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Two Causal Relationships Between the Planes of Fact-Finding and Substantive Law

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TWO CAUSAL RELATIONSHIPS BETWEEN THE PLANES OF FACT-FINDING AND SUBSTANTIVE LAW

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Abstract

This essay depicts two causal processes that demonstrate how, in the American legal system, the fact-finding plane is more fundamental than the substantive law (or substantive rights) plane. In the first process, a priori policy judgments about what facts should be available, and a priori epistemological claims about what facts can be available, drive expansions, contractions, and intentional reaffirmations of legal rights' substantive scope. In the second process, factual wrinkles in individual cases are seized upon by judges and/or litigators and exercise an outsized influence on the development of substantive law. Although these processes are present across different areas of law, they are particularly visible in constitutional criminal procedure. Therefore, this essay focuses on how the two processes manifest in constitutional criminal procedure.

I. Introduction: The primacy of facts over the articulation of rights

> [A]ccurate fact-finding is as fundamental to the construction of a just society as the articulation of rights and obligations. Indeed, accuracy in fact-finding may be more fundamental than rights and obligations, for without accurate fact-finding, rights and obligations are meaningless. Every contested claim of a right or an obligation is entirely dependent upon the juridical finding of facts. In order to assert and defend a right in court, one must first be able to establish the foundational facts to demonstrate a violation of that right.[2]

This statement depicts one analytically impenetrable account of the primacy of fact-finding over the articulation of substantive rights and obligations in a legal system. I will illustrate this statement with an abstract example. Imagine a fictitious civilization, State X, has a constitution that enumerates four individual rights: free speech, data privacy, religious exercise,

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[2] Ronald J. Allen, Timothy Fry, Jessica Notebaert & Jeff VanDam, *Reforming the Law of Evidence of Tanzania (Part Two): Conceptual Overview and Practical Steps*, 32 B.U. INT'L L.J. 1, 4 (2014).

and freedom from unreasonable restraint.[3] Assume certain citizens of State X claim to have suffered a violation of their right to religious exercise because their city council has enacted an ordinance that prohibits the opening of catholic churches on Sundays. So, they file a lawsuit seeking to enjoin the measure because it is unconstitutional. And to make fact-finding seem as ministerial and non-adversarial as possible, assume this constitutional litigation occurs unopposed. Without a reliable fact-finding mechanism, the violation of the constitutional right would be effectively impossible to allege, and the right would be impossible to vindicate.

In thinking about what are the most important components of the rule of law, it is easy to ignore the necessity of a reliable law of evidence. But the mechanism gives citizens the ability to, for example, bring to a judge's attention the existence of an allegedly unconstitutional ordinance, or introduce testimony about the effect of an ordinance on their ability to exercise constitutional rights. It is also easy to take for granted that the introduction of this evidence will reliably result in an official factual record reflecting it. But these things should not be taken for granted because any rights would be meaningless without them.

In this way, fact-finding, and robust/reliable mechanisms facilitating fact-finding, are unquestionably more fundamental than this or that specific cocktail of substantive rights. But again, this is *one*, not *the* account of the primacy of fact-finding relative to the articulation of legal rights and obligations. In this essay, I would like to describe a second account: in addition to making it possible for citizens to allege violations of their rights and ultimately obtain the protection of such rights, fact-finding itself determines the content and scope of the rights. This happens in two ways.

[3] This particular set of rights, as well as the number, has no substantive significance.

First, embedded within constitutional interpretation are *a priori* policy judgments about fact-finding that ultimately play a causal role in the contraction, expansion, or reaffirmation of the specific constitutional rights' substantive content and scope. Second, agents of the legal system, like impact litigation groups and judges themselves, seize upon factual wrinkles in individual cases. These factual wrinkles play a significant role in the causal chains that result in the modification or conscious reaffirmation of constitutional rights' substantive content and scope.

My goal in this essay is to describe the operation of both of these processes and to underscore primacy of fact-finding over the articulation of legal rights and obligations. Fact-finding is more fundamental than substantive legal rights not only in the sense that the former must be accomplished for the latter to even be considered, but also in the sense that the former determines the content of the latter.

II. The First Process: from a priori decisions about fact-finding to substantive legal development

Our substantive legal rights have contracted and expanded based on a priori policy judgments about what kinds of facts should be inquired into, and a priori epistemological decisions about what facts it is even possible to find.

Assume all the same basic facts as those presented in the hypothetical scenario I described in the introduction to this essay—the same rights, the same ordinance, etc. At Time 1, the Supreme Court of State X uses a test for determining the constitutionality of the governmental action that asks whether a restriction on a church's hours of operation *actually* burdens the aggrieved citizen's ability to practice religion. But at Time 2, the Supreme Court changes its mind and adopts a new test—it now measures the constitutionality of an ordinance based on whether it reduces a church's hours of operation by at least fifty percent. This

hypothetical jurisprudential development can be understood as the result of an a priori decision about fact-finding. At time 1, the fact-finding regime consisted of an inquiry into facts about the mind of the citizenry; whether someone is *actually* burdened in their ability to exercise their spirituality is undoubtedly a fact that exists on the subjective plane. At Time 2, however, the fact-finding regime consists of an inquiry into readily-ascertainable, objective facts about the world—the number of hours a church was allowed to stay open.

Such a shift will undoubtedly exert a causal influence on the scope of this hypothetical right to religious exercise. Whether it has the effect of contracting or expanding the right is irrelevant—in fact, it is possible that the scope would not expand or contract in a given case. My point is that there is a causal effect on the substance of the right. Even if the scope does not materially contract or expand, this *lack* of change will also have been caused by the a priori fact-finding decision.

And developments like this have played out in some of the most deeply rooted cases and doctrines in the United States' law of constitutional criminal procedure. The *Whren*,[4] *Miranda*,[5] and *Katz*[6] decisions demonstrate that our legal rights' substantive content can be determined by a priori judgments about what facts will be evidentiarily available. But importantly, there is no clear algorithm predicting *how* these a priori choices determine the substantive content of our rights; it is impossible to discern a rule-like statement about how one or another of these choices is better or worse for criminal defendants, law enforcement officers, or victims.

A. A priori decisions about the evidentiary availability of facts about an officer's mind

[4] Whren v. United States, 517 U.S. 806 (1996).
[5] Miranda v. Arizona, 384 U.S. 436, 447 (1966).
[6] Katz v. United States, 389 U.S. 347 (1967).

As I attempt to show below, the continuous urge to make, and to revisit previously made, a priori decisions about what facts can or should (or cannot or should not) be found can be seen as one of the engines of legal development in the field of constitutional criminal procedure.

Robinson,[7] *Gustafson,*[8] *Scott,*[9] *and Whren*[10] all answer the a priori question of whether facts about a police officer's state of mind are relevant to the fourth amendment analysis. The answer in each case is emphatically no, but it is telling that the question reappeared as often as it did. *Robinson* concerned an officer's seizure of heroin from a car incident to a full-custody arrest of the defendant for driving while his license was revoked.[11] *Gustafson*, a companion case, involved virtually identical facts, with the difference that the defendant was found to be in possession of marijuana.[12]

And the constitutional question presented in *Whren v. United States* was "whether the temporary detention of a motorist who the police have probable cause to believe has committed a civil traffic violation is inconsistent with the Fourth Amendment's prohibition against unreasonable seizures unless a reasonable officer would have been motivated to stop the car by a desire to enforce the traffic laws."[13] But the case stands for the broader topic of pretextual governmental conduct. For example, it has been described as "[bringing] an end to a long-running debate over the proper Fourth Amendment treatment of pretextual police conduct[.]"[14] In addition, Professors Daniel Richman and Bill Stuntz have cited the case in their discussion of

[7] United States v. Robinson, 414 U.S. 218 (1973).
[8] Gustafson v. Florida, 414 U.S. 260 (1973).
[9] Scott v. United States, 436 U.S. 128 (1978).
[10] Whren v. United States, 517 U.S. 806 (1996).
[11] Robinson, 414 U.S. at 220–21.
[12] Gustafson, 414 U.S. at 262–63.
[13] Whren v. United States, 517 U.S. 806, 808 (1996).
[14] Brian J. O'Donnell, Whren v. United States*: An Abrupt End to the Debate over Pretextual Stops*, 49 ME. L. REV. 207, 208 (1997).

the "strong social interest in non-pretextual prosecutions."[15] And Professor Bernard Harcourt has argued that the decision "essentially condoned using race under the Fourth Amendment as long as there is independent justification for the search—in essence, tucking the race issue under the rug, since few savvy police officers confess to stopping a suspect based on race alone."[16]

The case involved a traffic stop that led to the discovery of "two large plastic bags of what appeared to be crack cocaine" in one of the vehicle passenger's hands.[17] The passengers were charged with violating "various federal drug laws,"[18] and in their defense, they argued the traffic stop was pretextual and "had not been justified by probable cause to believe, or even reasonable suspicion, that petitioners were engaged in illegal drug-dealing activity."[19]

Although the Supreme Court already had, before *Whren*, held[20] that examinations into the mind of a police officer have no place in assessing the reasonableness of a search or seizure, numerous lower federal courts adopted a test in which they inquired "whether under the same circumstances a reasonable officer *would* have made the stop in the absence of the invalid purpose."[21] This test seemed particularly applicable to pretextual traffic stops because "by definition, the officer making the stop has probable cause or reasonable suspicion that the motorist is violating a traffic law. At the same time, though, the violation is a minor one which is normally not enforced."[22]

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[15] Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 584–85 n.4 (2005).
[16] Bernard Harcourt, *Rethinking Racial Profiling: A Critique of the Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275, 1338 (2004).
[17] Whren, 517 U.S. at 809.
[18] Id. (citing 21 U.S.C. §§ 844(a) and 860(a)).
[19] Id.
[20] Scott v. United States, 436 U.S. 128 (1978).
[21] United States v. Cannon, 29 F.3d 472 (9th Cir. 1994); United States v. Valdez, 931 F.2d 1448 (11th Cir. 1991); United States v. Guzman, 864 F.2d 1512 (10th Cir. 1998).
[22] Brian J. O'Donnell, Whren v. United States*: An Abrupt End to the Debate over Pretextual Stops*, 49 ME. L. REV. 207, 210 (1997).

The case, therefore, squarely presented a new iteration of the debate on whether courts should attempt to inquire into the minds of the arresting police officer—a new opportunity for the Supreme Court to make an a priori decision about what facts can or cannot or should or should not be investigated. And again, this decision necessarily would exert a causal influence on the substantive development of the scope of the fourth amendment.

The Court's decision was clear and unmistakable. While Justice Scalia admitted that inquiring into the mind of the police officer is not an impossible task,[23] the Court emphatically declined to view such an inquiry as adequate in the fourth amendment context. Interestingly, the Supreme Court did not expressly discuss epistemology in any form. But the case unmistakably stands for a clear epistemological proposition: that it is not wise to attempt to access the mind of the police officer.[24]

In this way, an a priori decision about fact-finding foreclosed the expansion of the substantive protections of the Fourth Amendment.

B. A priori decisions about the evidentiary availability of facts about a suspect's mind

Katz v. United States,[25] *United States v. Jones*,[26] and *Florida v. Jardines*[27] shift the perspective in an important way. The a priori epistemological decisions being made by the Supreme Court here concern the evidentiary availability of information about the estate of a suspect's mind, rather than the state of an officer's mind.

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[23] Whren, 517 U.S. at 815 ("Indeed, it seems to us somewhat easier to figure out the intent of an individual officer than to plumb the collective consciousness of law enforcement in order to determine whether a 'reasonable officer' would have been moved to act upon the traffic violation") (Scalia, J.).
[24] At least one prominent scholar has read the case in this way. *See* Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness"*, 98 COLUM. L. REV. 1642, 1653 (1998) (writing that "[t]he Court reasoned that it would be impractical to inquire into what truly motivated the police in each individual case").
[25] 389 U.S. 347 (1967).
[26] 565 U.S. 400 (2012).
[27] 569 U.S. 1 (2013).

Cases like *Olmstead*,[28] decided in 1928, and *Silverman*,[29] decided in 1967, seemed to suggest that the fourth amendment was chiefly a property-protecting provision.[30] But in *Katz*, the Court famously held that "the Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth, and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment."[31] The famous statement that "the Fourth Amendment protects people—and not simply 'areas'"[32] or private property, represented a shift that should be understood as an a priori decision about fact-finding. *Katz* represented an a priori decision to open up the floodgates to facts existing in the mind of the suspect—specifically, whether the suspect had an expectation of privacy in a given situation.

More recently, these a priori judgments have been revisited and reversed, and the trend does not seem to stop. For example, Justice Scalia's decisions in *Jones* and *Jardines* represent a revival of the property-based approach, which make the applicability of the Fourth Amendment turn on more objective facts. Interestingly, however, there is no express rejection of the availability of subjective facts which was made possible by *Katz*. And similarly, Professor Will Baude has recently advocated for a "positive law approach" to the Fourth Amendment, which views the applicability of the Fourth Amendment as completely dependent on the positive law of

[28] Olmstead v. United States, 277 U.S. 438 (1928).
[29] Silverman v. United States, 365 U.S. 505 (1961).
[30] In his opinion in *Jones*, Justice Scalia emphasized that for a long time Fourth Amendment interpretation was "exclusively property-based," explaining that "our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century." Jones, 565 U.S. at 405–06 (citing Olmstead, 277 U.S. 438; Orin Kerr, *The Fourth Amendment and New Technologies; Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 816 (2004)). What is not commonly discussed is how a property-based approach itself reflects the a priori decision to limit the factual inquiry to objectively ascertainable facts existing outside peoples' minds—to facts about the content of positive property law.
[31] Katz, 389 U.S. at 353.
[32] Id.

a given jurisdiction.[33] This proposal can be understood as yet another result of an a priori judgment about what kinds of facts should be prioritized, and it is also of a more objective character than what was introduced by the *Katz* decision.

C. Evidentiary availability of facts about a detainee's free will

The *Miranda* decision represents yet another shift. Famously, in this case, the Supreme Court handed down an opinion whose "core holding" looked more like a piece of legislation than like a judicial interpretation. In its discussion of the potential abuses inherent in custodial interrogations, after the Court cited the Wickersham Report on Lawlessness in Law Enforcement[34] and a report by the 1961 Commission on Civil Rights,[35] the court made the following comments—comments that could easily have been taken from the "findings," "policy," or "purpose" section of a statute: "The examples given above are undoubtedly the exception now, but they are sufficiently widespread to be the object of concern. Unless a proper limitation upon custodial interrogation is achieved—such as these decisions will advance—there can be no assurance that practices of this nature will be eradicated in the foreseeable future. The conclusion of the Wickersham Commission Report, made over 30 years ago, is still pertinent[.]"[36]

Another striking feature of the decision—one that is more intimately linked to the thesis in this essay—is that the Court's decision is marked by an even more stunning lack of epistemic humility than what was present in *Katz*. Here, the Court went one step even further than to merely make an a priori judgment about the evidentiary availability of this or that fact. It made

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[33] William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821 (2016).
[34] IV NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931).
[35] 1961 COMMISSION ON CIVIL RIGHTS REP., JUSTICE, PT. 5, 17.
[36] *Miranda*, 384 U.S. at 447.

an a priori finding of fact itself, something to the effect of, when X is present, Y will always be the case. Consider the following excerpt:

> We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.[37]

Or this one:

> The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights.[38]

These excerpts are a perfect illustration of my main conceptual point. In making the a priori factual judgment that abusive police practices in closed-off custodial settings "operate very quickly to overbear the will" of a suspect, the Supreme Court was—at least nominally—enlarging the scope of the Fifth Amendment.[39]

Professor Ronald Allen has highlighted, even if indirectly, *Miranda*'s relevance to the phenomenon I am discussing in this essay:

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[37] Id. at 467.
[38] Id at 469–70.
[39] Whether *Miranda* actually contributed to making Constitutional protections effective, however, is another story. *See, e.g.*, Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1449 ("One can imagine the *Miranda* warnings as serving a function similar to the caution printed on cigarette packages. The smoker is advised of the risks he is taking, but he does not get the message until the package is in hand when the impulse for gratification is the strongest. The warning is thus ineffective in most cases.").

> The defenders of Miranda also ignore the single most salient point about the voluntariness test, which is that, while on its surface it purports to regulate free will, in reality, it was providing a regulatory regime for something that actually can be regulated—police practices. There plainly were, and are, investigatory abuses. One cannot regulate police practices by tests geared to nonexistent or impenetrable mental states, but one can regulate the manner of investigation, including its public nature and the extent of pressure that can be brought to bear on an individual. The real problem with police interrogation was, and remains, its secretiveness, which goes a long way in explaining Miranda's ineffectiveness—it does not deal with the controlled and secret nature of interrogation practices at all.[40]

As this excerpt shows, the Supreme Court made an a priori judgment—even if an unspoken one—that fact-finding in disputes about abusive police interrogation would *not* be limited to objective police practices or other forms of evidence that are readily available to the senses.

III. The Second Process: How the Modification of the Content of a Constitutional Right can sometimes be traced to specific factual wrinkles of a specific case

Second, significant substantive developments in the scope and content of rights can be traced to specific findings of fact in individual cases.[41] Every instance of fact-finding—whether accurate or inaccurate—functions as an input into the legal system that furthers its complex operation.[42] At supreme court and appellate court levels, this fact-finding is woven into judicial opinions. It is very common to hear from judges that theirs is the only governmental position that requires a written explanation for all their decisions.[43] Although this is a slightly inaccurate statement—the APA requires agencies to conduct robust disclosure, comment review, and sometimes even on-the-record decision making—written judicial opinions have become a staple

[40] Ronald J. Allen, *The Gravitational Pull of* Miranda*'s Blackhole: The Curious Case of* J.D.B. v. North Carolina, 46 Tex. Tech. L. Rev. 143, 147 (2013).
[41] A related-but-incidental purpose of this essay is to provide a modest contribution to the view that legal development is chiefly governed by principles of complexity. This is not a new proposition. Long ago, Oliver Wendell Holmes wrote: "The life of the law has not been logic; it has been experience." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).
[42] Here I use "complex" as a scientific term of art, rather than as a synonym for "complicated."
[43] See, for instance, Justice Ketanji Brown Jackson's confirmation hearings at various points.

of what we consider to be our legal system. But judicial opinions are not necessary for the presence of adjudication; one can imagine a system where judicial decisions consist solely of "we find that X prevails," or "judgment for Y."[44]

On the surface, a minimalist system of judicial decision-making such as this would seem to be more stable. In fact, in such a system, each individual judgment *would* carry a certain amount of impenetrability and thus, a high level of internal stability.[45] The reason for this is that, in a system where judicial decision making consists solely of these minimalist judgments, there would be nothing subject to future undermining. When the Supreme Court "overturns" a prior Supreme Court decision, it does not modify the winner and loser of the prior decision. What *is* open to undermining is everything else the judge writes outside of "X wins."

In a related way, then, we can say that judicial opinions as we know them, viewed as legal units or legal inputs into the larger system we call law, are inherently unstable. And how could they not be? When a Supreme Court justice authors a decision, the legal analysts whose job it is to digest the decision are faced with dozens of pages consisting of arguments and sub arguments replete with assumptions (unstated and stated), premises (unstated and stated), syllogisms, choices of precedent, justifications for why an issue is framed narrowly or broadly, and word choice. And these legal analysts are people who have been trained to engage in the same form of argumentation, as well as to engage in the picking apart of others' arguments. This component of judicial decision making is what I am calling the "everything else" in addition to

[44] And in many instances, judicial decision-making does not stray too far from this. But at the Supreme Court level, where the meaning of a constitutional provision is involved, it is almost always the case that there are long, detailed judicial opinions. And this fact is not ignored by laypeople. A significant portion of the public debate and conspiracy theorizing with regards to the leak of Justice Alito's draft majority opinion in *Dobbs* was about how the opinion "had to be authentic. Look how long it is! Are you telling me these justices write long opinions that haven't even been accepted by their colleagues, yet?"

[45] Stability here would be measured in terms of the likelihood of a decision being undermined in the future.

the "X wins" component. And the presence of this "everything else" embeds instability into any decision of the Supreme Court.

One glaringly obvious normative justification, and perhaps also an explanatory account of the development of written judicial opinions consisting of an "X wins" component in addition to an "everything else" component as the staple of our litigation system, is that the judiciary must be seen as legitimate. It is very likely that a judicial system based solely on "we find that X prevails" and "judgment for Y" would quickly collapse despite the rigidity, impenetrability, and stability of each individual judgment. This is because, when someone loses in court, it is reasonable to assume that they would like to know why they lost; the probability that they have made the expensive decision to litigate a cause of action without a plausible legal theory is slim to zero.

So, at the very least, it appears that judicial legitimacy requires a certain level of instability in each individual judicial decision. What also becomes clear is that it is simply false that each Supreme Court decision carries the same legal force. Although formally, the same body may have issued *Decision T1* and *Decision T2*, the practical effect—the legal force—of each of those decisions will be completely determined by what arguments and words were used by the Justice issuing the decision. And one may completely dwarf the other when it comes to having an effect on the law. Much like the legal force of a constitutional provision dwarfs a statutory provision it its inconsistent with, the legal force of one judicial decision may dwarf that of another.

One common characteristic of the instability of judicial decisions is their use of a case's specific factual wrinkles[46]—specifically, their tendency to let the factual wrinkles play an

[46] One example of this, which I will not delve into deeper, is the *Katz v. United States* decision. First of all, the Court prominently discussed the petitioner's proposed framing of the legal questions in the case, and this framing featured

outsized role in the outcome and in the substantive development of a legal right's scope. And the *Mapp*[47] decision, as well as the *Vega v. Tekoh* case,[48] are excellent examples of how a factual wrinkle in one specific case can serve as the primary component of the engine of substantive legal change.

A. Mapp v. Ohio

I will now turn to *Mapp v. Ohio* as an example. There are two ways in which *Mapp* is a demonstration of the substance-determinative role of fact-finding, and each is characterized by its own form of fact-finding. The first pertains to legal fact-finding in the way it is traditionally thought of—the creation of a factual record in the trial courts. The second is more related to the empirical fact-intensive legal argumentation Justice Clark used in the decision.

In all cases, a factual record is produced. But sometimes these factual records produce a "hook" that has some form of overpowering effect—an effect that catches the attention of appellate judges or justices, as well as academics that tell the story of a case. Such is the case of *Mapp v. Ohio*.

The facts in *Mapp* were as follows. Three Cleveland police officers arrived at Mapp's residence in response to a tip that there was someone in her home who "was wanted for questioning in connection with a recent bombing, and that there was a large amount of policy paraphernalia being hidden in the home."[49] She lived on the top floor of a two family dwelling, and they forced themselves into the building without a warrant.[50] The officers eventually provided her with a fake warrant, and they also prevented Mapp's attorney from consulting with

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the case's factual wrinkle—the telephone booth. *See Katz*, 389 U.S. at 349 ("The petitioner phrased [the question] as follows: 'A. Whether a public telephone booth is a constitutionally protected area[?]"). In addition, in its decision, the Court emphasized "the vital role the public telephone has come to play in private communication." Id. at 352.

[47] Mapp v. Ohio, 367 U.S. 643 (1961).

[48] Vega v. Tekoh, 142 S. Ct. 858 (2022).

[49] *Mapp*, 367 U.S. at 644.

[50] Id.

her.[51] She was eventually convicted of "knowingly having had in her possession and under her control certain lewd and lascivious books, pictures, and photographs in violation of § 2905.34 of Ohio's Revised Code."[52] As the court explained:

> The obscene materials for possession of which she was ultimately convicted were discovered in the course of that widespread search. At the trial no search warrant was produced by the prosecution, nor was the failure to produce one explained or accounted for. At best, 'There is, in the record, considerable doubt as to whether there ever was any warrant for the search of defendant's home.' The Ohio Supreme Court believed a 'reasonable argument' could be made that the conviction should be reversed 'because the 'methods' employed to obtain the (evidence) were such as to 'offend 'a sense of justice,"' but the court found determinative the fact that the evidence had not been taken 'from defendant's person by the use of brutal or offensive physical force against defendant.'[53]

The Supreme Court overturned the judgment of the Ohio Supreme Court and held that the exclusionary rule applies to state prosecutions just as much as federal prosecutions. But it is difficult to accept an argument that the outcome in *Mapp* can be explained only by a principled textual interpretation of the Fourth Amendment. After all, the Court had, only twelve years before, ruled that the Fourth Amendment exclusionary rule did not apply to the states.[54]

As Professor Bill Stuntz wrote, the presence of material classified as obscene gave the case a free expression tinge. He explained that "[a] common thread to Entick, Wilkes, and Mapp [is that] all are free speech cases in disguise."[55] History seems to bear this suspicion out, and a very helpful article by Professor Dorin provides an inside look into the Supreme Court's decision-making process in the case.[56]

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[51] Id. at n.2.
[52] Id. at 643.
[53] Id. at 645.
[54] Wolf v. People of State of Colorado, 338 U.S. 25 (1949).
[55] William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, n.164 (1995).
[56] Dennis Dorin, *Marshalling* Mapp: *Justice Tom Clark's Role in* Mapp v. Ohio*'s Extension of the Exclusionary Rule to State Searches and Seizures*, 52 CASE W. RSRV. L. REV. 401 (2001).

It was not just a free expression "tinge." Freedom of expression was the dominant legal theory advanced by Mapp:

> "When the Court addressed the Mapp case in conference, Kearns's First Amendment strategy seemed clearly to have prevailed. The vote was nine-to-zero. Ohio, everyone agreed, had blatantly violated Mapp's right of free expression. How could a law survive that made the mere knowing possession of obscene materials a felony? During a term with plenty of controversy and strong emotions, Mapp seemed easy. Its opinion for the majority, which within the next few days would be assigned by Warren to Clark, could be expected to be somewhat routine."[57]

Professor Dorin provides an account of the opinion writing process itself. Apparently, Justice Clark began the process by acknowledging that Mapp had challenged her state conviction not only on First Amendment grounds, but also on Fourth Amendment grounds.[58] The presence of obscene materials seemed to play an important role.[59]

> On the search and seizure question, Clark observed, 'the Court adheres to its rule announced in Wolf v. Colorado . . . and hence this contention of appellant is denied.' But her freedom of expression claim was valid, and the case would be decided on that ground.
> The next three pages detailed the facts. The Cleveland police had broken into Miss Mapp's home. On the advice of her lawyer, she had demanded to see their alleged warrant. An officer showed her something on paper. She grabbed it from him and placed it in her bosom. 'A struggle ensued in which the officers took (it back,) handcuffed Miss Mapp and took her up to her bedroom.' The second and basement floors were searched--ultimately yielding the materials that Ohio claimed were obscene. No warrant was ever produced at trial, and whether it even existed appeared to be 'under question.'
> Clark spent several more lines delineating the content of the Ohio statute and the alleged crime for which Ms. Mapp was convicted. He was poised to treat the merits of her First and Fourteenth Amendments claim, but failed to reach them. The draft trailed off. It was never developed further. Perhaps Clark's recitation of the Cleveland police's tactics had been too much for him.

[57] Id. at 413.
[58] Id.
[59] Id. ("First, she maintained, the allegedly obscene materials on her premises had been seized in violation of the Fourth Amendment and, therefore, should have been excluded from her trial. Second, she contended that the statute under which she had been convicted violated the first and fourteenth amendments").

> Whatever the reason, he had begun to transform Mapp into a state search and seizure landmark.[60]

In *Mapp*, the Supreme Court defined the scope of a legal right—here, the Fourth Amendment right to be free from unreasonable searches and seizures. And Professor Dorin's discussion seems to show that the particular factual wrinkle of the case—namely, its "free expression tinge"—was the proximate cause of the Supreme Court's eventual decision. The Court eventually held that "the exclusionary rule is an essential part of both the Fourth and Fourteenth amendments."[61] This holding is an example of the Supreme Court's definition of the scope of the Fourth Amendment. Although there is lots of debate about whether the Fourth Amendment *includes* the exclusionary rule, or whether the exclusionary rule is a mere enforcement measure that, while not technically a *part* of the right, is still grounded in the right, this debate is irrelevant for the purpose of my claim, which is that the fact-finding of the lower courts played a causal role in modifying the substantive scope of the Fourth Amendment. There seems to be no reason to distinguish between prophylactic enforcement rules and substantive law for the purposes of my analysis.

Specifically, my view is that *Mapp* came out the way it did largely because of what is arguably a strong resemblance with *Entick*[62] and *Wilkes*.[63] And this strong resemblance would never have been noted by any legal scholars, or by anyone who pays attention to Supreme Court jurisprudence, had there not been a system of fact-finding that produced a record telling us that the defendant in that case possessed pornographic material, and that the material was eventually

[60] Id. at 414.
[61] *Mapp*, 367 U.S. at 657.
[62] 19 Howell's St Trials 1029 (CP 1765).
[63] Wilkes v. Wood, 98 Eng. Rep. 489 (1763).

discovered and seized by the police officers. This is, then, a straightforward example of the causal relationship between fact-finding and substantive legal development.

I recognize that the argument that *Mapp* only came out the way it did because of one factual wrinkle that made its way into the record and into Justice Clark's opinion faces an uphill battle. Such a claim could never be proven. What is much more plausible, however, is that rather than playing *the* role in the Court's decision, the factual wrinkle played *a* role. And even if only this more limited version of my claim is granted, we would still be facing a clear example of fact-finding playing a causal role in the modification of the substantive content of a legal right.[64]

In *Mapp*, a large part of the Court's stated reasoning was based on a different kind of fact-finding—judicial notice of empirical data about the world as it existed at that moment.

B. Vega v. Tekoh

> Most Americans can likely recite the Miranda warnings by heart: the right to remain silent, that any statements given can be used against you, the right to an attorney during questioning, and the right to have an attorney appointed. Many also know that the Supreme Court announced these warnings in the watershed case, Miranda v. Arizona, 384 U.S. 436 (1966). But few, I venture to guess, can identify the origin and nature of the warnings. Is Miranda a right mandated by the Fifth Amendment's Incrimination Clause? Or are the warnings prophylactic rules created by judges to safeguard the people's rights?[65]

These are the opening lines of a dissenting opinion authored by Judge Patrick Bumatay, a judge on the U.S. Court of Appeals for the Ninth Circuit. The excerpt reads like it belongs in a

[64] And I have not even mentioned that a large part of the reasoning in Mapp was based on judicial notice of empirical data about the world as it existed at that moment. As Justice Clark wrote: "While in 1949, prior to the Wolf case, almost two-thirds of the States were opposed to the use of the exclusionary rule, now, despite the Wolf case, more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the Weeks rule." Mapp, 367 U.S. at 651. Justice Clark did write that these factual considerations were "not basically relevant to the constitutional consideration[.]" Id. at 653. But he himself made use of such considerations in eventually extending the exclusionary rule to the states. This is a parallel example of the causal effect of fact-finding on legal development.

[65] Tekoh v. Cty. of Los Angeles, 997 F.3d 1260, 1264 (9th Cir. 2021) (Bumatay, J., dissenting).

judicial opinion that will overturn *Dickerson*[66] and undermine *Miranda*. In reality, this was not the case, first because federal circuit courts cannot take it upon themselves to expressly overturn a Supreme Court decision, and second because the case did not squarely present the issue of whether *Miranda* should be overruled. But our legal system operates in such a way that the above excerpt is possible—even in the face of cases like *Dickerson*, which purported to settle the question of whether *Miranda* was truly a constitutional decision and *Withrow*, [67] which held that an officer's failure to give *Miranda* warnings is a constitutional infirmity that can support federal habeas relief.

This is because of a factual wrinkle in the *Tekoh* case. The case is really about whether a bare *Miranda* violation is enough to allege a § 1983 claim against the police officer.[68] This—the existence of a "bare" Miranda violation—one that didn't actually harm the defendant in any way, shape, or form—is the sort of factual wrinkle, analogous to the telephone booth in *Katz* or the pornographic material in *Mapp*, which can drive the contraction or expansion of legal rights. *Tekoh* allowed the justices to decide whether the receipt of *Miranda* warnings comes within the scope of the statutory phrase "rights, privileges, or immunities secured by the Constitution[.]"

The basic facts of the case are that a defendant in a sexual assault prosecution was acquitted even after his confession was admitted at his trial.[69] But since his confession was given in the absence of *Miranda* warnings, he later brought a § 1983 action against the interrogating

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[66] Dickerson v. United States, 530 U.S. 428 (2000).
[67] Withrow v. Williams, 507 U.S. 680 (1993).
[68] § 1983 provides for federal jurisdiction over lawsuits for damages filed against state actors, where an aggrieved party alleges that they have suffered a violation of a federal right at the hands of said state actors. It states that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any *rights, privileges, or immunities secured by the Constitution* and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]" 42 U.S.C. § 1983 (emphasis added).
[69] Tekoh v. Cty. of Los Angeles, 985 F.3d 713, 716–18 (9th Cir. 2021).

police officer, and he argued that the lack of *Miranda* warnings gave him a cause of action under the statute. The District Court held that the *Miranda* violation, without any allegations of actual coercion, did not by itself show a violation of the Fifth Amendment. A Ninth Circuit panel reversed and based its decision primarily on *Dickerson*,[70] a decision that had seemed to constitutionally entrench *Miranda* warnings. Rehearing en banc was rejected by the full Ninth Circuit, though seven judges dissented from the denial of rehearing.[71]

The Supreme Court granted certiorari.[72] Consider the following excerpt from Justice Kagan's questioning during the oral argument:

> [I]f we come out your way, it will undermine Dickerson, it will be understood as inconsistent with Dickerson. I mean, that's what I think, and I know you don't think it, but I want to put that aside and — and — and to have you at least acknowledge that there are many people who will think of this as utterly inconsistent with Dickerson. And I just want your reaction to what Dickerson was all about and what it said about the Court as an institution, in part through the lens of Chief Justice Rehnquist's progress through these cases, because, you know, I think what people think about Dickerson is that, essentially, the Chief Justice understood that Miranda had come to mean something extremely important in the way people understood the law and the way people understood the Constitution and that whatever he might have thought about the original bases of Miranda, that it, you know, was sort of central to people's understanding of the law and that if you overturned it or undermined it or denigrated it, it would be -- you know, it had -- would have a kind of unsettling effect not only on people's understanding of the criminal justice system but on people's understanding of the Court itself and the legitimacy of the Court and the way the Court operates and the way the Court sticks to what it says, you know, not just in a kind of technical stare decisis sense but in a more profound -- in a -- in a more profound sense about the Court as an institution and the role it plays in society. So I — I guess I just — that might be above your pay grade, and I'm sorry if it is, but if you would just react to that.[73]

[70] Dickerson v. United States, 530 U.S. 428 (2000).
[71] One of the dissenters from the denial was Judge Bumatay, whose decision is referred to above.
[72] Vega v. Tekoh, 142 S. Ct. 858 (2022).
[73] Transcript of Oral Argument at 24–25, Vega v. Tekoh (No. 21-499).

As is evident from this excerpt, Justice Kagan discussed the real possibility that the outcome of this case could undermine *Miranda* and *Dickerson.* She was correct, and the case did, in fact, modify the scope of the Fifth Amendment.

The majority of the Supreme Court's decision concerned the meaning and reach of *Miranda* itself. In an opinion written by Justice Alito, the Court held that while a violation of the Fifth Amendment itself *is* undoubtedly sufficient for § 1983 relief, a bare violation of *Miranda* is not.[74] It explained that "*Miranda* itself was quite clear on this point. *Miranda* did not hold that a violation of the rules it established necessarily constitute a Fifth Amendment violation, and it is difficult to see how it could have held otherwise . . . At no point in the opinion did the Court state that a violation of its new rules constituted a violation of the Fifth Amendment against compelled self-incrimination. Instead, it claimed only that those rules were needed to safeguard that right during custodial interrogation."[75]

The conclusion that a violation of the rules set out in *Miranda* does not by itself equal a violation of the Fifth Amendment represents a significant contraction of the Fifth Amendment's substantive scope. Therefore, *Tekoh* is yet another instantiation of the concept I have been discussing: a factual wrinkle serving as the proximate cause for substantive legal development. By extension, it is also an instantiation of the primacy of the fact-finding plane over the substantive legal rights plane.

IV. Concluding Remarks

I would like to use this concluding note to briefly discuss accuracy in fact-finding and its effect on the rule of law. The preceding analysis has shown that one cannot reduce to a formula the question of *how* the law's content is shaped by either (1) a priori, categorical judgments

[74] Vega v. Tekoh, 142 S. Ct. 2095, 2101 (2022).
[75] Id. at 2101–02.

about fact-finding made by the Supreme Court, or (2) individual factual wrinkles in specific cases. The decision to scrap a fact-finding regime that focuses on facts about someone's state of mind in favor of one that focuses more on objective, readily identifiable facts, does not necessarily expand, nor does it necessarily contract, nor does it necessarily keep stable the substantive scope of constitutional rights. As Professor Ronald Allen and Ross Rosenberg have written, the legal system in general, and the fourth amendment in particular, is a grown system rather than a made system.[76] Not much else should be expected from grown systems.

It is not up for serious dispute that the Fourth and Fifth amendments are notorious failures from a rule of law standpoint.[77] Relatedly, any assumption, to the extent it exists, that accurate fact-finding contributes to stability and coherence in the law, or, relatedly, that it serves a helpful channeling function in law's development, is probably invalid. There is no reason to believe that accurate fact-finding would organize our law any more than inaccurate fact-finding, except to the extent that it might stave off revolts/revolutions led by those who have been aggrieved by inaccurate fact-finding. In other words: the incoherence of the law of constitutional criminal procedure cannot be traced to any accuracy-related failures of fact-finding.

Perhaps this is where the distinction between the *first* account of the primacy of fact-finding, which I discussed at the very outset of this essay, and the *second* account, which was the focus of this essay, lies. The first is normative—that is, we *should* care more about fact-finding than we do about the articulation of legal rights and obligations, because the latter are meaningless without the former. And we *should* try to ensure, as much as possible, that such

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[76] Ronald Allen & Ross Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN'S L. REV. 1149, 1153 (1998).

[77] *See, e.g.*, Ronald Allen, *Miranda's Hollow Core*, 100 NW. U. L. REV. 71, 72–73 (2006) ("It is considerably less clear that the legal system can be justly proud of the contours of the Fifth Amendment debate"); *see also* Akhil Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757 (1994) ("The Fourth Amendment today is an embarrassment").

fact-finding is accurate, in order to preserve dignitary values[78] and to foster trust in the litigation process. However, the second—the one I've described here—is purely descriptive, and it shows that there is no good reason why accurate fact-finding would prevent the chaotic development of the law.

[78] See, e.g., Jerry Mashaw, *Administrative Due Process: the Quest for a Dignitary Theory*, 61 B.U. L. REV. 885 (1981); Frank Michelman, *Formal and Associational Aims in Procedural Due Process, in* DUE PROCESS: NOMOS XVIII 126 (J. Pennock & J. Chapman eds. 1977) (discussing dignitary theories of due process).