the court account for precisely those elements of fault and duty that are occluded in the received constitutional doctrine. The result is an interpretative gap across which courts must “speak” a previously adjudicated right in a new remedial context. This language barrier necessitates translation, a model for which is developed in Part III.

At the outset, it bears emphasizing that this analysis examines only one of many possible sources of interpretative gaps. While I do contend that determining the fault of a government actor is a particularly formative dynamic in civil rights litigation as well as a particularly difficult one in the context of criminal adjudication, other defining contrasts between these two remedial contexts could also be observed. Moreover, while assessing the role of remediably specific doctrinal considerations is aided by establishing a conceptual focal point, the aim here is not to explore fully the nuances of fault in criminal procedure, or criminal and civil litigation more generally—a worthy task that would take the current project far afield. Rather the point is simply to advance the claim that some distinctive remedial concerns exist, and that these concerns shape the manner in which courts implement constitutional guarantees within those realms. Indeed, while the Article develops this argument in the specific arena of constitutional criminal procedure, and contrasts the remedial arenas of criminal and civil litigation, these are dynamics that exist more broadly in constitutional adjudication.

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48 See *infra* Part II.A.1.b.
49 For example, rules for constitutional adjudication that are shaped via the Supreme Court’s review of state criminal proceedings might by hypothesized to reflect different, and remedial-context-specific, federalism concerns than rules governing adjudication of civil constitutional claims brought under federal question jurisdiction—and specifically pursuant to federal civil rights laws.
50 See *infra* Part IV.
A. Underdetermined Duties: Fault Assessment and Brady

Consider the case of Lesly Jean, convicted of rape by a North Carolina jury in 1982. Jean brought direct appeals and sought state and federal habeas relief, alleging that his conviction violated the Fourteenth Amendment guarantee against deprivation of liberty without due process of law on the ground that he had been deprived of exculpatory and impeachment evidence at his trial. Nine years later, the Fourth Circuit reversed a federal district court’s denial of Jean’s habeas petition, holding that evidence concerning hypnosis procedures conducted with the eyewitnesses, “twice requested - should have been disclosed to defense counsel, and that the government’s failure to do so was a violation of the principles announced in Brady and its progeny.”

The State declined to repursue Jean after the writ of habeas corpus issued, and he was released from prison. Armed with the Fourth Circuit’s finding that Brady violations had infected his trial, Jean then brought suit under 42 U.S.C. § 1983, claiming that he had suffered a constitutional deprivation (and consequent damages from nine years of wrongful incarceration), and naming as defendants the police officers responsible for the concealed hypnosis evidence. Notwithstanding its previous decision on Jean’s habeas claim, the Fourth Circuit dismissed the Section 1983 suit, finding that no constitutional violation could be shown because Jean’s allegations failed as a matter of law to demonstrate that the defendant police officer had deliberately and in “bad faith” withheld the hypnosis evidence from prosecutors.

As will be demonstrated below, neither intent nor “bad faith” are components of the Brady right as the Supreme Court has formulated it in its criminal procedure jurisprudence. Yet Jean is not an outlier among courts to have considered Brady claims. What accounts for this discrepancy?

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51 Jean v. Rice, 945 F.2d 82, 87 (4th Cir. 1991).
52 Jean was ultimately proven innocent of the crime through DNA testing—but not until 2001. See Joseph Neff, A Rape Case Totters; A Marine’s Life Falls Apart, News Observer (Jan. 12, 2006).
54 Jean has been expressly or impliedly followed by the Fifth and Eleventh Circuits, as well as district courts within the First Circuit, which has not resolved the standard for civil Brady claims. See Porter v. White, 483 F.3d 1294, 1306-08 & n.11 (11th Cir. 2007); Hart v. O’Brien, 127 F.3d 424, 446 (5th Cir. 1999), abrogated on other grounds by Kalina v. Fletcher, 522 U.S. 118 (1997); Sanders v. English, 950 F.2d 1152, 1162 (5th Cir. 1992) (holding that police officer defendant’s deliberate failure to disclose . . . undeniably
1. The Defensive Brady Right

The Fourth Circuit’s reference to “Brady and its progeny” invoked the Supreme Court’s line of Fourteenth Amendment criminal procedure cases emanating from *Brady v. Maryland*, which held that “[t]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” The *Brady* decision announced a sea change in criminal discovery and constitutional criminal procedure in only seven pages, and yet was silent on many of the details of the right that it announced. Put differently, *Brady* may be seen as having announced a constitutional operative proposition, but doing little to develop corresponding decision
rules. Over the course the subsequent decades, the Court’s Brady decisions announced and refined implementing tests to a point of relatively stable consensus. In so doing, the Court grappled with and rejected notions of fault as formative considerations in the development of those decision rules, opting for a results-based rather than conduct-focused framework for assessing constitutional compliance, and enforcing the right through highly streamlined remedial rules. These choices were the product of considered reflection by the Court in the specific arena of Brady doctrine, and also reflected functional considerations more generally applicable to “defensive” constitutional litigation in the context of a criminal proceeding.

a. Trajectory of Brady.—Brady itself rejected the notion that the due process guarantee that it announced hinged upon the “fault” of government actors. This feature of the due process right (and corresponding duty) of disclosure has repeatedly been emphasized in the Court’s subsequent jurisprudence. And yet, the Court has grappled with the role that individualized conduct-based duties can and should play in two central aspects of Brady doctrine: the standard of “materiality” that triggers a duty to disclose, and the question of where within the collective “state” the disclosure duty has resided. In both arenas, the Court has made the considered path to eschew fault-based standards.

The requirement that favorable evidence be “material” in order for its non-disclosure to trigger constitutional scrutiny was announced in Brady,

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58 Whether the holding of Brady is, in its entirety, best conceived as an operative proposition in its entirety, or part operative proposition and part decision rule, or neither, is open to debate and will be discussed infra in Part III. But for current purposes, positing the holding as an operative proposition concerning the meaning of the Due Process Clause is certainly both plausible and a useful starting point for analysis.

59 Brady, 373 U.S. at 87.

60 See, e.g., Kyles v. Whitley, 514 U.S. 419, 437-38 (1995) (“[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith), the prosecution’s responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.” (internal citation omitted)); United States v. Agurs, 427 U.S. 97, 110 (1976) (“If evidence highly probative of innocence is in [the prosecutor’s] file, he should be presumed to recognize its significance even if he has actually overlooked it. . . . If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.”); Giglio v. United States, 405 U.S. 150, 153-54 (1972) (citing Brady no-fault language in support of holding that impeachment evidence known to the government generally rather than the individual trial prosecutor must be disclosed); see also Arizona v. Youngblood, 488 U.S. 51, 57-58 (1988) (announcing “bad faith” standard for constitutional claims stemming from destruction of potentially helpful evidence, and contrasting the no-fault Brady standard).
however the decision provided little if any criteria to assess in any given case whether concealed evidence mattered sufficiently to meet the materiality standard. This is a classic decision-rule inquiry, and in the cases that followed Brady, the Court toyed with but ultimately rejected materiality tests that hinged on an assessment’s of the blameworthiness of a prosecutor’s conduct in failing to disclose evidence. In United States v. Agurs, the Court erected a three-tiered framework for assessing materiality. Where deliberate misrepresentation or concealment of evidence could be shown (not the case in Agurs), the defense burden of demonstrating materiality would be at its lowest. Where no such misconduct could be shown, but where the undisclosed evidence had been specifically requested by the defense, the materiality analysis should be stricter. But in a third situation, the one actually posed in Agurs, in which either no defense request for exculpatory evidence, or only a request of the most general sort, the test for materiality would pose a greater burden on the defense: [R]eversal would occur only if the defendant could show that the undisclosed evidence, evaluated in the context of the entire trial record, created a “reasonable doubt” of guilt in the mind of the reviewing court.

In its next opportunity to consider Brady materiality, however, the Court abandoned its three-pronged approach. In United States v. Bagley that Court rejected the Agurs formulation, and announced a single, outcome-focused standard: Evidence was “material” if there existed a “reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.” It is that standard, essentially reaffirmed in the Court’s

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61 See Berman, supra note 8, at 10 (positing the preponderance-of-the-evidence standard as a default decision rule).


63 Id. at 103 (stating that in such circumstances a conviction would be “set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury”).

64 Id. at 104-06. The precise contours of this materiality standard were not spelled out by the Court, but it suggested that Brady itself had applied such a standard and had reversed upon a finding that the withheld evidence “might have affected the outcome of the trial.” Id.

65 Id. at 112-13.

66 United States v. Bagley, 473 U.S. 667, 678, 681-82 (1985). The portion of Justice Blackmun’s opinion for the majority that announced abandonment of the distinction between “request” and “no request” situations was joined only by Justice O’Connor. Id. at 669. Chief Justice Burger, Justice White, and Justice Rehnquist, however, adopted both single-standard formulation and the “reasonable probability” standard in Justice White’s concurring opinion. Id. at 685 (White, J., concurring).
subsequent Brady cases, that has remained the touchstone of materiality.\textsuperscript{67} Notably, the Bagley Court rejected the government’s view that a more defense-friendly materiality standard should govern nondisclosure following specific requests for evidence,\textsuperscript{68} conceding that that “the prosecutor’s failure to respond fully to a Brady request may impair the adversary process,” but concluding that “[t] his possibility of impairment does not necessitate a different standard of materiality,” since “the reviewing court may consider directly any adverse effect that the prosecutor’s failure to respond might have had on the preparation or presentation of the defendant's case.”\textsuperscript{69} Thus, the Court deliberately removes examination of government fault from the equation, making it relevant, if at all, only to the extent it measurably affects the criminal proceeding itself.

Evolution of the Court’s views on the location of the disclosure duty can be seen as following a similar trajectory toward solidification of a results-based rather than fault-based inquiry. Again, Brady itself framed the due process inquiry as turning upon the character of undisclosed evidence, rather than the precise conduct of the state.\textsuperscript{70} Yet the decision also discussed the unique role of the prosecutor in our criminal system—an individual who is both adversary and public servant\textsuperscript{71}—and thus left open the question of the extent to which that role, and conversely a prosecutor’s derogation of it, animated its constitutional holding.

The Court’s subsequent jurisprudence continued to reflect ambivalence on that score. In Giglio v. United States, the Court extended the Brady due process right to encompass not only information directly suggestive of a defendant’s innocence, but also “evidence affecting credibility” of witnesses – there, information concerning promises made to government witnesses in exchange for cooperation.\textsuperscript{72} Critically, the record

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  \item \textsuperscript{68} United States v. Bagley, 473 U.S. 667, 682 (1985).
  \item \textsuperscript{69} Id. at 682-83.
  \item \textsuperscript{70} See Michael E. Rusin, Comment, The Prosecutor’s Duty of Disclose: From Brady to Agurs and Beyond, 69 J. Crim. L. & Criminology 197, 198 (1978) (“Brady v. Maryland marked a distinct shift in the Court’s emphasis and analysis and a corresponding major alteration in the Mooney standard. Instead of focusing on the prosecutor’s misconduct as the basis for a finding of violation of due process, the Court concentrated on the fairness of the proceedings to the defendant.”).
  \item \textsuperscript{71} See Brady v. Maryland, 373 U.S. 83, 86-87 (1963).
  \item \textsuperscript{72} Giglio v. United States, 405 U.S. 150,153 (1972).
\end{itemize}
contained contradictory evidence concerning whether the trial prosecutor had knowledge of the undisclosed cooperation deal; but this dispute, the Court said, was of no moment.73 Nondisclosure “is the responsibility of the prosecutor. . . . A promise made by one attorney must be attributed, for these purposes, to the Government. To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.”74

The question of the institutional location of the Brady duty was presented again, and more broadly, in Kyles v. Whitley, when the record reflected that favorable evidence had been concealed not only from the defense but from prosecutors, by police investigators.75 The State of Louisiana had suggested in lower-court habeas proceedings that “it should not be held accountable under Bagley and Brady for evidence known only to police investigators and not to the prosecutor”—a suggestion that the Court rejected as “a serious change of course from the Brady line of cases.”76 Conceding that police may at times suppress convey favorable evidence, the Court reaffirmed Giglio’s direction that “procedures and regulations” be established to insure communication of relevant information to prosecutors, and held that “[s]ince . . . the prosecutor has the means to discharge the government’s Brady responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government’s obligation to ensure fair trials.”77

More recently, in Youngblood v. West Virginia, the Court again considered a Brady claim stemming from what was undisputedly police misconduct: an investigator’s destruction of exculpatory documents.78 In a per curiam opinion that granted certiorari, vacated, and remanded to the state court, the Court rejected the state’s contention that the trooper’s ignorance of a constitutional disclosure obligation vis-à-vis the documents vitiated a due process claim, citing Kyles for the proposition that “suppression occurs when the government fails to turn over even evidence

73 Id. at 153-55.
74 Id. at 154.
76 Id. at 437-38.
77 Id. at 438.
that is ‘known only to police investigators and not to the prosecutor.’”  

Two features of *Brady* doctrine emerge from tracing its development from *Giglio* to *Kyles* to *Youngblood*. First, the decisions assess compliance with the due process guarantee primarily by reference to outcome for the defendant—i.e., did the defendant receive the favorable evidence—rather than conduct of any state actor. Second, while the Court consistently suggests that prosecutors have the capacity to obtain favorable evidence known to other corners of law enforcement, the constitutional analysis does not inquire into the actual available mechanisms for such communications, or compliance with them. The upshot is that the Court announces an outcome that must be achieved—disclosure of material exculpatory evidence—but is agnostic as to how law enforcement, both prosecutors and police, achieve compliance. The Court can thus be seen as rejecting inquiry into law enforcement duty as relevant to the *Brady* inquiry.

b. **No-fault decision rules and criminal adjudication.**—I have aimed to demonstrate that the Court’s disregard of fault-based inquiries through its development of *Brady* decision rules was considered rather than accidental, in furtherance of my contention that this is an intrinsic aspect of the criminal remedial regime. But to persuade fully on this score, and to lay adequate foundation for contrast with civil litigation, requires further consideration of criminal adjudication generally and the role of criminal procedure litigation within it. Indeed, I will argue in this Part’s subsequent discussion of suggestive identification and *Miranda* jurisprudence that these attributes of fault-based considerations in criminal adjudication apply generally to the construction of constitutional criminal procedure doctrine as it is litigated defensively.

First, the remedies available in criminal litigation when a constitutional violation is identified have significant influence on the role, or absence thereof, of fault-based standards. The conventional remedy for constitutional violations in criminal litigation is reversal, a “cost” that is borne institutionally rather than by any individual law enforcement actor or office. Indeed, it is this dynamic that in *Brady* doctrine permits the Court’s agnosticism as to the “how” of the disclosure duty. The trial-based remedy

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79 Id. at 870.
80 They may, however, not apply across the board—for example, Fourth Amendment jurisprudence emanating from criminal litigation features a significant number of fault-based decision rules. The reasons for this arguable aberration, as well as a general theory of the role of government fault in constitutional criminal procedure doctrine, are beyond the scope of this Article.
of reversal permits deferral of fault question, as “the state” becomes the collective effort of various agencies and actors that have generated the criminal case.

This point is closely related to a second feature of defensive criminal procedure adjudication: unique administrability concerns. The primary objective of a criminal proceeding, at least from the perspective of the state, is not to litigate government conduct, but rather to determine the guilt or innocence of the accused—a factor noted in the Brady context by the Agurs Court. Criminal dockets are crowded, and a concern that proceedings be dispensed with expeditiously is animated by both functional and constitutional values. Given such pressures, the burdens of proving intent and state of mind—notoriously fact- and discovery-intensive inquiries—are particularly problematic. In a world of limited adjudicatory resources, determining the blameworthiness of the defendant occupies a place of primacy over determining the blameworthiness of government.

Shifting from the perspective of the trial court to that of appellate
courts reveals additional administrability concerns, particularly those animated by federalism and intra- and inter-branch comity. Greater fact-intensiveness in a lower court’s analysis means either greater deference or greater institutional intrusiveness in review—depending upon the proclivity of the appellate tribunal. Thus, in a show of restraint or, conversely, in order to preserve greater oversight authority, the Court is especially inclined to construct objective and bright-line constitutional decision rules in criminal procedure.

Inter-branch deference to the executive—police and prosecutors—also shapes the Court’s approach to constructing tests for constitutional compliance. Decision rules in criminal procedure are, after all, directed not only at courts in deciding cases, but also at officials who must predict how their conduct will affect investigations and prosecutions down the road. The Court is thus inclined on the one hand to give clear guidance to law enforcement, and averse on the other hand to injecting itself into the details of law enforcement administration, or to scrutinizing the day-to-day work of law enforcement actors. Such concerns arguably are implicated in any remedial context, but they are presented in relief by criminal adjudication, the volume of which—again, at the lower-court level—demands courts’ constant engagement with the work of police and prosecutors. “Policing the police” through this remedial mechanism strikes the Court not only as burdensome but also, to use Justice O’Connor’s word, “unattractive.”

2. The Offensive Brady Right

These dynamics of doctrinal formulation change significantly when adjudication shifts to offensive assertion of Brady violations in civil rights actions. It is this shift, and the resulting interpretative gap that arises around questions of fault and duty, that led the Jean court to inject intent and bad-faith into the Brady right. Before examining the specific rationale of the Jean court, however, the centrality of fault-based inquiries to civil rights litigation must be explained. One manifestation of this dynamic, the role of governmental immunities, features prominently in the story of the Jean case.

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85 See 28 U.S.C. § 2254(d)(2) (requiring that federal courts in habeas proceedings reverse only “unreasonable” factual findings by state criminal tribunals); Hernandez v. New York, 500 U.S. 352, 364-67 (1991) (ruling that state court’s finding of no discriminatory intent in defendant’s Batson challenge was entitled to “great deference” and rejecting invitation to independently review factual record supporting constitutional violation).


and civil Brady litigation more generally, and is examined in this Section. Consideration of the second, the role of causation, awaits discussion in Part II.B.

a. Immunity and remedial rules in civil rights litigation.—A Section 1983 or Bivens action claiming abridgment of a constitutional criminal procedure right—or any other constitutional violation—cannot commence with the identification of one or more government actors who bear responsibility for the deprivations complained of. Such are the statutory command of Section 1983 and the common law structure of the civil suit.88

But assessment of fault is further complicated by the operation of official immunity doctrines, which operate to insulate from suit—i.e. preclude as viable defendants—government actors who might as a factual matter be responsible for violations constitutional rights. In brief summary, all government officials enjoy “qualified immunity” from suit for discretionary actions undertaken in their capacities as state actors: Officials are not liable for violations of rights where the illegality of their conduct would not have been apparent to a reasonable official.89 But some officials enjoy “absolute immunity” from suit. Thus, under the Court’s Eleventh Amendment jurisprudence, neither states nor state employees in their official capacities may be sued for damages.90 Absolute immunity also extends to actors whose conduct is “intimately associated with the judicial phase of the criminal process”—chiefly, judges and prosecutors91—with obvious implications in the litigation of criminal procedure rights. The rationale of both qualified and absolute immunity has been explained by the

88 See 42 U.S.C. § 1983 (providing cause of action against any person acting under color of state law who “subjects, or causes [the plaintiff] to be subjected . . . to the deprivation of any rights . . . secured by the Constitution”); Ashcroft v. Iqbal, 129 S. Ct. 1937, 1948 (2009) (citing contemporary and nineteenth century authority for the proposition that in a Section 1983 or Bivens action “a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution”).
90 See Will v. Michigan Dep’t of State Police, 491 U.S. 58, 66-71 (1989). In the context of criminal procedure rights, Eleventh Amendment immunity implicates suits against state law enforcement agencies, as well as seemingly local officials such as sheriffs or District Attorneys when these offices are deemed to be arms of the state. See, e.g., McMillian v. Monroe County, 520 U.S. 781, 783 (1997); Will, 491 U.S. at 60; Walker v. City of New York, 974 F.2d 293, 301 (2d Cir. 1992).
91 Imbler v. Pachtman, 424 U.S. 409, 427-28 (1976); see also Van de Kamp v. Goldstein, 129 S. Ct. 855, 861-62 (2009) (extending absolute immunity to district attorney administrators who train or supervise regarding areas that are intimately associated with the judicial phase).
Court as embodying both individual fairness and societal benefit: Subjecting officials to the burdens and expense of litigation and liability for discretionary acts that it is their duty to perform is unjust, risks deterring individuals from government service, and encourages risk-averse behavior that in the exercise of official duties.92

The complex and controversial operation of immunities doctrine in civil rights litigation has generated much valuable critical analysis, and is beyond the scope of the current inquiry.93 Rather, for present purposes the goal is to perceive the manner in which immunities bring issues of fault front and center in civil rights litigation. In this regard, three points bear emphasis.

First, as a matter of taxonomy, qualified and absolute immunities are classic “remedial rules”: Once a determination of constitutional abridgement is made in a civil action, immunities doctrines guide courts in assessing whether a damages remedy will be available.94 Remedial rules also exist in connection with defensive criminal procedure litigation: harmless error rules are a classic example;95 as discussed in Part II.C, the tests employed to determine whether the Fourth or Fifth Amendment will be enforced via the exclusionary rule are another.96

94 See Berman, supra note 8, at 12 (“Th[e] distinction between operative propositions and decision rules would not, I reiterate, comprise the whole of a useful taxonomy of constitutional doctrine. The dichotomy is likely to be supplemented, at the least, by remedial rules that direct what a court should do when application of a decision rule yields the conclusion that the operative proposition has been, or will be, violated.”).
95 See Chapman v. California, 386 U.S. 18, 22 (1967) (“[T]here may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.”).
96 See Herring v. United States, 129 S. Ct. 695, 700 (2009) (“The fact that a Fourth Amendment violation occurred—i.e., that a search or arrest was unreasonable—does not necessarily mean that the exclusionary rule applies. . . . [O]ur precedents establish important principles that constrain application of the exclusionary rule.” (internal citations omitted)); infra Part II.C.
Second, and relatedly, immunities are fault-based remedial rules. At a minimum, a court must find negligence on the part of an official in order for liability to attach for a constitutional deprivation. This focus on individual fault is magnified by the fairness concerns that at least partly animate immunities. Despite the fact that the immunity inquiry may be conceptually segregated from the operative propositions and decision rules that function to identify a constitutional violation, as a practical matter the looming immunity inquiry focuses courts’ attention on the blameworthiness of a particular official from the very get-go. Put differently, immunities are a prime manifestation of courts’ tendency to “peek[] at consequences” in adjudicating constitutional claims, and, as Jean will demonstrate, this inevitable “peeking” enhances the primacy placed on individual fault in construction of constitutional doctrine.

Third, as the Jean case illustrates, although immunities function as remedial rules they have the effect of driving party selection in the first instance. Thus, Lesly Jean faced the reality that the prosecutor at his criminal trial was, as a function of absolute immunity, essentially unavailable as a defendant in a Brady-based civil rights action. This did not preclude suit, though, as much as it forced the inquiry upstream, to examine whether police officers, who enjoy only qualified immunity, were

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97 See Groh v. Ramirez, 540 U.S. 551, 571 (2004) (Kennedy, J., dissenting) (contrasting qualified immunity with a “regime of strict liability”); Malley v. Briggs, 475 U.S. 335, 341 (1986) (“As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law.”); Jeffries, Significance of Fault, supra note 93, at 100 (describing qualified immunity as enacting a negligence standard for constitutional torts).

98 See supra note 92 and accompanying text.

99 This segregation was until recently embodied in the Supreme Court’s qualified immunity doctrine through Saucier v. Katz, which imposed on courts a two-step process by which first the existence of a constitutional violation was determined, and second the question of reasonableness was considered. 533 U.S. 194, 201 (2001). Saucier, however, was overruled in the 2009 Term by Pearson v. Callahan, 129 S. Ct. 808 (2009).

100 Levinson, supra note 12, at 939; see Pearson, 129 S. Ct. at 820 (“Although the Saucier rule prescribes the sequence in which the issues must be discussed by a court in its opinion, the rule does not-and obviously cannot-specify the sequence in which judges reach their conclusions in their own internal thought processes. Thus, there will be cases in which a court will rather quickly and easily decide that there was no violation of clearly established law before turning to the more difficult question whether the relevant facts make out a constitutional question at all. In such situations, there is a risk that a court may not devote as much care as it would in other circumstances to the decision of the constitutional issue.”); Leong, supra note 93, at 670-71 (concluding on the basis of empirical research that courts assessing qualified immunity are influenced by their belief in the reasonableness of an official’s conduct in their adjudication of a constitutional right in the first instance).
responsible for the alleged withholding of evidence. But note that this process forces precisely the duty-based inquiry that criminal Brady jurisprudence eschewed. Moreover, the extension of absolute immunity to prosecutors, but preservation of police liability within the constraints of qualified immunity, enhances courts’ attentiveness to individual blameworthiness as a counterweight to the doctrinal asymmetry. Thus, in Jean, the court expressly grappled with what it perceived as an unfair consequence that civil suits were channeled exclusively toward police.101

b. The interpretative difficulty in Jean.—These observations position us to assess civil Brady doctrine with more precision, and in particular to examine the Jean court’s response to the interpretative dilemma that arises from underdetermined fault in Brady doctrine received from the criminal remedial context.

The six judges who voted to affirm dismissal of Jean’s claim rejected the notion that a Brady claim, per se, could lie against police officers such as those named as defendants by Jean. Brady spoke only to the duties of prosecutors, the court held, and the “right” was simply not implicated by police conduct.102 In other words, the Jean concurrence interpreted the Court’s silence on questions of fault as having resolved them. The Jean court drew instead from other, non-Brady due process caselaw holding that constitutional due process is not implicated absent intentional misconduct by government actors,104 and held that Jean could

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101 Jean v. Collins, 221 F.3d 656, 661 (4th Cir. 2000) (en banc) (Wilkinson, C.J., concurring) ("We similarly decline to impose a sweeping duty on police in the instant situation and note the obvious drawbacks of doing so. For instance, such a duty would widen the legal gulf between prosecutors and police to such an extent as to make scapegoats of police for every item of evidence discovered post-trial. Prosecutors plainly enjoy absolute immunity in the exercise of their prosecutorial duties, of which the disclosure of Brady material to the defense is clearly one. To confer on prosecutors absolute immunity while denying to police the right to argue even bona fides would multiply exponentially litigation against even conscientious officers.” (internal citations omitted)).

102 Id. at 659-60 (“Supreme Court decisions establishing the Brady duty on the part of prosecutors do not address whether a police officer independently violates the Constitution by withholding from the prosecutor evidence acquired during the course of an investigation. . . . [T]o speak of the duty binding police officers as a Brady duty is simply incorrect. The Supreme Court has always defined the Brady duty as one that rests with the prosecution.”).

103 The en banc court split evenly in reviewing the district court’s dismissal, and affirmed in a per curiam opinion. Thus, the concurring judges announced the rationale for affirmation. See id. at 658.

104 Id. at 660-61, 663 (citing Daniels v. Williams, 474 U.S. 327, 328 (1986) (holding, in the context of a prisoner’s Section 1983 suit against prison officials, that “the Due
not make out a constitutional violation in his civil suit against the police absent evidence of bad faith—meaning, specific intent to deprive Jean of exculpatory evidence.\footnote{Jean, 221 F.3d at 663.} Thus, the court interpreted \textit{Brady} doctrine as excluding police conduct from its purview, as a matter of either the constitutional operative proposition (\textit{i.e.}, the due process right simply does not encompass police conduct) or, perhaps more plausibly, the decision rule (\textit{i.e.}, where police conduct is concerned unconstitutional non-disclosure will not be found absent evidence of bad faith).

Three points should be made about this result. First, putting aside the fate of Lesly Jean’s individual claim, note the result of this holding from the perspective of the \textit{Brady} right as regulatory in nature. The \textit{Jean} holding departs from criminal \textit{Brady}’s agnosticism concerning the institutional mechanism by which the disclosure duty will be complied with, and selects a constitutional test that is effectively a conduct rule: The duty lies with prosecutors alone for affirmatively gathering exculpatory evidence. This may vindicate the \textit{Jean} court’s concern that police not bear the brunt of an asymmetrical immunities regime,\footnote{Id. at 661.} however it may well not be an effective mechanism for achieving the disclosure result sought by \textit{Brady}.\footnote{See Newsome v. McCabe, 256 F.3d 747, 752 (7th Cir. 2001) (Easterbrook, J.).} Moreover, the rule selected by \textit{Jean} incentivizes a law enforcement regime in which police stay in the dark, as a legal and factual matter, about the significance of evidence in an overall case, since police avoid liability by avoiding actual knowledge under the \textit{Jean} rule.

Second, this outcome emerges from the elision of constitutional operative propositions and decision rules in criminal \textit{Brady} doctrine. The \textit{Jean} court expressed that it was bound as a matter of constitutional meaning by the Supreme Court’s silence on the question of how to assess a particular actor’s compliance with that meaning. But the remedy of reversal that flows from adjudication of a \textit{Brady} violation in criminal litigation, together with other features of that context, does not necessitate such an inquiry in the defensive context in which the Court has considered the right.\footnote{The Supreme Court has never addressed the merits of a civil \textit{Brady} claim. In the 2009 Term, however, the Court extended absolute immunity to dismiss civil rights claims brought against a former district attorney and his first assistant for policies that allegedly led to \textit{Giglio} violations—and the plaintiff’s wrongful conviction—in Los Angeles County.}

\footnote{Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property”), and \textit{Arizona v. Youngblood}, 488 U.S. 51, 55-58 (1986) (holding that \textit{Brady} no-fault rule did not apply to a claim of governmental failure to preserve potentially exculpatory evidence)).}
Questions of police fault and duty were not resolved by the Court’s *Brady* doctrine, but rather emerge *underdetermined* from the criminal jurisprudence. By cleaving its inquiry from the realm of *Brady*, the *Jean* court consequently and improperly decoupled its task of doctrinal construction from the values and purposes animating *Brady* jurisprudence.

But yet, notice that the *Jean* concurrence was *correct* to perceive and respond to the existence of some interpretative gap. By contrast, the dissenters’ view that *Jean*’s civil rights claim was a straightforward replay of habeas proceedings, a view shared by courts that have rejected *Jean*’s approach, disregard the additional work that must be done to “read” *Brady* within the imperatives of civil adjudication. To announce, with no further analysis, a pure symmetry between the defensive and offensive *Brady* contexts is to engage in subterfuge: In truth, a new decision rule must be fashioned in order to assess police duty vis-à-vis the constitutional guarantee.

**B. Over-Determined Causation:**

*Fault Assessment and Suggestive Identification*

In 1992, Raymond Wray was convicted in New York City of robbery and weapons offenses. His conviction was premised in part on the testimony of eyewitnesses to the robbery who identified Wray as a gunman. Prior to trial, those eyewitnesses had participated in identification procedures at a police precinct: Police displayed Wray, alone in a jail cell, to each witness, asking whether they could identify him. Wray won his release seven years later when the Second Circuit determined in federal habeas corpus proceedings that the conviction had been premised on the admission at trial of a suggestive out-of-court identification. But when he pursued civil damages for that deprivation under Section 1983, bringing claims both against the individual police officers who procured the pre-trial identifications, and against the New York City Police Department for allegedly maintaining a widespread practice of permitting suggestive show-up procedures, the Second Circuit dismissed the action. The court held that absent proof that the police had intentionally misled prosecutors or the trial

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109 *See id.* at 665 (Murgahan, J., dissenting) (“Because we have already established that a *Brady* violation occurred, there is a core constitutional offense that forms the basis for a § 1983 action. The availability of § 1983 as a remedial measure would seem to follow inexorably from the very fact of the underlying *Brady* violation.”).
110 *See supra* note 54.
112 *Id.* at 524
court about the unduly suggestive circumstances of the identifications they had obtained, no constitutional violation could be said to have been caused by them.\footnote{113}{Wray v. City of New York, 490 F.3d 189, 193-96 (2d Cir. 2007).}

As the following discussion will demonstrate, Wray redrew the contours of the Supreme Court’s suggestive identification jurisprudence as it developed through criminal adjudication, both by rejecting the constitutional significance of the Court’s decision rule for determining a due process violation, and by erecting a remedial rule that alters the conduct norm prescribed by suggestive identification doctrine. Again, the Wray court’s approach is not isolated.\footnote{114}{See, e.g., Higazy v. Templeton, 505 F.3d 161, 177 (2d Cir. 2007) (citing Wray for proposition that, for coercion of confession to give rise to liability under Bivens, officers must be shown to have concealed acts of coercion); Murray v. Earle, 405 F.3d 278, 289-92 (5th Cir. 2005) (dismissing Section 1983 action against police whose interrogation of juvenile produced involuntary confession but who did not conceal circumstances of interrogation from prosecutors or court).} And, again, the court’s approach can be understood as an attempt to navigate the interpretative dilemma it encountered when attempting to apply constitutional doctrine generated in the criminal realm in a remedial context calling for distinctive assessments of fault and duty.

1. **Defensive Development of Suggestive Identification Doctrine**

As with the preceding discussion of Brady doctrine, our task here is not exhaustive exploration of the Court’s constitutional oversight of eyewitness identifications, but rather to map the general contours of the defensive right, and to trace the evolution of fault-based considerations in its development. Specifically, the Court’s doctrinal migration from a focus on police conduct to a focus on the significance of the evidence in the context of the criminal trial record, is explained as a remedial-context-driven shift in decision rules applied to identify a due process violation.

The suggestive nature of procedures commonly employed by police to obtain identification evidence in criminal investigations, and the significant risk of wrongful conviction that is posed by persuasive effect upon jurors of eyewitness testimony, is and has long been a prominent concern among observers of and participants in the criminal justice field.\footnote{115}{The universe of current literature in the legal, social science, and law enforcement administration fields that analyzes the risks of identification evidence, and, critically, the failure of existing criminal procedure regimes to control for those risks, is vast. A representative sample of highlights includes The Justice Project, Eyewitness Identification...}
Traditionally, however, defendants possessed only the weapon of cross-examination to wield against identification evidence—until a single day in 1967, when the Court decided United States v. Wade, \textsuperscript{116} Gilbert v. California,\textsuperscript{117} and Stovall v. Denno.\textsuperscript{118} The so-called Wade trilogy brought the due process clause to bear on eyewitness identification evidence, holding that a procedure may be “so unnecessarily suggestive and conducive to irreparable mistaken identification” that due process of law bars admission of the resulting identification into evidence in federal or state criminal proceedings.\textsuperscript{119}

This statement may fairly be posited as the Court’s constitutional operative proposition concerning the meaning of the due process guarantee vis-à-vis identification evidence. But Stovall also announced a decision rule: “[A] claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it.”\textsuperscript{120} The Court applied that test to a victim’s in-court identification that followed a highly suggestive hospital show-up, and considered a single factor in addition to the suggestiveness inherent in the identification procedure: what it deemed the “imperative” nature of an “immediate” identification in light of the victim’s life-threatening injuries.\textsuperscript{121} This factor led the Court to reject the defendant’s constitutional claim.\textsuperscript{122} Thus, while Stovall described the operative proposition as hinging on the admission of tainted identification evidence at trial, the totality-of-the-circumstances decision rule that it articulated focused squarely on the police conduct in procuring the out-of-court identification.

\textsuperscript{116} 388 U.S. 218 (1967).
\textsuperscript{117} 388 U.S. 263 (1967).
\textsuperscript{118} 386 U.S. 293 (1967).
\textsuperscript{119} Stovall, 386 U.S. at 302 (suggestiveness holding). A second important outcome of the Wade trilogy was the extension of the Sixth Amendment right to counsel to pre-trial identification procedures. See Wade, 388 U.S. at 236-37; Gilbert, 388 U.S. at 272 (applying Sixth Amendment right to state proceedings).
\textsuperscript{120} Stovall, 386 U.S. at 302.
\textsuperscript{121} Id.
\textsuperscript{122} Id.
This focus continued in the Court’s post-

Stovall cases, although ambivalence with the centrality of police conduct in the “totality” inquiry was apparent. In Foster v. California, the only case in which the Court found a constitutional violation in connection with identification evidence, the totality-of-the-circumstances test again focused exclusively on the identification procedure itself: the conduct of the police during it, and the witness’s confidence at the time. In Coleman v. Alabama the precinct focus appeared to endure, with the Court affirming the admission into evidence of a witness’s in-court identification, but its analysis again limited to the identification procedure itself. Yet, by the time Foster and Coleman had come before the Court, Simmons v. United States had already eroded the conduct-based focus of the totality test, and had begun to refocus inquiry on the significance of identification evidence in the context of a trial record.

To be sure, Simmons continued to articulate a standard that by its terms focused on the identification procedures themselves, holding that “convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” But while the Court conceded by footnote that the photographic identification procedures conducted in Simmons featured numerous elements of suggestiveness, the factors it considered in applying the totality-of-the-circumstances test were largely extrinsic to the procedures themselves—including the occurrence of multiple positive identifications (all by individuals who participated in identical suggestive procedures) and the witnesses’ expressed confidence in their identifications at trial. Thus while the decision rule remained nominally focused on police conduct, Simmons planted the seed of a migration to a results-based analysis.

That seed germinated in Neil v. Biggers, in which the Court

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124 Foster, 394 U.S. at 442-43.
126 Id. at 6.
128 Id. at 384 (emphasis added).
129 Id. at 386 n.6.
130 Id. at 385-86.
131 409 U.S. 188 (1972).
reviewed the grant of a federal habeas petition based upon the trial court’s finding that due process was violated by the admission into evidence of a victim identification that followed the following procedure: Seven months after her sexual assault, during which time the victim had participated in multiple unsuccessful identification procedures, police “walk[ed Biggers] past the victim,” and, “[a]t the victim’s request, . . . directed respondent to say ‘shut up or I’ll kill you,’” the words used by the perpetrator during his attack.\(^{132}\) In reversing the finding of a constitutional violation, the Court conceded that it was not “clear from our cases . . . whether, as intimated by the District Court, unnecessary suggestiveness alone requires the exclusion of evidence.”\(^{133}\) Casting the Court’s holding in the terminology of the decision-rules model, it rejected an implementing test that was in its view insufficiently tailored to the operative due process proposition: “The purpose of a strict rule barring evidence of unnecessarily suggestive confrontations would be to deter the police from using a less reliable procedure where a more reliable one may be available, and would not be based on the assumption that in every instance the admission of evidence of such a confrontation offends due process.”\(^{134}\) Instead, the Court adopted a totality of the circumstances decision rule that focused not only on the identification procedure itself, but also on characteristics of the identification evidence later introduced at trial.\(^{135}\)

**Biggers**, however, reviewed a criminal conviction that was finalized prior to **Stovall**, a factor noted by the Court in its rejection of a constitutional bar to suggestive procedure per se.\(^{136}\) The Court therefore had the opportunity to reconsider its reasoning in **Biggers** when faced with a suggestive identification challenge in **Manson v. Brathwaite**.\(^{137}\) But the Court reaffirmed the **Biggers** approach in terms consistent with the remedially driven decision-rules concerns discussed above in relation to **Brady** doctrine. Importantly, the Court clarified the constitutional meaning that its suggestive identification jurisprudence was aimed at vindicating, adopting the D.C. Circuit Judge Leventhal’s formulation that “‘the **Stovall** due process right protects . . . an evidentiary interest,’” the “linchpin” of

\(^{132}\) *Id.* at 195.

\(^{133}\) *Id.* at 198-99.

\(^{134}\) *Id.* at 199.

\(^{135}\) *Id.* at 199-200 (enumerating relevant factors as “the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the criminal, the level of certainty demonstrated by the witness at the [trial] confrontation, and the length of time between the crime and the confrontation”).

\(^{136}\) *Id.* at 199.

which is “reliability.”\textsuperscript{138} The Court then enumerated three factors that guided it in selecting a rule for adjudicating suggestive identification claims: deterring disfavored law enforcement practices with regard to identification evidence, enhancing reliability of the criminal trial, and advancing the administration of justice.\textsuperscript{139} The \textit{Biggers} totality-of-the-circumstances rule was adjudged by the Court to advance all three goals, however it was the final factor placed a thumb on the scale against a strictly conduct-based decision rule. The cost of that approach’s over-protection of the core due process interest in reliability would be to deny the trier of fact some relevant and reliable facts, resulting “on occasion, in the guilty going free.”\textsuperscript{140} Given the primacy of the criminal adjudicatory interest in determining the guilt of the accused, such a result was intolerably costly.

By this account, the Court’s defensive suggestive identification jurisprudence followed a trajectory similar to \textit{Brady} doctrine, toward an ever-more institutionally expansive understanding of the locus of constitutional inquiry, from a focus on the integrity of police procedures in the \textit{Wade} trilogy, to an analysis that effective permitted the trial process to “cleanse” investigative conduct that, from an ex ante perspective, risked constitutional harm. Additionally, the Court’s progress in that direction tracked, at times explicitly, the remedially based concerns discussed above,\textsuperscript{141} including in particular a concern that adjudication of a criminal defendant’s guilt not be disrupted by constitutional decision rules aimed at the subsidiary interest in rooting out government wrongdoing and enforced by the “Draconian sanction”\textsuperscript{142} of reversal. Yet the Court’s suggestive identification due process jurisprudence is distinguishable from \textit{Brady} doctrine in an important sense: Notwithstanding the results-oriented, decision rule settled upon in \textit{Biggers} and \textit{Brathwaite}, the Court never abandoned the premise that pretrial law enforcement conduct in the course of conducting identification procedures was constitutionally \textit{relevant}, even if it was reduced to one of several factors to be considered in a totality-of-the-circumstances decision rule for assessing the “reliability” of an identification.

2. Civil Suggestive Identification Claims

\textsuperscript{138} \textit{Id.} at 113 & n.14 (quoting \textit{Clemons v. United States}, 408 F.2d 1230, 1251 (1968) (Leventhal, J., concurring).

\textsuperscript{139} \textit{Id.} at 112-13.

\textsuperscript{140} \textit{Id.} at 113.

\textsuperscript{141} \textit{See supra} Part II.A.1.b.

\textsuperscript{142} \textit{Brathwaite}, 432 U.S. at 113.
The foregoing discussion permits an understanding of the Wray decision as grappling with fault and duty as concepts that appear overdetermined when courts compare the operative proposition to the decision rule developed in the Supreme Court’s criminal jurisprudence. Put differently, the court interpreted the gap between the Court’s trial-based operative proposition and its totality-of-the-circumstances decision rule as relegating police conduct to sub-constitutional status. This led the Second Circuit to disconnect its construction of remedial rules from the constitutional inquiry before it, an approach that led to revision of the conduct-based directives of suggestive identification doctrine.

Recall that the crux of the Wray court’s analysis pertained to whether the police defendants who procured the concededly suggestive identification could be said to have caused the constitutional violation that occurred. In other words, the Wray court analyzed the operative due process proposition announced by the Supreme Court’s suggestive identification doctrine as being trial based: The constitutional violation is complete upon the introduction of unreliable evidence at trial. This had concededly occurred, as the Second Circuit had already found in Wray’s habeas proceedings. But, the court reasoned, the officers themselves had played no part in the admission of evidence at trial; responsibility for that task lay with the prosecutor and judge. As the police officers’ pretrial conduct did not itself violate the constitution, the court reasoned that some additional showing of wrongdoing must be demonstrated: proof of intentional concealment of the identification circumstances by the defendant officers.

The court’s causation analysis demonstrates the role of a second set of remedial rules that operate distinctively in the context of civil adjudication. Section 1983 provides that civil liability attaches to one who “subjects, or causes to be subjected” any person to a constitutional deprivation. This language, the principles of which are applied as well in Bivens actions, has long been viewed by the Supreme Court as incorporating common law tort concepts into the statutory reach of the federal civil rights remedy, in particular the “background of tort liability

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143 See supra Part II.A.2.a.
144 42 U.S.C. § 1983; see Baker v. McCollan, 443 U.S. 137, 142 (1989) (“[A] public official is liable under § 1983 only if he causes the plaintiff to be subjected to a deprivation of his constitutional rights.”).
that makes a man responsible for the natural consequences of his actions.”

Thus, federal civil rights suits contemplate distinctive inquiries: *both* identification of constitutional harm, *and* determination of civil liability for that outcome. It is the second step that operates as a remedial rule.

Or, to place causation within the decision rules model, assessment of a civil constitutional claim requires *first* a statement as to constitutional meaning, *second* a statement of the decision rule that will apply that meaning to the facts, *third* application of the decision rule, and *fourth* application of a remedial rule to determine whether a particular defendant’s conduct caused the constitutional violation identified in step three. Sometimes steps three and four will coalesce. For example, this occurs in the criminal procedure arena in analysis of Fourth Amendment claims: An “unlawful seizure” is obviously *caused* by an act of arrest or other detention—though, note, whether liability follows from an order to seize, or a policy requiring seizure, requires the conceptually distinct fourth-stage analysis, however straightforward it may be.

Causation analysis in constitutional torts is fraught and controversial, though perhaps no more so than in the field of tort law generally. Without traipsing deeply into that thicket, in the context of the present analysis it may be observed that among the complex issues raised is the proper relationship between the determination of a constitutional violation and the assessment of causal link between that violation and a defendant’s conduct; put differently, the question is of the proper relationship between operative propositions and decision rules on the one hand, and remedial rules on the other.

The analysis of the *Wray* court brings that dynamic into relief. To its credit, the Second Circuit acknowledged a conceptual distinction

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147 See, e.g., Barbara Kritchevsky, “Or Causes to be Subjected”: The Role of Causation in Section 1983 Municipal Liability Analysis, 35 U.C.L.A. L. Rev. 1187, 1188 (1988); W. Page Keeton, *Prosser and Keeton on Torts* 263 (5th ed. 1984) (“There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion [as proximate or legal cause]”).
between its assessment of constitutional deprivation on the one hand, and its analysis of causal link between that deprivation and the police defendants’ procurement of a suggestive identification on the other. But note that its conceptual severance was nearly complete. Wray asserted that police conduct in the context of identification procedures was not itself constitutionally significant, and looked solely to common law principles to erect a causation rule. Moreover, with the Court’s suggestive identification jurisprudence understood within a decision rules framework, Wray’s conclusion that conduct rules governing identification evidence lacked constitutional significance can be seen as a failure to recognize the role that the Court’s decision rules play as constitutional doctrine in implementing the meaning of the due process clause.

Again, note the consequence of this approach, from a regulatory and systemic perspective. Defensive suggestive identification doctrine directs, albeit as only one factor in a totality analysis, that police conduct identification procedures in a manner that is not unduly suggestive. Failure to do so risks the loss of evidence at a criminal trial, a dynamic that even the Brathwaite Court described as aimed at incentivizing desirable police conduct. The rule incentivizes police department investment in procedures and training aimed at enhancing the reliability of identification methods—or at least purports to do so—since those methods themselves remain subject to scrutiny. The Wray rule, by contrast, makes identification methodology effectively irrelevant, so long as procedures are disclosed to prosecutors. This is not simply a higher burden for civil recovery, but also a more lenient standard of conduct for the police. Such a rule might be inconsequential, if the criminal remedial regime were adjudged sufficient, standing alone, to instill the desired conduct incentives. There are reasons to believe, however, that the opposite is true—both because of criminal remedial rules such as harmless error that limit enforcement, and because police may well be less attuned to the remedies of exclusion or reversal than to civil monetary consequences. Thus, the effect of Wray and cases of its

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149 See id. But see, e.g., Garrett, supra note 7, at 79-88 (discussing failures of the totality of the circumstances test to improve identification practices, for reasons including operation of harmless error doctrine).
150 See Irvine v. California, 347 U.S. 128, 136 (1954) (doubting that evidentiary exclusion of evidence deters police); Brandon Garrett, Judging Innocence, 108 Colum. L. Rev. 55, 78-81 (2008) (observing that of 158 cases in which now exonerated individuals faced identification evidence at trial, courts denied relief in all appellate and habeas challenges to the identifications, “even in instances where we know in retrospect that the eyewitness was not ‘reliable,’ but instead in error); John R. Ellement, SJC Puts Limit on Pat-Down Searches, Boston Globe (Apr. 3, 2009) (reporting view of district attorney that
ilk\textsuperscript{151} may well be to diminish the regulatory effects of constitutional criminal procedure.

C. Overdetermined Fault Redux: Causation and Miranda

In 2000, Kevin Hannon was convicted of murder in Minnesota. His conviction was reversed, after the Minnesota Supreme Court determined on direct appeal that Hannon’s inculpatory statements should have been suppressed at trial.\textsuperscript{152} Specifically, the court determined that police had improperly continued interrogation of Hannon notwithstanding his request for counsel after having been informed of his rights pursuant to the Supreme Court’s line of Fifth Amendment decision stemming from \textit{Miranda v. Arizona}.\textsuperscript{153} Hannon brought suit under Section 1983, seeking damages for the Fifth Amendment violation that had occurred upon admission into evidence of his wrongfully obtained statement.\textsuperscript{154} The claim was dismissed, on the ground that police officers’ disregard of the interrogation procedures outlined by the Supreme Court in \textit{Miranda} and its progeny do not give rise to a civil action. Rather, the \textit{Hannon} court held, violations of \textit{Miranda} give rise only to the remedy of suppression at a criminal trial.\textsuperscript{155}

Again, \textit{Hannon} is not an outlier, though its view is not uniformly held.\textsuperscript{156} The conflict among lower courts, and indeed among the justices of

\textsuperscript{151} See supra note 112.
\textsuperscript{152} \textit{State v. Hannon}, 636 N.W.2d 796, 807 (Minn. 2001).
\textsuperscript{153} 384 U.S. 436 (1966); \textit{Hannon}, 636 N.W.2d at 804-07.
\textsuperscript{154} \textit{See Hannon v. Sunner}, 441 F.3d 635, 636 (8th Cir. 2006). Unfortunately for Hannon, he was retried and again convicted. \textit{Id.} at 635-36.
\textsuperscript{155} \textit{Id.} at 637.
\textsuperscript{156} Along with the Eighth Circuit, at least the Tenth and Eleventh Circuits have held that civil rights claims may not be brought against law enforcement for violations of \textit{Miranda}, regardless whether the statements obtained were introduced into evidence at trial. \textit{See Jones v. Cannon}, 174 F.3d 1271, 1291 (11th Cir. 1999). The Second Circuit has suggested such a per se bar on civil \textit{Miranda} claims, though it appears not to have considered the question in the context of a civil action in which the plaintiff’s statements were introduced at trial. \textit{See Neighbour v. Covert}, 68 F.3d 1508, 1510 (2d Cir. 1995). The distinction is an important one, since in the absence of a statement introduced at trial the civil \textit{Miranda} claim raises the separate question of whether a Fifth Amendment violation has in fact been completed, \textit{i.e.} whether the self-incrimination right extends only to admission of statements at trial or covers pre-trial interrogation as well. That issue is discussed \textit{infra}, however as will be seen I take as resolved that the Court’s current view of the meaning of the self-incrimination clause is that it is implicated only at trial and not at the time of interrogation. The Sixth and Seventh Circuits have permitted civil \textit{Miranda} claims under Section 1983 where the offending statements were introduced at trial \textit{see Best
the Supreme Court, concerning the adjudication of *Miranda* through civil litigation is reflective of the broader and widely theorized debate over the constitutional significance of the *Miranda* decision itself. Rather than retracing that well-trod ground, the present discussion focuses, again, on the disconnect between notions of fault and duty that emerges when criminal *Miranda* doctrine is invoked in the civil remedial context. Similar themes are presented as those that were explored in connection with suggestive identification litigation, however added challenges are presented by *Miranda*’s comparatively more contested and unresolved status as a fixture of constitutional criminal procedure.

1. Development of Defensive Miranda Doctrine

The Fifth Amendment privilege against self-incrimination was long held to govern the admissibility of a defendant’s statements at her federal criminal trial, and in 1964 was extended to state proceedings through the Fourteenth Amendment. Throughout that pre-*Miranda* era,

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157 Compare Chavez v. Martinez, 538 U.S. 760, 790 (2005) (Kennedy, J., concurring) (stating, in opinion joined by Justice Stevens, that “[t]he identification of a *Miranda* violation and its consequences, then, ought to be determined at [the criminal] trial. The exclusion of unwarned statements, when not within an exception, is a complete and sufficient remedy”), and id. at 780 (Scalia, J., concurring) (rejecting notion that Section 1983 provides a remedy for *Miranda* violations); *with id.* at 777 (Souter, J., concurring in part and dissenting in part) (stating in opinion joined by Justice Breyer that Section 1983 remedy for *Miranda* violation might be available in exceptional circumstances).


159 U.S. Const., amend. 5 (“No person . . . shall be compelled in any criminal case to be a witness against himself . . .”).


161 See *Malloy v. Hogan*, 378 U.S. 1, 6 (1964). Prior to *Malloy*, the Court had held on several occasions that the due process clause of the Fourteenth Amendment, standing alone, prohibited states from admitting into evidence a defendant’s confession that was the product of coercion—understood as potentially both physical and psychological in nature. See, e.g., *Haynes v. Washington*, 373 U.S. 503, 507 (1963) (holding that due process was violated by admission of statement of defendant who, among other deprivations, was
the touchstone of the privilege had been the voluntariness of a defendant’s statements\textsuperscript{162} assessed based on a “totality of the circumstances.”\textsuperscript{163} The primary and self-conscious import of Miranda was to shift the Fifth Amendment self-incrimination inquiry to a bright-line regime, by displacing case-by-case voluntariness analysis with a fixed and objective test for presumptively identifying compelled statements.\textsuperscript{164} The decision itself is known in the popular imagination for the four-pronged “warnings” it inscribed on the ritual of police interrogation,\textsuperscript{165} and in the legal imagination for its emblematic status as a decision generating seemingly endless debate over constitutional meaning and judicial legitimacy. However, as Professor Steven Schulhofer has observed, the decision is probably best viewed as announcing three holdings, each of which has importance to understanding the development of Miranda doctrine:\textsuperscript{166} first, that compulsion within the meaning of the Fifth Amendment can include not only physical but also psychological pressure to speak;\textsuperscript{167} second, that the Fifth Amendment self-incrimination clause was applicable not only to trial proceedings but also at the time of a custodial interrogation;\textsuperscript{168} and prohibited from calling his wife until he confessed); Spano v. New York, 360 U.S. 315, 319, 323 (1959) (holding due process violated by admission of confession procured, \textit{inter alia}, through false representation of professional harm to suspect’s friend absent a confession); Brown v. Mississippi, 297 U.S. 278, 285 (1936) (holding due process right violated by conviction on the basis of confession procured through torture, but emphasizing “the question of the right of the state to withdraw the privilege against self-incrimination is not here involved”).

\textsuperscript{162} See Bram, 168 U.S. at 542.


\textsuperscript{164} See, e.g., Dickerson, 530 U.S. at 434-35 (discussing Miranda Court’s concern with inadequacies of the totality-of-the-circumstances test); Miranda, 384 U.S. at 468-69 (“The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact.” (footnote omitted)).

\textsuperscript{165} Id. at 444.

\textsuperscript{166} Schulhofer, supra note 155, at 446-53.

\textsuperscript{167} Miranda, 384 U.S. at 457-58.

\textsuperscript{168} See id. at 462-66 (stating that the history of the self-incrimination privileged raised “[t]he question [of] whether the privilege is fully applicable during a period of custodial interrogation,” reviewing that history, and concluding that and concluding that “all the
third, that the prescribed warnings are required, absent equally effective substitute procedures, to protect against violation of the self-incrimination privilege.\(^{169}\)

The accuracy of the Court’s second holding and the nature of the third—i.e., what the Court viewed the relationship between the warnings and the Fifth Amendment to be—have been at the root of the ensuing decades of scholarly debate about the meaning, nature, and legitimacy of *Miranda*.\(^{170}\) What is not controversial, however, is the proposition that the *Miranda* rules for determining the admissibility of custodial statements were crafted by the Court in response to functional concerns about the totality-of-the-circumstances voluntariness inquiry that had governed self-incrimination jurisprudence in the preceding years.\(^{171}\) The Court viewed methods of police interrogation as creating a high risk of constitutionally significant coercion—both physical and, equally important, psychological\(^{172}\)—but also as inhibiting proof of such coercion at a criminal trial, particularly given the incommunicado nature of questioning.\(^{173}\) Assessment of the “totality” of circumstances of an interrogation was likely

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\(^{169}\) *Miranda*, 384 U.S. at 467 (“We cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.”). According to Professor Schulhofer, the third holding is that “precisely specified warnings are required to dispel the compelling pressure of custodial interrogation.” Schulhofer, *supra* note 155, at 436. I posit a more general description because I believe that, in following Professor Schulhofer’s structure, the substance of holding number three depends on one’s view of how the *Miranda* Court resolved the relationship between the interrogation environment and the courtroom environment in which a statement is admitted, and also must be qualified by the Court’s caveat that equivalent procedures might vindicate the goals of its holding.

\(^{170}\) See *supra* note 155.

\(^{171}\) See, e.g., Richard H. Fallon, Implementing the Constitution 7 (2001) (“In short, *Miranda*...shows the Court making practical, instrumental, and tactical judgments about the appropriate role of the judicial branch in securing effective constitutional implementation.”); Strauss, *supra* note 29, at 207-09 (defending *Miranda* as an accommodation of institutional reality); Grano, *supra* note 155 at 108-09.

\(^{172}\) *Miranda*, 384 U.S. at 445-56.

\(^{173}\) *Miranda*, 384 U.S. at 445 (“[D]ifficulty in depicting what transpires in interrogations” since many are held “incommunicado.”)
in the Court’s view to err on the side of admitting statements tainted with constitutionally significant compulsion. By contrast, the warnings enumerated by the *Miranda* Court offered “clear-cut” guidance both to law enforcement and criminal suspects, thus reducing the coercion inherent in interrogation, as well as to courts adjudicating Fifth Amendment challenges to custodial statements.

These rationales for adoption of the pre-interrogation warnings required by *Miranda* were reaffirmed in *Dickerson v. United States*, which rejected, albeit somewhat inscrutably, the invitation to overrule *Miranda*, and characterized the *Miranda* warnings as “a constitutional rule.” *Dickerson* is perhaps best read as characterizing *Miranda* as a creature of the decision-rules model, and as acknowledging the role of remedial-context-driven concerns in crafting *Miranda*’s presumptive test for identifying Fifth Amendment violations; indeed, this view was essentially urged upon the Court by then-Solicitor General Seth Waxman. The

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174 *See Missouri v. Seibert*, 542 U.S. 600, 608 (2004) (discussing *Miranda*’s “concern that the ‘traditional totality-of-the-circumstances’ test posed an ‘unacceptably great’ risk that involuntary custodial confessions would escape detection recognized risk that involuntary custodial confessions would escape detection” (quoting *Dickerson v. United States*, 530 U.S. 428, 442 (2000)); *Dickerson v. United States*, 530 U.S. 428, 434-35 (2000) (“In *Miranda*, the Court noted that reliance on the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial confession, a risk that the Court found unacceptably great when the confession is offered in the case in chief to prove guilt.” (internal citation omitted)).

175 *Miranda*, 384 U.S. at 468-69; *see also Berkemer v. McCarty*, 468 U.S. 420, 431 (1984) (rejecting proposed exception to *Miranda* for questioning following misdemeanor arrest on the ground that “the doctrinal complexities that would confront the courts if we accepted petitioner's proposal would be Byzantine. . . . The litigation necessary to resolve such matters would be time-consuming and disruptive of law enforcement. And the end result would be an elaborate set of rules, interlaced with exceptions and subtle distinctions, discriminating between different kinds of custodial interrogations. Neither the police nor criminal defendants would benefit from such a development”).


177 Transcript of Oral Argument, *Dickerson v. United States*, 530 U.S. 428 (2000), available at http://www.oyez.org/cases/1990-1999/1999/1999_99_5525/argument, at (hereinafter *Dickerson* Transcript) (“The constitutional test, I think under either the Fifth Amendment or the Fourteenth Amendment, is voluntariness. It’s, was this—did the person speak in these circumstances as an exercise of free will, or was his will overborne? Now,
Court’s opinion described the operative proposition corresponding to the self-incrimination clause as prohibiting the introduction of a defendant’s involuntary statements at a criminal proceeding.\(^{178}\) *Miranda* announced a decision rule for adjudicating voluntariness—one arrived at based on a conclusion that the evils of “under-enforcement” outweighed those of the “over-enforcement” that resulted from the exclusion in evidence of unwarned statements that were, as a subjective matter, voluntarily given.\(^{179}\)

Yet *Miranda* must also be viewed together with the Court’s line of cases interpreting and applying the decision in a fashion that substantially limited its decision’s reach.\(^{180}\) While an effort to reconcile the Court’s various “exceptions” to *Miranda* is beyond the scope of the present endeavor and perhaps in any event futile, I contend that examining *Miranda* in the context of its subsequent retrenchment illuminates three aspects of the doctrine that are relevant to the present discussion. First, as a descriptive matter, cases subsequent to *Miranda* held the decision’s conduct-focused rules formally intact, but progressively diminished the significance of law enforcement failure to abide the decision’s commands.\(^ {181}\) Second, and relatedly, this process ensued through curtailment of the remedy provided by *Miranda* for Fifth Amendment violations at trial. And third, the Court’s reconsideration of the scope of the *Miranda* remedy was conducted with an

the totality-of-the-circumstances test was a legal construct . . . . It was an effort to impose legal rules on police conduct, and it, itself, included prophylactic rules that the Court developed over time. It—you know, if the suspect is held more than 36 hours, we don’t want to hear anything else. If violence was used or threatened—“).\(^{178}\) *Dickerson*, 530 U.S. at 439 & n.4.

\(^{179}\) I*d.* at 443-44; see also Berman, *supra* note 8, at 114 (“*Miranda* doctrine consists of a constitutional operative proposition directing courts not to admit into evidence statements that had been compelled by the state, administered by a constitutional decision rule directing that a court must conclusively presume a statement to have been compelled if it concludes (by a preponderance of the evidence) that the statement was elicited during custodial interrogation not preceded by the requisite warnings or in which the suspect’s invocation of a right to silence or to counsel was not respected. The Court chose this decision rule, furthermore, as a means to reduce adjudicatory error because it believed that compulsion was common yet very hard to discover.”).\(^{180}\) See, e.g., *Oregon v. Elstad*, 470 U.S. 298, 300 (1985) (holding that fruits-of-the-poisonous-tree doctrine, which excludes otherwise admissible evidence obtained after a constitutional violation, as basis for analyzing admissibility of a subsequent warned confession following “an initial failure ... to administer the warnings required by *Miranda*”); *New York v. Quarles*, 467 U.S. 649, 651 (1984) (announcing public safety exception to dictates of *Miranda*); *Harris v. New York*, 401 U.S. 222, 226 (1971) (holding that *Miranda* violation did not bar use of unwarned statement in cross-examination of defendant). *But see Withrow v. Williams*, 507 U.S. 680, 691 (1993) (holding that violation of *Miranda* provided basis for federal habeas claim).\(^{181}\) See *Steiker, supra* note 2, at 2479-85.
eye to functional concerns that adhere to criminal adjudication of self-incrimination claims.

The Court’s first major backpedal from *Miranda*, in *Harris v. New York*, is exemplary in this respect. There, the Court held that while the Constitution required that statements obtained in violation of *Miranda* must be excluded from use in the prosecution’s case-in-chief, such statements could be admitted for purposes of cross-examining the defendant. 182 The Court described its inquiry into the scope of *Miranda*'s applicability squarely in the language of remedial rules, as this Article has used the terminology 183: “*Miranda* barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel. It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution’s case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards.” 184 The overarching concern of the *Harris* Court was clearly the integrity of evidence at the criminal trial, with complete exclusion as a *Miranda* remedy effectively immunizing a testifying defendant from perjurious recantation of her unwarned, incriminating statements. 185

So, too, can *Oregon v. Elstad*, which permitted the prosecution’s use at trial of admissions that were the “fruits” of unwarned statements, be understood as refining the applicability of *Miranda*'s remedial rules to self-incrimination doctrine. Again, the majority describes *Miranda* in terms resonant with the decision-rules model: “The *Miranda* exclusionary rule . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. . . The Fifth Amendment prohibits use by the prosecution in its case in chief only of compelled testimony. Failure to administer *Miranda* warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda.*” 186 *Elstad*, however, cabins the availability of the *Miranda* remedy, holding that “the *Miranda* presumption, though irrebuttable for purposes of the prosecution’s case in chief, does not require that the statements and their fruits be discarded as inherently tainted. . . Where an unwarned statement is preserved for use in situations that fall

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182 *Harris*, 401 U.S. at 226.
183 *See supra* Part II.B.
184 *Harris*, 401 U.S. at 224.
185 *Id.* at 225-26.
outside the sweep of the Miranda presumption, ‘the primary criterion of admissibility [remains] the ‘old’ due process voluntariness test.’”\(^\text{187}\) A more sweeping rule of exclusion, according to the Elstad Court, would not vindicate the twin interests of deterring coercive police conduct and ensuring that reliable evidence be available at trial.\(^\text{188}\)

Thus Miranda and the decisions understood as its “exceptions”\(^\text{189}\) can be understood on aggregate as having developed a constitutional operative proposition concerning the meaning of the self-incrimination clause, as well as a series of decision rules and remedial rules that govern adjudication of the right in the criminal realm, fashioned with an eye to the functional exigencies of criminal litigation. This reading of Miranda offers some doctrinal coherence, but also illuminates the interpretative challenge that vexes courts in adjudicating civil Miranda claims.

2. Civil Miranda Claims

Courts, like the Eighth Circuit in Hannon, which reject Miranda-based civil claims can be understood as advancing one of two possible views of Miranda doctrine. The first reading, which disregards the disaggregating insights of the decision rules model, views the Miranda rules concerning police conduct in interrogations as not tethered to the trial-based meaning of the self-incrimination clause itself; exclusion of a statement from evidence in a criminal proceeding as a consequence of a Miranda violation is therefore a remedy that bears no constitutional significance. On this view, a Miranda violation is not actionable through a civil rights action because proof of its occurrence does not establish the requisite constitutional violation to give rise to a cause of action.\(^\text{190}\) This

\(^{187}\) Id. at 307-08 (quoting Stephen Schulhofer, Confessions and the Court, 79 Mich. L. Rev. 865, 877 (1980)).

\(^{188}\) Id.

\(^{189}\) See also Missouri v. Seibert, 542 U.S. 600, 602 (2004) (holding that where Miranda warnings are given and a statement obtained after an initial un-warned interrogation, the later statement is inadmissible unless the warnings conveyed to “a reasonable person in the suspect’s shoes . . . that she retained a choice about continuing to talk”); New York v. Quarles, 467 U.S. 649, 651, 658-59 (1984) (holding that a “public safety exception to the requirement that Miranda warnings be given before a suspect’s answers may be admitted into evidence”).

\(^{190}\) See Hannon v. Sanner, 441 F.3d 635, 638 (8th Cir. 2006) (“The admission of Hannon’s statements in a criminal case did not cause a deprivation of any ‘right’ secured by the Constitution, within the meaning of 42 U.S.C. § 1983.”); Jones v. Cannon, 174 F.3d 1271, 1291 (11th Cir. 1999) (“[F]ailing to follow Miranda procedures triggers the prophylactic protection of the exclusion of evidence, but does not violate any substantive Fifth Amendment right such that a cause of action for money damages under § created.”);
interpretation of \textit{Miranda} doctrine is in my view flawed for reasons similar to the critique lodged against the \textit{Wray} court: It disregards the constitutional significance of the decision rule erected by \textit{Miranda} for implementing Fifth Amendment meaning. But alternately, these decisions might reflect a view that is not inconsistent with the decision rules model per se. The \textit{Miranda} warnings, as decision rules for detecting a Fifth Amendment violation at a \textit{criminal trial}, might be understood to correspond to only a single remedial rule: that of (limited) evidentiary suppression at trial.\footnote{See, \textit{e.g.}, \textit{Missouri v. Seibert}, 542 U.S. 600, 608 (2004) (citing \textit{Chavez v. Martinez}); \textit{United States v. Patane}, 542 U.S. 630 (2004) (same); \textit{see also Dickerson Transcript}, supra note 175, at __.} This view, though perhaps a more coherent reading of \textit{Miranda} doctrine, would suggest a disregard of the import of civil \textit{remedies} for constitutional violations. In other words, even if in criminal litigation \textit{Miranda} leads only to suppression of custodial statements in the prosecution’s case in chief, Section 1983 (and \textit{Bivens}) nevertheless by their terms provide a civil remedy where a constitutional violation has occurred. Denying that remedy for a \textit{Miranda} violation thus requires further explanation if one credits the constitutional legitimacy of the \textit{Miranda} decision rule.

Under either reading, the consequence of the \textit{Hannon} approach of rejecting \textit{Miranda} violations as creating causes of action for constitutional torts again creates regulatory distortions. Some of these concerns are similar to those discussed in the context of suggestive identification doctrine.\footnote{See \textit{ supra} note 153.} While rejecting \textit{Miranda} violations as constitutionally relevant for purposes of civil rights actions does not, as in \textit{Wray}, create a conflicting conduct norm, it does erode the regulatory force of the \textit{Miranda} rules—a matter of particular concern if, again, one doubts that exclusion of evidence is standing alone a remedy that is effectively internalized by law enforcement. An additional and perhaps greater concern is raised by the \textit{Hannon} approach, however. The inter-remedial membrane with regard to \textit{Miranda} has been particularly permeable, with meaning and rules developed in civil adjudication playing an identifiable role in shaping criminal doctrine.\footnote{See \textit{ supra} note 153.} This is likely attributable to the fact that the nature and implications of \textit{Miranda} and its progeny remain, even in the criminal adjudicatory context, more in flux than other areas of criminal procedure—certainly than the \textit{Brady} and suggestive identification doctrine. As the

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\item Bennett \textit{v. Passic}, 545 F.2d 1260, 1263 (10th Cir. 1976); \textit{see also} 42 U.S.C. § 1983; \textit{Bivens v. Six Unknown Federal Agents}, 403 U.S. 388 (1971).
\item See \textit{ supra} note 153.
\item See \textit{ supra} note 153.
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Supreme Court and lower courts continue to draw on available sources to define this still-contested area of constitutional doctrine, the contours drawn in civil litigation contribute to that dynamic process. Where the constitutional strictures announced in civil adjudication are loosened for remedially specific reasons that either are not made transparent or are not perceived as relevant, *Miranda* doctrine broadly writ is enervated.

**D. Summary**

This Part has pursued three goals. The first has been to describe the dynamic of recursive adjudication of constitutional criminal procedure through both criminal, or “defensive,” litigation, and civil rights claims, or “offensive” litigation. Courts’ adjudication of civil *Brady*, suggestive identification, and *Miranda* claims have been shown to reshape constitutional doctrine announced in the Supreme Court’s criminal procedure jurisprudence generated in the defensive realm. The second goal has been explanatory, to suggest that this disconnect is caused by the shift in remedial context, and to suggest in particular that the differing roles of fault in shaping constitutional doctrine in the criminal and civil realms have played a significant role in erecting the language barriers that have been examined. Third, and finally, the discussion has offered a critique of the process by which courts have navigated the interpretative disconnect that arises from the shift in remedial context. Along the way, the discussion has afforded examination of the existence and operation of “remedial rules” as a feature of constitutional doctrine, and particularly in civil constitutional adjudication.

Overall, the aim has been to demonstrate that greater coherence in the process of criminal procedure adjudication warrants serious and constructive attention—not simply in the interest of more accurate, principled, or transparent judicial work product, but also in light of the unique regulatory role played by criminal procedure adjudication. The next Part turns, then, to take up the ameliorative challenge.

**III. RIGHTS TRANSLATION**

This Part offers “rights translation” as a device for bridging the language barriers exemplified by the areas of litigation examined in Part II. Section A introduces the metaphor of translation and discusses the significance of the trope itself in conceptualizing a principled approach to rights that are adjudicated within and across recursive remedial realms.
Section B proposes criteria for translation which aim to operationalize the values discussed in Section A. Finally, Section C applies the model to the criminal procedure claims featured in Part II. Critically, as will be seen, offering translation as a process for courts to follow in adjudicating these claims does not thereby dictate particular outcomes. Relatedly, the discussion here sketches some, but not all, possible “readings” that translation might afford. Nevertheless, the values and techniques of translation offer interpretative guidance and constraint to ameliorate some of the incoherence criticized in the previous sections, and in so doing also provide criteria for assessing better or worse translation outcomes.

A. Translation as Metaphor

The notion of “rights translation” is intended to suggest a particular conception both of constitutional meaning and of the work of those actors who generate and experience that meaning. Indeed, the utility of the metaphor of translation has been recognized by others, including most prominently Professor Lawrence Lessig, in the field of constitutional law. While the framework proposed here shares some of the insights expressed by Lessig and others about parallels between linguistic techniques of translation and the work of legal interpretation, my own use of the trope of translation is perhaps more limited and certainly less tethered to technical aspects of literary translation. Thus, it is well to elaborate on the notion of “translation” and the values that the concept is intended to express in the instant project.

First and perhaps most obviously, the metaphor of translation signals a dual dynamic of both changed context and fidelity to source —

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194 See, e.g., Lawrence Lessig, Understanding Changed Meanings, 47 Stan. L. Rev. 395, 401-14 (1995) (hereinafter Lessig, Changed Meanings); Lawrence Lessig, Fidelity in Translation, 71 Tex. L. Rev. 1165, 1172-73 & n. 32 (1993) (describing the use of the “translation” trope and citing other instances of its deployment in the context of constitutional interpretation and fidelity to framers’ intent) (hereinafter Lessig, Fidelity); see also Robert P. Mosteller, Confrontation as Constitutional Criminal Procedure: Crawford’s Birth Did Not Mean That Roberts Had to Die, 15 J. L. & Pol. 685, 719-20 (2007) (advocating “translation” as mechanism for determining contemporary meaning of Sixth Amendment confrontation clause). Importantly, scholarly efforts to apply translation insights to constitutional interpretation have not extended to constitutional adjudication.

195 See, e.g., Lessig, Changed Meanings, supra note 194, at 396 & n.2 (referring to “fidelity theory” in constitutional interpretation, and explaining that “fidelity is the aim to preserve meaning, intent, or purpose from a distant interpretive context within our own. Fidelity theory describes the conditions under which that achievement is possible.”); Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204, 205 (1980).
with the changed context here being the shift from criminal to civil adjudication, and the source conceived as the constitutional operative proposition first announced in the criminal remedial context. Rights translation thereby stakes out three contestable positions: first, that something that is conceptually identifiable as constitutional meaning can be actually and coherently identified across remedial contexts; second and relatedly that the meaning should be not to change across those contexts or, at least, that change should be minimized; and third, that decision rules and remedial rules might change in the move to a new remedial regime. For reasons made clear in Part I, the first and second propositions express the clearest sense in which rights translation is a challenge to the pragmatist framework. A significant aim of Part II, in turn, was to defend the third proposition.

The second way in which the metaphor of translation does work in the instant context is through the notion of guided discretion. I have endeavored throughout to advance the point that the revision of constitutional criminal procedure doctrine when it moves across remedial context is at times necessary, but that this process has consequences for the regulatory function that the doctrine serves vis-à-vis law enforcement. Translation, offered as a device for navigating the language barriers between remedial regimes in a coherent and principled fashion, must provide criteria for deciding when particular features of doctrine should and should not change.

Third, “rights translation” deliberately evokes a sense of constitutional doctrine as having both author and audience. In the arena of criminal procedure, the focus in that regard is on authorship of courts, as implementers of constitutional guarantees, and on the perception of law enforcement and the public, as hearers of the doctrine generated by courts. As suggested by prior discussions of criminal procedure’s

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196 Lessig has employed the term “humility” to harken to a similar set of interpretative values. See Lessig, Fidelity, supra note 194, at 1206-07.
197 Lessig, Changed Meanings, supra note 194, at 400 (“In each example, there is a change in the context of interpretation that many would agree should justify a changed reading, consistent with the demands of interpretive fidelity (‘necessity,’ helicopters and telephones, handguns). In each, there is also a change in the context of interpretation that many would argue could not justify a changed reading, consistent with those same demands (‘proper,’ reasons for a delay, dignity). Fidelity needs to distinguish, but what distinguishes these two types of changes is not clear. We have plenty of intuitions, but no satisfactory account.”).
198 Other combinations of author and audience could be contemplated. For example, inter-branch dynamics might be understood through a translation lens, with the
regulatory significance, translation features within the author-audience dynamic because while courts’ relationship with criminal procedure rights spans the criminal and civil remedial contexts, law enforcement and private individuals experience a more unified understanding of their respective duties and rights. This difference results from the fact that for the latter constituencies, and in particular for law enforcement, the import of criminal procedure rights arises independent of and prior to legal remedies: Police and prosecutors must know how to conduct themselves before criminal or civil proceedings commence, and the public is entitled to settled expectations about their rights at the time of their confrontation with an investigative or prosecutorial setting. Additionally, constitutional rights per se have symbolic and signaling functions outside the context of any given encounter between law enforcement and the citizenry. The expressive value of strictures on police conduct and intrusion and norms of citizen autonomy and security vis-à-vis the state, all of which are embodied in constitutional criminal procedure, is diminished when constitutional doctrine is redrawn. For all of these reasons, audience “bilingualism” is not an available or desirable competence. Thus, the court-author must do the work of translation.

B. A Framework for Translation

The values just discussed are embodied in the framework of rights translation that is sketched in this Section and applied in the next. Indeed, it may well be that even adherence to the principles animating translation, if not the precise techniques proposed herein, would improve significantly upon the quality of adjudication that courts perform in constitutional criminal procedure—and, perhaps, in other arenas in which recursive remedial regimes are similarly available.

constitutional authorship of non-Article-III actors and its reception by a judicial audience might be considered. See, e.g., Roosevelt, supra note 16, at 1680-83 (discussing constitutional implementation by legislative or executive actors); Larry Kramer, Popular Constitutionalism, Circa 2004, 92 Calif. L. Rev. 959, 967-74 (2004) (discussing citizens’ roles in constitutional interpretation); Sager, supra note 15, at 1220-28 (discussing roles of Congress and executive in constitutional interpretation and implementation). Or, interactions among levels of the judiciary, with appellate courts as authors and trial courts as audience, or vice versa, might feature unique translation concerns. 199 See, e.g., Yale Kamisar, On the Fortieth Anniversary of the Miranda Case: Why We Needed It, How We Got It—And What Happened to It, 5 Oh. St. J. Crim. L. 163, 196-97 (2007); Steiker, supra note 2, at 2548-51; Schulhofer, supra note 155, at 460.
The first step in translation is analytical: The “right” being asserted must be broken apart into the constitutional operative proposition and the decision and remedial rules that implemented constitutional meaning in the separate remedial context. Translation should employ a nearly irrebuttable presumption that a constitutional operative proposition continues to govern across the remedial divide, and a strong but rebuttable presumption that decision rules will remain constant as well. Remedial rules, by contrast, should receive the least deference, as these rules are, at least formally, the least likely to be applicable in both remedial realms. As a consequence, risks of doctrinal bleed across the remedial membrane are the lowest; borrowing from Professor Dan-Cohen, remedial rules may be seen as largely characterized by naturally occurring acoustic separation.\(^{200}\) Overall, these distinctions in treatment of doctrinal components are justified by the values of stability that translation aims to vindicate; but at the same time they concededly inject complexity into the adjudicatory analysis. Distinguishing the components of constitutional doctrine—operative proposition from decision rule, and decision rule from remedial rule—will at times be difficult and contestable, as the discussion in Part II has suggested.

The second and third steps are to assess the extent to which the received decision and remedial rules are born from factors intrinsic to the prior remedial context, and to determine whether their rationales continue to fit in the new remedial context. I present these steps together to highlight that they will often, though not inevitably, be performed in somewhat overlapping fashion. Again, there should be a presumption against altering decision rules, but not as strong of a presumption that exists against altering an operative proposition. Conduct-based constitutional decision rules that do not require translation to maintain coherence should be adhered to, absent circumstances that outweigh the values of \textit{stare decisis} and regulatory consistency. When decision rules must give way to remedially specific concerns, new rules should be fashioned to maximize expression to the operative proposition, and to minimize conflict with existing decision rules—again, in particular, those that are conduct-focused. Remedial rules, by contrast, are most likely to require refashioning or formulation anew. But discretion in their reshaping or construction must still be guided: New rules should be fashioned to maximize expression of the operative proposition, and to minimize conflict with existing decision rules—again, in particular, those that are conduct-focused.

\(^{200}\) See Dan-Cohen, \textit{supra} note 2.
C. Translation Applied

This Section’s application of the rights translation framework demonstrates that attending to the values sketched above, and to principled interrelationship among the constituent components of constitutional doctrine, yields advantages over the approaches of courts that were featured in Part II. At the same time, however, the process of translation is not simple, and interpretative discretion within the framework means that some indeterminacy assuredly remains. But even the umpire’s task of calling balls and strikes is contestable on the margins, all the more so in areas of adjudication that are as fraught with complexity as those described in Part II. That some room remains for imagination, difference of opinion, and perhaps error does not itself demonstrate the model’s deficiencies, as much as it reflects the nature of the constitutional implementation—and judging generally. Moreover, the ensuing discussion aims to show that even simply the values of transparency inherent in the translation model accomplish much in the way of ameliorating the regulatory harm that may flow from unguided cross-remedial adjudication.

1. Translating Brady

Faced with a civil Brady claim such as Lesly Jean’s, a court would begin by analyzing the constitutional doctrine invoked, identifying its constituent elements of operative proposition, decision rules, and, if applicable remedial rules. The above discussion has already suggested my own view of the most faithful reading of the Supreme Court’s Brady doctrine: The operative proposition is that due process means a guarantee that the defendant will receive material, favorable evidence for use at trial. Other facets of Brady jurisprudence, including definitions of materiality, and including mechanisms of achieving disclosure, are in my view decision rules.

Note that this is not the only possible doctrinal interpretation, demonstrating the reality that even at its first step the process of rights translation is not straightforward or free of controversy. The Jean court, had it followed the rights interpretation model, would presumably have taken a different first step in slicing constitutional doctrine. The Fourth Circuit’s statement that Jean had failed to identify a right that was violated by the police defendants in the case suggest that the court took a different view of the operative proposition itself, and appeared to interpret it as

incorporating within the meaning of due process a particular understanding of how disclosure would be achieved—namely, by prosecutors. In a different vein, Professor Brandon Garrett’s examination of civil Brady claims might be viewed as characterizing materiality as a “harmless error rule” that should be dispensed with in civil litigation. In the current framework, his position might be understood as an assertion that materiality is a decision rule rather than an operative proposition, and one that is specific to the criminal remedial context such that it should be abandoned in civil litigation.

For reasons explained in Part II, my own view is that neither of these readings is an accurate analysis of Brady doctrine. This substantive conclusion concededly flows not from the translation model, but rather from what I hope is careful and considered reading of Brady and its progeny. What translation does achieve at step one, with a substantial debt to the decision rules, is to force a structural discipline upon the interpretative process, which in turn generates a statement of constitutional meaning that is discrete from implementing doctrine. There is value to that achievement alone, as it furthers the functional and expressive values of guidance to state actors and affirmation to the public with respect to constitutional duties and strictures.

Proceeding to steps two and three in adjudicating Lesly Jean’s civil Brady claim, a court would ask whether the Brady decision and remedial rules that were developed through criminal adjudication continue to fit in the new adjudicatory context. As discussed above, the answer would seem clearly to be no, at least in the case of Jean’s claim against police defendants, and at least if Brady doctrine has been cleaved as I argued for in step one. That is to say, at a minimum a court will be faced with the challenge of fashioning a duty for police, since Brady as developed in criminal litigation, on my reading, is agnostic as to how the outcome-focused right (disclosure) is secured.

Before proceeding to fashion a decision rule for adjudicating police fault, however, note that other Brady decision rules would, under the translation model, be examined in step two. Thus, for example, the civil

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203 Garrett, supra note 7, at 69-75.
204 See supra Part II.A.1.
205 See supra Part I.C.
206 See supra Part III.A.
Brady claim could not be adjudicated without tests for assessing “materiality,” which I have identified as decision rules. A court might ask whether in a new remedial context the governing test—that undisclosed evidence raises a “reasonable probability” of a different result—should subsist. In fact, Garrett’s view that the materiality test should be abandoned for civil Brady claims might be read as appropriately addressed to the step-two inquiry rather than to step one. In my own view, however, such a shift would contravene the constraints of fidelity, and in particular the strong presumption that conduct-based decision rules should be adhered to across remedial regimes. The materiality standard is arguably such a rule, because it provides ex ante guidance—albeit obliquely—to assist prosecutors (and perhaps police) in determining what must be disclosed to the defense. Altering the test for purposes of identifying a civilly actionable rights violation would introduce a conflicting norm, the effect of which could not be cabined to the civil context alone. Hence, only if such an alteration in the materiality decision rule is desirable across the board—a significant doctrinal shift that, at a minimum, would be not be properly undertaken at the lower court level—should a change be considered.

By contrast, the test for assessing breach of the Brady right by police is appropriately and necessarily broached in the civil context. It is a question which must be answered for civil adjudication to proceed and, as I have asserted above, it is left unanswered in criminal doctrine. Hence, no conflict can emerge—an important consideration within the translation framework for assessing whether new doctrine or doctrinal revision may occur.

This conclusion of course leaves the most difficult matters, those of substance, unresolved. For it is this step of the translation process that is arguably least constrained, i.e. the most fully guided by variable and contestable considerations of administrability, fairness, policy, and so forth. The selection of an appropriate mechanism to assess police responsibility for executing the Brady guarantee is further complicated by a structural

207 See supra notes 66-69 and accompanying test.
208 See supra note 198 and accompanying text.
choice that must be made: Should the matter be addressed through a decision rule or a remedial rule? Because the translation framework that I have proposed assigns different consequences to the two categories of rules—namely, a weaker presumption of adherence for remedial rather than decision rules—this is a consequential decision. The answer on this score must lay in assessing the function of each of the two components in relation to the constitutional operative proposition. Having defined the Brady operative proposition as guaranteeing disclosure *vel non* of material, favorable evidence, a test to determine whether a particular law enforcement actor violated the right would seem a poor fit with the function of a decision rule in implementing constitutional meaning: Under this formulation, the source of non-disclosure is itself irrelevant to the constitutional guarantee. Rather, the inquiry seems better framed as a causal one—in other words, as a remedial rule.

With that ample groundwork, a court would finally be positioned to fashion the test for assessing police liability for a Brady violation. Translation does not dictate a result at this stage, but it does demand that a remedial rule be fashioned in a manner that is faithful to the goals of the constitutional operative proposition. What other considerations are desirable or legitimate? Here the translation model, at least as I have conceived it thus far, must confess to essentially the same indeterminacy as the status quo. One possible rule—and the one that I would endorse—would deem police to have “caused” a Brady violation where they conceal favorable evidence to the prosecution. This is a workable rule as a functional matter, and it arguably advances goals of disclosure by incentivizing maximum effort by law enforcement to ensure that all evidence is conveyed to prosecutors. Yet selection of the rule is ultimately guided by particular notions of fairness and institutional relationships within the criminal justice system, which are neither driven nor guided by translation itself. Indeed, the rule ultimately reached by the Jean court might well be fully consistent with the values of translation—at least if formulated as a remedial rule.

This final caveat, however, is not without force. For the structural discipline that rights translation imposes is itself a mechanism of fidelity—not by limiting the discretion of the translating court, but by limiting the reach of its output. The Jean court’s holding, requiring bad-faith, intentional concealment by police to establish the existence of a constitutional violation, threatens by its terms to reshape Brady doctrine.

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across remedial contexts. Even if Jean were interpreted by courts as applying solely to the civil remedial context—perhaps a more plausible result given the relative stability of criminal Brady jurisprudence—reading Brady to affirmatively reject a police duty as a matter of constitutional meaning results not only in preclusion of civil actions against individual police officers, but also of systemic litigation remedies against municipalities or police departments. This more far reaching result is be avoided if the Jean test of bad-faith intent were instead cabined as a remedial rule for adjudicating individual police fault; the duty of a police department might sensibly, and consistent with the translation model, be differently drawn.

2. Translating Suggestive Identification

Translation of a suggestive identification claim such as Raymond Wray’s proceeds similarly to the above Brady analysis, but distinctive features of suggestive identification doctrine highlight the potential for translation itself to guide innovation in criminal procedure.

A court adjudicating such a claim would begin, again, by cleaving of the doctrinal components of suggestive identification jurisprudence. The discussion in Part II presaged my own view of the proper output of this inquiry: The settled operative due process proposition appears to be that only reliable identification evidence may be admitted at a criminal trial; that proposition is implemented in the criminal context through a decision rule that assesses the totality of the circumstances of the proffered identification evidence, including but not limited to the procedure used to procure any out-of-court identification prior to trial. Again, this conclusion is contestable, though perhaps less so as a matter of settled doctrine than the other two areas of criminal procedure discussed herein. Certainly some, including both scholars and civil litigants, have argued that the operative proposition should be, and perhaps for a brief moment in the Wade trilogy was, conceived as protecting an interest that extends backward from trial to the conduct of identification procedures themselves—through the Fourth

212 See, e.g., Gregory v. City of Louisville, 444 F.3d 725, 753-54 (6th Cir. 2006) (discussing Section 1983 claim against the City of Louisville for failing to train and supervise police regarding Brady disclosure duty); Mayes v. City of Hammond, 442 F. Supp. 2d 587, (N.D. Ind. 2006) (denying summary judgment on Section 1983 claim against City of Hammond for failure to supervise and train officers in regard to Brady disclosure).

213 See supra Part II.B.1; see also Neil v. Biggers, 409 U.S. 188, 195 (1972) (describing the right as “due process protection against the admission of evidence deriving from suggestive identification procedures”).
Amendment or substantive due process. For better or for worse, the Supreme Court appears not to have pursued this path, and indeed has expressed hostility as a general matter to applying constitutional scrutiny, rather than the crucible of cross-examination, to the production of evidence per se.

At steps two and three, a court must decide whether to adhere to translation’s presumption that the totality-of-the-circumstances test applies in adjudicating the civil suit. Again, this is a strong presumption, but not absolute. Certainly, the totality test is administrable in the civil context. And yet, a court might be justified, within the bounds of translation’s strictures, in erecting a different rule. In Brathwaite, the Court declined to adopt a decision rule that examined only the suggestiveness of police procedures themselves, and enshrined the totality test as factoring not only the procedures themselves, but also trial-focused factors such as a witness’s confidence or measure of corroboration. The critical factor moving the Court appeared to be “administration of justice”—in particular, a concern that the “per se” approach would unjustifiably deny a criminal jury the benefit of potentially reliable evidence in the course of its assessment of a defendant’s guilt. Note that this consideration is highly specific to remedial context: Application of a per se decision rule in, for example, Raymond Wray’s civil action, for purposes of asking retrospectively whether constitutionally unreliable identification evidence had been admitted against him in criminal proceedings, carries no similar risk. Additionally, a shift from the totality rule to per se analysis of the suggestiveness of identification procedures themselves would not introduce a conflicting conduct rule, since the prevailing decision rule already requires police to minimize suggestiveness in the course of identification procedures. Put differently, the thrust of the totality-of-the-circumstances inquiry is directed at courts deciding constitutional claims, rather than police seeking to conform their conduct to constitutional norms; adopting a different adjudicatory rule in a distinctive remedial context would not conflict with the behavioral regime the operates in the criminal realm.

216 Id. at 110-17.
217 Id. at 112-13.
Given the presumption that I have articulated against a shift in decision rules, these factors must be adjudged at best neutral in considering adoption of a new test: Change would do no harm. Legal scholars and scientists have offered a number of pluses to a shift away from the totality test, however, including by pointing to systemic incentives that such a shift might provide for law enforcement to implement and train on more reliable identification procedures. Depending upon the weight attached to these arguments, the presumption against development of a new decision rule for suggestive identifications might appropriately be adjudged to have been rebutted. Of course, that is not to say that such a shift is dictated by translation. But these considerations are consistent with the model, and suggestive identification doctrine stands as a fruitful illustration of the manner in which translation might encourage principled innovation in criminal procedure’s regulatory capacity.

Moving to the final step of translation in a suggestive identification claim, a court will confront the difficulty presented by the Wray decision itself: the fashioning of an appropriate remedial rule to govern the causation inquiry, i.e., the question of whether the complained of conduct by the defendants—police who procured an identification under allegedly suggestive circumstances—caused the constitutional deprivation—admission of unreliable identification evidence at trial. As discussed in Part II, it is here where the Wray court went most problematically off course, by fashioning a causation test that was expressly disconnected from the constitutional values animating suggestive identification doctrine, and that erected a new and conflicting conduct norm which arguably weakened the regulatory incentives at which the doctrine aims. Again, constructing the proper causation inquiry remains difficult and highly contestable even within the structure of translation; the principles fashioned here to guide adjudication do not exhaust the considerations that might be brought to bear in causation analysis more generally. Nevertheless, some guidance emerges from the model.

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219 Wray v. City of New York, 490 F.3d 189, 195-96 (2d Cir. 2007).

220 See supra note 147 and accompanying text.
First, the relevant operative proposition and decision rule animating the constitutional violation that is being assessed by the remedial stage of inquiry must guide the assessment of causal link. Was the complained-of conduct, specifically the use of suggestive identification procedures, “constitutionally relevant”? \(^\text{221}\) Here, that question may be readily answered by reference to the applicable decision rule: Even under the totality-of-the-circumstances test, the risk that employing suggestive procedures will lead to the introduction of unreliable identification evidence at trial is recognized. Conduct that is sufficiently relevant to the constitutional risk that it is a factor in identifying a constitutional violation should seemingly be sufficient to constitute a causal link. Indeed, even \textit{Brathwaite}, in rejecting a “per se” decision rule focused exclusively on identification procedures, acknowledged both the importance of police conduct in identification procedures in relation to the underlying constitutional value of reliability, as well as the importance of the value of deterring undesirable police practices in obtaining eyewitness identifications. \(^\text{222}\)

For its part, the \textit{Wray} court appeared to reach a different result \textit{not} because it rejected the premise that constitutional doctrine should inform a separate causation inquiry, but rather because it rejected the relevance of identification procedures themselves to the scope of constitutional protection. \(^\text{223}\) This arguably represents an affirmation of the translation model’s principles, though at the same time the problematic aspects of the \textit{Wray} court’s substantive conclusion might be seen as demonstrating the limits of an adjudication structure in cabining discretion.

3. Translating \textit{Miranda}

Turning to translation in \textit{Miranda}, a different category of challenges is highlighted. Here, in contrast to \textit{Brady} and suggestive identification, the contours of constitutional doctrine remain fairly contested in the context of both defensive and offensive criminal procedure litigation. This makes the task more difficult, and the conclusions reached even more tentative. Nevertheless, there is value to considering how translation might operate, and aid, in a more dynamic and conflicted doctrinal realm.

At step one, a court faced with a civil \textit{Miranda} claim would be challenged to identify the doctrinal components of the rights claim being asserted. Part II has suggested my own view of the proper analysis at this

\(^{221}\) \textit{Wray}, 490 F.3d at 195.  
\(^{222}\) \textit{Brathwaite}, 432 U.S. at 110-12.  
\(^{223}\) \textit{Id.} at 193-96
stage, at least as a matter of where a majority of Supreme Court justices currently stand on the matter: that the Fifth Amendment self-incrimination clause means that involuntary statements may not be admitted in evidence at a criminal proceeding.224 *Miranda* then erects an implementing decision rule: Where the prescribed warnings are not given, or where they are given but not honored, the self-incrimination clause is adjudged violated.225 And, further, a particular remedial rule attaches to *Miranda*’s holding, as delimited by subsequent cases: In consequence of that violation, the involuntary statements must be excluded in the prosecution’s case in chief.226 Other readings of *Miranda* doctrine are, of course, possible. For example, in *Chavez v. Martinez*, Justice Souter suggested a different conceptualization of *Miranda*’s decision rule—not as an implementing rule in the form of an irrebuttable presumption of involuntariness, but rather as a protective device.227 Within the current decision rules framework, Justice Souter’s view might be understood as perceiving an operative proposition—an evidentiary protection at criminal proceedings—and a series of remedial rules triggered by violation or threat of violation of the right, presumably with corresponding decision rules. But this view appears to describe and legitimate those remedies not as species of constitutional doctrine per se, but rather as instruments of the Court’s supervisory powers—although if this is the view espoused, the extension of those powers to state proceedings would appear to require further justification.228 The point is not to spin hypothetical understandings of *Miranda* for their own sake, but rather to illustrate that the discipline of conceptualizing rights within the decision rules framework, and the further constraint of engaging in that structured

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224 Supra Part II.C.1; see *Dickerson v. United States*, 530 U.S. 428, 439 & n.4 (2000); *Withrow v. Williams*, 507 U.S. 680, 691 (1993) (holding that *Miranda* protects a “trial right”); see also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1989) (stating in dicta, “The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial”).

225 See supra Part II.C.1.


227 See *Chavez v. Martinez*, 538 U.S. 760, 777-78 (2003) (Souter, J., dissenting) (explaining that “the Fifth Amendment . . . focuses on courtroom use of a criminal defendant’s compelled, self-incriminating testimony, and the core of the guarantee against compelled self-incrimination is the exclusion of any such evidence,” and that *Miranda* along with a variety of similar cases provided remedies that were “outside the Fifth Amendment’s core, with each case expressing a judgment that the core guarantee, or the judicial capacity to protect it, would be placed at some risk in the absence of such complementary protection”).

228 See Monaghan, supra note 14, at 20-21, 38-40.
exegesis as a first step in translation, assists in assessing the coherence of a particular doctrinal proposition. This not only permits scholarly critique but, more importantly for present purposes, aids judicial review and facilitates either the emergence of a consensus view or adoption of a particular interpretative view by the Supreme Court.

In proceeding to steps two and three with the doctrinal cleaving that I have proposed, a court would be faced with the challenge of assessing whether the *Miranda* decision rule should hold in the civil context. I have suggested in Part II that selection of the *Miranda* decision rule was heavily driven by remedial-context-specific concerns, among them, the difficulty of adjudicating voluntariness in the course of criminal proceedings, and the significant damage to Fifth Amendment interests that is risked when a defendant’s involuntary statement is introduced into evidence against her at a criminal trial. Those concerns are arguably minimized in the civil remedial context, suggesting that perhaps the rule should be reconsidered—especially if one believes that the rule carries a high “error rate,” *i.e.* the frequency of finding admission of a statement that is actually voluntary to have violated the Fifth Amendment. Professor Susan Klein, has advanced such arguments for abandoning the *Miranda* rule for civil adjudication, asserting that there is no need “for creating prophylactic rules in interpreting . . . federal torts,” because “there is no reason to believe that either plaintiffs or defendants in ordinary civil litigation will suffer any lopsided interpretation of the law, unlike the fate suffered by criminal defendants,” and because “the stakes are much higher with criminal litigation—when lower courts get it wrong, an individual may be wrongfully imprisoned.”

Yet as a decision rule, the *Miranda* test enjoys a strong presumption of perdurance under the translation model, particularly given that the *Miranda* decision rule epitomizes the conduct-focused norms that should be maintained across remedial context. Additionally, while the force of some factors animating creation of the *Miranda* rule may be seen as diminished in the context of civil adjudication, others remain constant—chiefly, the evidentiary difficulties posed to a defendant-turned-plaintiff by the isolation of interrogation and the inherent challenge of proving the effects of subtle forms of coercion. The call is concededly a close one, though my own view is that the presumption of maintaining the *Miranda* decision rule is not rebutted—at least not clearly so. If it is, the most persuasive factors would

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230 *Klein, supra* note 174, at 1037.
appear to be subtle changes in the adjudicatory imperatives of the remedial context, paired with a rule that carries a high risk of mis-adjudication when judged by the “gap” between the consequences of its implementation and the meaning of its corresponding constitutional provision. Those concerns, if they are to be addressed through a shift in remedial rules, are probably best met not by modification rather than abandonment of the *Miranda* rules—for example, by fashioning a rebuttable presumption of coercion where a civil plaintiff demonstrates violation of *Miranda*. Such a rule would minimize the regulatory and expressive harm that would flow from erecting a conflicting norm in the civil context.

Finally, separate and apart from the question of *Miranda* decision rules, a court would be required to determine what remedial rule will govern with respect to causation—at least to the extent that the claim is premised upon police failure to abide the *Miranda* strictures. As with the suggestive identification claims discussed above, this step is necessitated by the conceptual gap between the conduct—interrogation—and the completion of the constitutional violation—introduction of a statement into evidence at trial, an event most directly caused by (absolutely immune) prosecutors or judges. Assessed by the bare-bones inquiry outlined in discussion of suggestive identification, the remedial rule would appear straightforward: The administration of and compliance with *Miranda* warnings by police is unquestionably embodied in the *Miranda* decision rule, and hence failure to comply with *Miranda* is constitutionally relevant, to use the phrase employed in the preceding section, and clearly linked to the downstream self-incrimination violation.

In this regard, however, consideration of *Miranda*’s “error rate” might again be appropriate. To the extent that one considers adjudication of the self-incrimination clause via the *Miranda* decision rule to result in frequent “false positives,” fairness concerns may be piqued by what amounts to a “strict liability” rule for individual liability. Following this logic, a *Wray*-style rule of intent might be appropriate, at least in regard to individual liability. As with the *Brady* causation inquiry, however, note that constructing a remedial rule for assessing the fault of individual officers for *Miranda* violations need not dictate a rule for assessing the civil liability of other actors—including, for example, law enforcement entities or municipalities. Observe as well that cabining these fault- and fairness-driven considerations to the realm of remedial rules—and doing so

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232 See supra Part III.C.1.
233 See, e.g., *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1939 (9th Cir. 1999).
expressly—may provide some insurance against remedial bleed-back. In other words, the strong presumption that a remedial rule is specific to a given remedial context should prevent courts in criminal adjudication from reading back the translated doctrine in a manner that ratchets down the force of the *Miranda* obligation in the criminal realm—by, for example, imposing a required showing of police intent in order to obtain suppression of evidence.\(^234\)

Again, translation per se cannot resolve these questions. But the considerations discussed herein are offered to illustrate the types of factors that should be at play within the translation framework.

IV. Objections Addressed and a Path Forward

It is perhaps a truism that any scholarly project risks provoking more questions than it answers, and certainly this Article leaves its fair share of dangling threads. With regard its descriptive premise, that remedial context inexorably shapes doctrine and complicates cross-remedial adjudication, far deeper inquiry could be pursued into the idiosyncrasies of the criminal and civil remedial realms, or even into the basis for the dividing lines I have erected.\(^235\) As for the translation model itself, many further nuances might be introduced. For example, the preceding discussion does not explored what role the translation mechanism might play in the adjudication of immunities themselves—an area of inquiry with enormous significance for a conception of rights as regulatory instruments. These are only some examples of a number of ways in which this Article suggests important avenues for further elaboration, and, hence in which the current project remains provisional. Nevertheless, even at this stage a number of potential objections to both the premises and the execution of arguments advanced herein should be attended to.

Some might object to the translation framework as empowering courts to diminish both rights and remedies, by providing “cover”: The cleaving of doctrine potentially furthers reaffirmation of constitutional principles accompanied by scaled-back remedies that render those


\(^235\) For example, I have treated habeas proceedings as part of “criminal” adjudication, notwithstanding the fact that numerous procedural rules and functional considerations are unique to the habeas realm, possibly to an extent that is significant for purposes of translation.
principles a nullity.\textsuperscript{236} Relatedly, it might be argued that, whatever the conceptual logic of remedially specific considerations that complicate cross-remedial adjudication, what fundamentally drives courts in fully implementing or constricting constitutional criminal procedure through civil adjudication is simply a set of naked preferences for or against official liability in the criminal justice arena. If this is accurate, then rights translation accomplishes little or nothing: Mere structural guidance in the task of adjudication is easily adapted to courts’ outcome-driven goals. Such criticisms merit attention. One response is that the reality of politically driven judging does not demand an abandonment of the insistence of principled process. A second response, meeting the criticism at its likely philosophical bent of aiming for preservation of substance of criminal procedure guarantees, is to point to translation’s mechanisms for cabining the effects of restrictive constitutional implementation within a particular remedial context. A third and related rejoinder is that, as seen in the preceding discussion of potential revision of suggestive identification decision rules in civil litigation, is that the cleaving of constitutional meaning from implementing rules which translation operationalizes might permit progressive innovation in constitutional oversight of criminal justice, with lower-stakes avenues for remedial experimentation

Issue could also be taken with the more fundamental starting point of this project, that constitutional criminal procedure is usefully conceived of as regulatory in nature. If criminal procedure rights and their enforcement ultimately have minimal or at least unpredictable effects on law enforcement behavior,\textsuperscript{237} one might question the value of imposing the sorts of adjudicatory structures described herein—not only for the expenditure of judicial resources that such attention to process entails, but also for the misleading significance of criminal procedure rights that it expresses. Again, this is a criticism which emerges from important insights. And yet, criminal procedure remains a significant preoccupation of constitutional doctrine, and in my own experience its values and enforcement bite are at least widely parroted by police and prosecutors

\textsuperscript{236} See, e.g., Steiker, supra, note 2.

\textsuperscript{237} See generally Daryl Brown, The Warren Court, Criminal Procedure Reform, and Retributive Punishment, 59 Wash. & Lee L. Rev. 1411 (2002) (arguing that “Warren Court criminal procedure decisions . . . indirectly and perversely contributed to the harsh punitivism that characterizes criminal justice today,” and positing “a broader thesis about the limited ability of courts to lead large-scale social change”); Stuntz, supra note 2, at __ (critiquing focus on procedural rights as mechanisms of law enforcement regulation and arguing that such a focus misses systemic distortions that occur from discretion that results from the absence of constitutional regulation of substantive criminal law).
alike.\footnote{Based on four years of litigating civil rights claims stemming from criminal procedure violations, I can attest that police and prosecutors both frequently cite legal strictures and judicial oversight in this realm as guiding their conduct—in the context of evidence gathering and disclosure, witness identifications, and interrogations.} The process of implementing criminal procedure rights ought be held to the regulatory aspirations that its core audience articulates.

This response gives way to the further observation that the framework of rights translation may well have applicability beyond the field of criminal procedure. Hence even if one credits the indictment of constitutional criminal procedure’s salience, the inquiry pursued herein promises to contribute to deeper understanding of constitutional doctrine, its meaning, and the generation thereof by courts. Consider, for example, the multiplicity of remedial arenas in which First Amendment rights are litigated: through civil rights claims, both for damages and injunctive relief (each arguably a distinctive remedial realm), and, importantly, as defenses in criminal litigation as well.\footnote{See generally Daniel J. Solove, The First Amendment as Criminal Procedure, 82 N.Y.U. L. Rev. 112 (2007).} The Eighth Amendment guarantee against the infliction of “cruel and unusual punishments,”\footnote{U.S. Const., amend. 8.} too, takes shape as both a defensively asserted right in criminal proceedings, and through civil litigation outside of the criminal procedure realms, in particular with regard to prison conditions. Indeed, the traditional mechanism by which constitutional guarantees were adjudicated and elaborated was through defensive assertion in criminal proceedings, and Henry Hart’s explication of constitutional adjudication contemplated as a prototypical dynamic that rights would be adjudicated both defensively and offensively.\footnote{Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1367-74 (1953).} In short, the study of constitutional adjudication as both remedially bound \textit{and} potentially requiring some fidelity to meaning carries relevance beyond the field of those rights that are traditionally thought of as constituting “criminal procedure.” Translation, though developed here with an eye to distinctive concerns raised in that field, thus provides a starting point for inquiry into the dynamics at work in adjudicatory development, revision, and constriction of constitutional doctrine generally.

In the final analysis, this Article has endeavored to illuminate a previously unnoticed problem in the adjudication of constitutional criminal procedure, and to begin to sketch an ameliorative approach. It can do no better than to make the case that the problems that have prompted this exploration are worth sustained attention, to provide a well-considered
starting point for dialog, and to prompt further and evolving consideration—hopefully within and beyond the scholarly community—of the difficulties and solutions explored herein.