LEAD ARTICLE

ASYMMETRIES, NORM MATCHING, AND THE PURSUIT OF EQUITY BETWEEN THE POLICE AND THE PUBLIC

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ABSTRACT

Concerns about police abuse and overcriminalization are on the forefront of public conscientiousness. In spite of the Black Lives Matter movement and calls for police reform, law enforcement officials enjoy a variety of criminal procedure loopholes and double standards, which the United States Supreme Court has ratified through its creation of the open fields, mistake of law, and third party doctrines, as well as its acceptance of deceptive police practices.

This Article analyzes the asymmetries between permissible civilian conduct and permissible police conduct to make a broader, systemic critique of the double standards and loopholes that pervade constitutional criminal procedure. It further seeks to provide a starting place for reconciling an individual's rights under the Fourth, Fifth, and Sixth Amendments with permissive police practices.

As it now stands, police may openly trespass on fenced, private fields with posted warning signs, lie or fabricate evidence during an investigation to extract a confession, excuse a wrongful stop or arrest by claiming a mistake of law, and obtain warrantless access to information shared with entrusted businesses, though such information is ordinarily protected against public disclosure. By allowing these practices, the Court, at the expense of privacy and other rights, endorses acts for which members of the public would be criminally sanctioned.

The perpetuation of these double standards, loopholes, and asymmetries can trigger serious unintended consequences. Cognitive dissonance can result when individuals discover that their expectations of the law conflict with its actual operation and when their expectations of privacy and other rights are

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consequently upended. To remedy the cognitive dissonance, a person might retreat into isolation. This retreat can negatively impact social capital, or the benefit that accrues from networking and social interactions. Moreover, as individuals discover the double standards and loopholes afforded to police, they may perceive the criminal justice system as unfair and lose trust in the laws, police, and, ultimately, the government's legitimacy—which could itself culminate in disobedience of laws.

Therefore, this Article proposes an elegant, easily administrable rule: the Court should cease to privilege these asymmetries over individual rights and recalibrate doctrinal police policies to conform to societal norms and public expectations. The courts, governmental bodies, and law enforcement entities should eliminate these asymmetries to secure the public's trust and confidence.

INTRODUCTION

The expression "do as I say, not as I do" might be appropriate for parenting, but it has no place in police-public relationships. The United States Supreme Court, however, has effectively endorsed this expression for the police by establishing the open fields, third party, and mistake of law doctrines and allowing deceptive police practices under constitutional law.

This Article highlights and examines four asymmetries found in criminal procedure, aiming to present a broader critique of the systemic loopholes that pervade criminal procedure and create the perception that the police are above the law.

Part I identifies four asymmetries, consisting of double standards and loopholes: the open fields doctrine, use of police deception, mistake of law doctrine, and third party doctrine. First, when laypersons see fences, walls, or postings demarcating private property, they must heed those signs lest they be prosecuted for trespassing on another person's property, including an open field.[1] Police officers, however, may trespass with impunity on private fields.[2]

Second, a private citizen may be prosecuted for lying to officers during an investigation.[3] Yet, officers may lie to the suspect—even to elicit a confession.[4] While the Constitution protects persons from physical and psychological coercion exerted by police, the Court has not interpreted it to protect against deceptive police practices that may be deployed during any stage of an investigation.[5]

Third, U.S. constitutional law and criminal law ironically impose a higher standard on the public to know the law than on police officers to know the law.[6] A layperson may not use ignorance of the law to escape criminal liability or rely upon his or her own interpretation of the law as a basis for establishing a mistake of law defense.[7] But officers are allowed to excuse their ignorance of the law and may even justify their errors by asserting a claim of reasonable mistake of law.[8]

Lastly, laypersons expect their information to be kept private and confidential when given to third parties for a legitimate business purpose.[9] But the third party doctrine overrides any expectation of privacy by allowing officers to access the information entrusted to third parties, including businesses, without showing probable cause or obtaining a warrant.[10] Disclosure of information may even be compelled through a subpoena, over the third party's protests.[11]

Part II argues that these asymmetries have the potential to cause serious unintended consequences. One concern lies with the cognitive dissonance that might

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1. *See, e.g.*, ALA. CODE §§ 13A-7-1, 13A-7-4 (2022); ARK. CODE ANN. § 5-39-203 (West 2022); LA. STAT. ANN. § 14:63 (2021); CAL. PENAL CODE § 602 (West 2022); FLA. STAT. ANN. § 810.09 (West 2022); KY. REV. STAT. ANN. §§ 511.070(1), 511.080, 511.090(4) (West 2022); MASS. GEN. LAWS ANN. ch. 266, § 120 (West 2022); ME. REV. STAT. ANN. tit. 17-A, § 402(1)(C) (2022); OHIO REV. CODE ANN. § 2911.21 (West 2022); TENN. CODE ANN. § 39-14-405 (West 2022).

2. *See* Oliver v. United States, 466 U.S. 170 (1984); United States v. Dunn, 480 U.S. 294 (1987).

3. *See, e.g.*, 18 U.S.C. § 1001.

4. *See* Frazier v. Cupp, 394 U.S. 731 (1969).

5. *Id.*

6. Eang L. Ngov, *Police Ignorance and Mistake of Law Under the Fourth Amendment*, 14 STAN. J. C.R. & C.L. 165, 177–78 (2018).

7. *See, e.g.*, People v. Marrero, 507 N.E.2d 1068 (N.Y. 1987).

8. *See* Heien v. North Carolina, 574 U.S. 54, 57 (2014).

9. Eang L. Ngov, More Than Friends: Recognizing Dichotomous Relationships in the Third Party Doctrine (Feb. 13, 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4357446.

10. *See* United States v. Miller, 425 U.S. 435 (1976); Smith v. Maryland, 442 U.S. 735 (1979).

11. *See, e.g., Miller*, 425 U.S. at 437.

arise from the asymmetries. Cognitive dissonance is a psychological discomfort that occurs when an individual holds two inconsistent thoughts or acts in a manner inconsistent with the individual's beliefs.[12] Asymmetries can cause cognitive dissonance when laypersons learn that what they believe to be true about the law is not in fact true.[13] For example, individuals may discover that the open fields doctrine disregards the privacy and property rights of landowners.[14] The third party doctrine may similarly upend privacy expectations and cause laypersons to be reluctant to share information with others, though they must do so to function in modern society.[15]

To cope with cognitive dissonance, individuals may employ several mechanisms or strategies, including altering their thinking, rejecting the contradictory information, and retreating into isolation.[16] When people retreat, they isolate themselves by reducing their interactions with others.[17] Isolation reduces social networks, which in turn reduces the benefits that accrue from social networks.[18] Consequently, isolation caused by cognitive dissonance may harm both personal and societal growth.[19]

Asymmetries may also result in the withdrawal of public trust in the government and a diminished perception of the government's fairness and corresponding legitimacy.[20] Studies show that a person's perception of fairness is dependent upon the process or procedures afforded to the individual.[21] If the process, procedures, or rules are fair, a person is more likely to agree that the result is fair, regardless of whether negative outcomes occur.[22] Because there is a special set of rules for law enforcement that is more forgiving or lenient than those imposed on laypersons, the asymmetries create the risk that the public will perceive the criminal justice process as unfair.[23] If the members of the public believe law enforcement entities are not held to the same standards as laypersons, they are likely to reject the criminal justice system for supporting such hypocrisies. In the end, this rejection of the criminal justice and legal systems begets lawlessness.[24]

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12. *See generally* Elliot Aronson, *Back to the Future: Retrospective Review of Leon Festinger's "A Theory of Cognitive Dissonance*," 110 AM. J. PSYCH. 127 (1997).

13. J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105, 144 (1993).

14. *See infra* Part II.A.

15. *Id.*

16. *Id.*

17. *Id.*

18. *See infra* Part II.B.

19. *Id.*

20. *See infra* Part II.C.

21. Eang Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 TENN. L. REV. 235, 278 (2009).

22. *Id.*

23. *Id.*

24. Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, 81 B.U. L. REV. 361, 391 (2001).

Therefore, it is imperative to resolve the problems emanating from the legal asymmetries. Part III of this article proposes that courts, state and local governments, and law enforcement entities eliminate the double standards and loopholes by conforming police practices to the public's expectations and norms.[25] If the police take action to operate within the boundaries of public norms, they may begin to restore their legitimacy and regain public trust.[26] Additionally, if the same standards are imposed on officers as are imposed on the public, officers and courts may gain clarity as to the permissible boundaries of police conduct.[27] Finally, recognizing the concern that changes in police practices related to the asymmetries could hamper crime fighting, this Article argues that elimination of the double standards and loopholes might instead facilitate the apprehension of criminals, and that regardless, crime fighting should not be achieved at the expense of individual rights.[28]

I. INSTANCES OF CRIMINAL PROCEDURE ASYMMETRIES

For ease, this Article will refer to the double standards, inconsistencies, and loopholes collectively as asymmetries. First, the Article acknowledges that there are many aspects of an officer's duties for which the officer would need to be given special privileges beyond what is afforded to the layperson. For example, an officer may need to run a red light in pursuit of a suspect. This Article does not argue that all duties and sanctions imposed on laypersons should be equally imposed on officers or that officers should be deprived of special privileges necessary to their duties. Rather, this Article focuses on the negative impact that asymmetries have on countervailing individual rights. The purpose of this Article is to highlight four notable flaws in constitutional criminal procedure where asymmetries strike at the heart of procedural fairness or equity. These areas have the potential to cause grave consequences, but they can be easily addressed by equalizing the standards for laypersons and officers.

A. Trespass and Open Fields

The first asymmetry concerns trespass. It is common knowledge that members of the public can face criminal and civil liability when they trespass onto private property, whether it be a structure or open land.[29] For example, in Alabama, anyone who "enters or remains unlawfully in or upon premises when he is not licensed, invited or privileged to do so" has committed a third degree criminal

25. *See infra* Part III.A.
26. *See infra* Part III.B.1.
27. *See infra* Part III.B.2.
28. *See infra* Part III.B.3.
29. Louisiana prohibits unauthorized persons from trespassing on movable or unmovable property but provides an exception for "a duly commissioned law enforcement officer in the performance of his duties" and other government personnel. LA. STAT. ANN. § 14:63 (2021).

trespass if the intruder has personally been given notice of trespass or if a trespass notice is posted conspicuously.[30] Arkansas similarly prohibits a person from unlawfully entering or remaining on a premise, classifying such acts as criminal misdemeanors.[31] In California, individuals who willfully remain on various forms of property may be found guilty of criminal trespass, punishable with up to one year imprisonment.[32] Florida law provides that a person who unlawfully enters or remains on land where notice against trespassing is given through communication, posting, fencing, or cultivation may be prosecuted for a first degree misdemeanor.[33] Likewise, it is a federal crime to knowingly enter or remain on property when notice is provided by actual communication, posting, or fencing.[34]

These legal repercussions against trespass signal the significant privacy interests accorded to private property and are asymmetrical to the open fields doctrine, which permits police trespasses onto private property. "[O]ne of the purposes of the law of real property (and specifically the law of criminal trespass . . .) is to define and enforce privacy interests—to empower some people to make whatever use they wish of certain tracts of land without fear that other people will intrude upon their activities."[35] The open fields doctrine developed through Fourth Amendment jurisprudence, however, invites officers to bypass "no trespassing" signs, fences, and gates erected by owners and to openly trespass on privately owned fields without a warrant because such actions do not constitute a Fourth Amendment search under U.S. Supreme Court case law. Indeed, the Court has held that private property need not be open or a field for it to fall within the open fields doctrine.[36]

The open fields doctrine was first articulated in *Hester v. United States*, where revenue officers entered private land to examine jugs of illegal whiskey.[37] Justice Holmes, writing for the Court, summarily dispensed with the defendant's claim that the

30. ALA. CODE §§ 13A-7-1, 13A-7-4 (2022) (internal quotations omitted).

31. ARK. CODE ANN. § 5-39-203 (West 2022).

32. CAL. PENAL CODE § 602 (West 2022).

33. FLA. STAT. ANN. § 810.09 (West 2022). Additionally, under Kentucky law, a criminal trespass occurs when a person knowingly enters land that is fenced or otherwise enclosed or enters unenclosed land with conspicuously posted signs that exclude the public. KY. REV. STAT. ANN. §§ 511.070(1), 511.080, 511.090(4) (West 2022); Oliver v. United States, 466 U.S. 170, 190 (1984) (Marshall, J., dissenting). Similarly, in Maine, it is a crime to intrude upon enclosed or fenced property or any land with reasonably visible signs posted that forbid entry or that comply with state law. ME. REV. STAT. ANN. tit. 17-A, § 402(1)(C) (2022); *Oliver*, 466 U.S. at 190–91 (Marshall, J., dissenting). Massachusetts punishes unauthorized entry on land with up to thirty days imprisonment. MASS. GEN. LAWS ANN. ch. 266, § 120 (West 2022). Knowingly entering or remaining on land without authorization is punishable as a fourth degree or first-degree misdemeanor trespass in Ohio. OHIO REV. CODE ANN. § 2911.21 (West 2022). And in Tennessee, a person commits a criminal trespass by unlawful entry or remaining on property when the owner has posted signs or painted trees with purple marks in accordance with state law. TENN. CODE ANN. § 39-14-405 (West 2022).

34. 25 C.F.R § 11.411 (2022).

35. Oliver v. United States, 466 U.S. 170, 190 n.10 (1984) (Marshall, J., dissenting) (internal citations omitted).

36. *Id.* at 180 n.11 (majority opinion).

37. Hester v. United States, 265 U.S. 57, 58 (1924).

officers' warrantless entry on private land violated the Fourth Amendment by proclaiming that "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open fields. The distinction . . . is as old as the common law."[38] Without any explanation for his proclamation, Justice Holmes merely cited to Blackstone's Commentaries.[39]

Sixty years later, in *Oliver v. United States*, the Court expounded upon the open fields doctrine.[40] In *Oliver*, the Court upheld an officer's warrantless entry on private land by invoking Blackstone's Commentaries and Justice Holmes:

> As Justice Holmes, writing for the Court observed in *Hester*, the common law distinguished "open fields" from the "curtilage," the land immediately surrounding and associated with the home. The distinction implies that only the curtilage, not the neighboring open fields, warrants the Fourth Amendment protections that attach to the home. At common law, the curtilage is the area to which extends the intimate activity associated with the "sanctity of a man's home and the privacies of life," and therefore has been considered part of home itself for Fourth Amendment purposes.[41]

The *Oliver* Court relied solely upon *Hester* and Blackstone's Commentaries cited therein to distinguish curtilage, which is protected by the Fourth Amendment, from unprotected open fields. But most early American courts found Blackstone's definition of curtilage ill-fitting for the American landscape and recognized that domestic pursuits revolving around the home included commercial or agricultural endeavors that encompassed structures for livestock and agricultural production and fields.[42] *Oliver* essentially precluded protections for agricultural activities that once were "at the heart of the domestic economy of the family in the nineteenth century."[43]

Subsequent cases would come to rely on *Hester* and *Oliver* for the distinction between curtilage and open fields. In *United States v. Dunn*, the Court upheld federal agents' warrantless intrusion onto private land that had multiple layers of fencing.[44] The defendant took every effort to keep out intruders by fencing his entire 198 acres with a perimeter fence.[45] Within the perimeter fence, the ranch home was set back a half mile from the public road.[46] The defendant also installed an interior fence enclosing the house and greenhouse.[47] Two barns were situated inside the perimeter fence and fifty yards from the interior fence.[48] The defendant

38. *Id.* at 59.
39. *See id.* (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *223, *225–26).
40. *See* 466 U.S. 170 (1984).
41. *Id.* at 180 (internal citation omitted).
42. *See* Anna Lvovsky, *Fourth Amendment Moralism*, 166 U. PA. L. REV. 1189, 1214–17 (2018).
43. *Id.* at 1217.
44. United States v. Dunn, 480 U.S. 294, 297 (1987).
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*

installed three additional layers of fencing, consisting of barb wire and wooden fencing, to protect the barns against intrusion.[49] On three separate occasions, the officers crossed all barriers erected by the defendant to look into the barns.[50] Despite the officers' repeated trespasses, the Court affirmed *Hester* and *Oliver*, concluding that the officers did not violate the Fourth Amendment because open fields are excluded from constitutional protection.[51]

But the Court erred in *Hester*, *Oliver*, and *Dunn* by relying on Blackstone for the proposition that the Fourth Amendment does not extend to open fields.[52] In the cited Commentaries, Blackstone actually sought to define the elements of *burglary* by stating that "no distant barn, warehouse, or the like, are under the same privileges, nor looked upon as a man's castle of defence"[53] as a mansion-house or dwelling house, because breaking into a distant barn or warehouse at night does not instill in the owner "the abundant terror" that naturally comes with "nocturnal housebreaking."[54]

It is thus faulty logic for *Hester*, *Oliver*, and *Dunn* to conclude that Blackstone's Commentaries reflect a statement of the law on expectations of privacy or the reach of Fourth Amendment protection.[55] Blackstone merely sought to distinguish what suffices as a dwelling for a burglary charge: "And if the barn, stable, or warehouse, be parcel of the mansion-house and within the common fence, though not under the same roof or contiguous, a burglary may be committed therein; for the capital house protects and privileges all its branches and appurtenants, if within the curtilage or homestall."[56] When Blackstone explained the ambit of curtilage for burglary, he was concerned with situations "when sleep has disarmed the owner, and rendered his castle defenceless."[57] To that end, it makes sense that a distant barn or warehouse is not considered within the curtilage of the home to satisfy the dwelling element for purposes of defining burglary.[58] But how curtilage is defined for a

49. *Id.* at 297–98.

50. *Id.*

51. *Id.* at 300–03.

52. For additional critiques of the Court's reliance on *Hester* and Blackstone in these cases, see Brief of Institute for Justice as Amicus Curiae in Support of Petitioner, Collins v. Virginia, 138 S. Ct. 1663 (2017) (No. 16-1027), 2017 WL 5624688.

53. 4 WILLIAM BLACKSTONE, COMMENTARIES *224–25.

54. *Id.* at *223.

55. First, the Court's statement in *Oliver* is misleading: "As Justice Holmes, writing for the Court, observed in *Hester*, the common law distinguished 'open fields' from the 'curtilage,' the land immediately surrounding and associated with the home." *Oliver*, 466 U.S. at 180 (internal citations omitted). The quotation marks around curtilage imply that *Hester* distinguished open fields from curtilage, but *Hester* does not mention curtilage. *See* Brendan Peters, Note, *Fourth Amendment Yard Work: Curtilage's Mow-Line Rule*, 56 STAN. L. REV. 943, 956 n.84 (2004). Second, Blackstone did not exclude fields from falling within curtilage or even mention fields in the cited Commentaries.

56. BLACKSTONE, *supra* note 53, at *225.

57. *Id.* at *224.

58. If one were to use Blackstone's definition of curtilage for burglary as a basis for determining Fourth Amendment curtilage and violations, then one should accordingly conclude that vacant homes are not afforded any Fourth Amendment protections because Blackstone excluded them as dwellings or curtilage. Blackstone

burglary offense should not dictate how curtilage is defined for Fourth Amendment rights.

Moreover, the Court's reliance on Blackstone to equate curtilage for a burglary charge with curtilage for a Fourth Amendment violation further undermines its open fields doctrine because the Court employed his Commentaries selectively.

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explained that "breaking open of houses wherein no man resides, and which therefore for the time being are not mansion-houses, [is not] attended with the same circumstances of midnight terror" and cannot constitute burglary. BLACKSTONE, *supra* note 53, at *225. Additionally, according to Blackstone, an outhouse unconnected with the dwelling house that is merely eight feet away does not constitute part of the dwelling house or its curtilage for purposes of burglary. BLACKSTONE, *supra* note 53, at *225 n.3. And yet, the vacant home and detached outdoor bathroom near the home actually fall under the auspices of Fourth Amendment protection as curtilage. *See* Roberson v. United States, 165 F.2d 752, 754 (6th Cir. 1948) ("A home does not lose its character as a home because it may be temporarily unoccupied. The fact that a dwelling house may be unoccupied at the time of the search does not permit a search without a warrant. Nor does the constitutional provision limit its protection to a single house or home. It is not at all unusual for a man to own two different houses, each of which is used by him at intervals at his home.") (internal citations omitted); Whiting v. State, 885 A.2d. 785, 799 (Md. 2005) (commenting that to determine whether a "subjective expectation of privacy [is] objectively reasonable, . . . we look at the following factors to determine objective reasonableness: whether the individual owned, leased, controlled, lawfully occupied, or rightfully possessed the premises searched"); State v. Finnell, 685 N. E.2d 1267, 1271 (Ohio Ct. App. 1996) (holding that an owner of a vacant building had an objectively reasonable expectation of privacy under the Fourth Amendment and invalidating law authorizing warrantless searches of vacant buildings); Lvovsky, *supra* note 42, at 1210–11 ("Lower courts, for example, frequently extend generous Fourth Amendment rights in public bathrooms, even where those spaces carry significant risk of exposure.").

Similarly, Blackstone did not consider portions of a home that are leased to someone for a business to be within the confines of curtilage for a burglary charge:

> But if I hire a shop, parcel of another man's house, and work or trade in it, but never lie there; it is no dwelling house, nor can burglary be committed therein: for by the lease it is severed from the rest of the house, and therefore is not the dwelling house of him who occupies the other part; neither can I be said to dwell therein, when I never lie there.

BLACKSTONE, *supra* note 53, at *225–26. Blackstone's statement indicates that leasing part of a house would sever the rented portion, if no one sleeps there, from the protections of the dwelling house and its curtilage when considering whether a burglary has occurred, even if the rented portion is still physically part of the house. By the same logic employed by Justice Holmes in *Hester* and the Court in *Oliver*, if the rented portion of the house that is not used for slumber does not qualify as curtilage for burglary, it should not qualify as Fourth Amendment curtilage or be protected by the Fourth Amendment. But in fact, such spaces are constitutionally protected as curtilage, and even if they are outside of curtilage, they fall within the Fourth Amendment's protection. *See Whiting*, 885 A.2d at 794–95 (recognizing Fourth Amendment privacy expectations in leased spaces and spaces where a person has lawful control, despite the lack of ownership); United States v. Broadhurst, 805 F.2d 849, 854 n.7 (9th Cir. 1986) ("It is clear, however, that a structure need not be within the curtilage in order to have Fourth Amendment protection."); United States v. Hoffman, 677 F. Supp. 589, 596 (E.D. Wis. 1988) ("[A] person can have a protected expectation of privacy in buildings (i.e., barns, garages, boathouses, stables, etc.) that are located far outside the area of the curtilage of the home."). Likewise, while breaking into a shop is not burglary because it is not a dwelling or curtilage, breaking into a shop, absent exceptions to the warrant requirement, is in fact a Fourth Amendment violation. *Oliver*, 466 U.S. at 178 n.8 ("The Fourth Amendment's protection of offices and commercial buildings, in which there may be legitimate expectations of privacy, is also based upon societal expectations that have deep roots in the history of the Amendment."); United States v. Pichany, 687 F.2d 204, 209–10 (7th Cir. 1982) (invalidating officers' warrantless search of a warehouse); Brief of Institute for Justice, *supra* note 52, at 11–12 (citing protected warehouse in See v. City of Seattle, 387 U.S. 541 (1967); electrical and plumbing business in Marshall v. Barlow's Inc., 436 U.S. 307 (1978); and furniture store in Michigan v. Tyler, 436 U.S. 499 (1978)). Therefore, the Court's application of Blackstone's definition of curtilage for burglary is inapposite for defining Fourth Amendment curtilage and reasonable expectations of privacy.

Blackstone specified that "if the barn, stable, or warehouse, be parcel of the mansion-house, and with the *same common fence*, though not under the same roof or contiguous," it is within the home's curtilage.[59] But the Court ignored that the barns in *Dunn*—which were each surrounded by its own separate fence, enclosed together by another layer of fencing, and surrounded by a perimeter fence that also enclosed the house[60]—would have qualified as curtilage under Blackstone's literal words. Those barns were within the "same common fence" as the house. Moreover, when Blackstone identified the places protected from burglary, he wrote that burglary "may also be committed by *breaking the gates or walls* of a *town* in the night."[61] By the same token, the Fourth Amendment should protect people against officers breaking gates, walls, or fences to enter private land. Yet, when officers "crossed a pasture fence" in *Hester*,[62] disregarded the "locked gate with a 'No Trespassing' sign"[63] in *Oliver*, and crossed multiple layers of fencing in *Dunn*,[64] the Court dismissed these acts as mere trespasses onto open fields, unworthy of Fourth Amendment protection. Thus, officers suffer no Fourth Amendment consequences when they knowingly trespass onto private open fields, even when a fence or gate stands as a clear sign that passersby are unwelcome.

The open fields doctrine has turned private property into a form of public access free-for-all for law enforcement that even permits officers to damage property to gain access to open fields and has eviscerated the privacy one expects on one's own private land, particularly land that is fenced or posted. In *State v. Brady*, for instance, the officers damaged private property when they used their vehicle to "ram through one gate and cut the chain lock on another, [and] cut or cross posted fences."[65] The court did not give any thought to the damage caused and countenanced it by upholding the government acts under the open fields doctrine.[66] In its dismissive treatment of the harm caused by the officers, the court failed to recognize the distinct Fourth Amendment concerns: whether land is considered an open field is an entirely different issue than whether the government may damage private property to gain access to open fields or may trespass upon effects located on open fields.

United States v. Castleman demonstrates how lower courts have liberally applied the open fields doctrine. There, the Eighth Circuit permitted officers to

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59. BLACKSTONE, *supra* note 53, at *225 (emphasis added); *see also* C.S. Parnell, Annotation, *Burglary: Outbuildings or the Like as Part of "Dwelling House*," 43 A.L.R.2d 831, § 2 (1955) (explaining that in England, it was "necessary that the outbuilding be physically inclosed by the same wall or fence which inclosed the dwelling before the structure could be considered part or parcel of the dwelling so that one breaking into it with the necessary felonious intent would be punishable for the offense of burglary").

60. *Dunn*, 480 U.S. at 297.

61. BLACKSTONE, *supra* note 53, at *224 (first emphasis added).

62. *Oliver*, 466 U.S. at 194 n.18 (Marshall, J., dissenting).

63. *Id*. at 173.

64. *Dunn*, 480 U.S. at 297–98.

65. State v. Brady, 406 So. 2d 1093, 1094–95 (Fla. 1981), *judgment vacated in part, cert. dismissed in part sub nom*. Florida v. Brady, 467 U.S. 1201 (1984).

66. State v. Brady, 466 So. 2d 1064 (Fla. 1985); *see generally* Edward M. BuxBaum, Note, Florida v. Brady*: Can* Katz *Survive in Open Fields?*, 32 AM. U. L. REV. 921 (1983) (discussing *State v. Brady*).

open a trash bag and a tote that was secured by a lid and largely hidden under a tarp because the items were found in an area that the court determined to be an open field.[67] The Eighth Circuit reasoned that the defendant had no expectation of privacy in those items because he "put on no evidence of his possession or control of the bag, his historical use of the tote bag, or his ability or attempts to regulate access to it."[68] Despite that the defendant secured the area from outside intrusion by erecting fences and gates, the court further reasoned that if there was a "'theoretical possibility' that . . . animals or persons could access the item," then the defendant's expectations of privacy were unreasonable.[69]

The Eighth Circuit's reasoning was reminiscent of *California v. Greenwood*, where the U.S. Supreme Court held that the defendant had no expectation of privacy in an opaque trash bag deposited at the curb because it was considered abandoned property and "readily accessible to animals, children, scavengers, snoops, and other members of the public."[70] But the Eighth Circuit failed to recognize that the trash bag in *Greenwood* was considered abandoned property and the curb was *legally* accessible by the public. It also discounted the fact that Castleman had secured his trash bag and tote against public intrusion by installing a fence around the area, with a gate and posted signs.[71] Moreover, in *Castleman*, although the bag's and tote's exteriors might have been visible to the officers once the officers invaded the open field, their contents were not.[72]

Similarly, in *Conrad v. State*, the Wisconsin Supreme Court permitted an officer to enter the defendant's land and use a backhoe to dig through the ground under a rock pile in search of the defendant's wife's body after previously digging fourteen holes.[73] Despite recognizing that the officer "committed an outrageous trespass," the court held that the evidence of the deceased's body was admissible under the open fields doctrine, notwithstanding that it was concealed in the ground under a rock pile.[74] The court reasoned:

> Under the "open fields" doctrine, the fact that evidence is concealed or hidden is immaterial. The area is simply not within the protection of the Fourth Amendment. If the field where the body was found does not have constitutional protection, the fact that the sheriff, rather than observing the evidence that might have been in plain view, dug into the earth to find the body and committed a trespass in so doing does not confer protection.[75]

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67. United States v. Castleman, 795 F.3d 904, 914 (8th Cir. 2015).
68. *Id.* (internal citations omitted).
69. *Id.* at 913.
70. California v. Greenwood, 486 U.S. 35, 40 (1988).
71. *Castleman*, 795 F.3d at 914.
72. *Id.* at 920 (Kelly, J., concurring in part and dissenting in part).
73. Conrad v. State, 218 N.W.2d 252, 256–57 (Wis. 1974).
74. *Id.*
75. *Id.* at 257. *Contra* Husband v. Bryan, 946 F.2d 27, 29 (5th Cir. 1991) ("Neither this court nor the Supreme Court have extended the open fields doctrine to anything beyond observation searches.").

Conrad and *Castleman* demonstrate that the open fields doctrine is susceptible to abuse. At most, the open fields doctrine would only excuse an officer's initial trespass onto the land and would not permit additional trespasses conducted once the officer is present on the open field.[76] Courts' liberal use of the open fields doctrine not only disregards the privacy interests that people reasonably expect in their land, but it also disregards the privacy expectations in their possessions and items found on their land. It thereby opens the floodgates for police abuse by creating a double standard that allows both the initial trespass and subsequent trespasses once officers gain access to the land.

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76. Equally perplexing as *Castleman*, the court in *Hollingsworth v. Tennessee Wildlife Resources Agency* held that, pursuant to the open fields doctrine, Fish and Wildlife officers did not violate a landowner's Fourth Amendment rights when they entered the interior of the owner's land to install a surveillance camera on the owner's tree. 423 F. Supp. 3d 521, 524–25 (W.D. Tenn. 2019). More recently, the Tennessee Circuit Court has held such acts to be facially unconstitutional under the state constitution. Rainwaters v. Tenn. Wildlife Res. Agency, No. 20-CV-6, 2022 WL 912534 at *7 (Tenn. Cir. Ct. Mar. 22, 2022).

Some courts have erroneously allowed items found on open fields to be searched. The New Jersey Supreme Court, for example, has found that an officer's removal of a blanket that covered a vehicle parked in the defendant's rented garage did not constitute a search. *See, e.g.*, State v. Ball, 530 A.2d 833, 836–37 (N.J. Super. Ct. App. Div. 1987) ("We also conclude that the police officer did not conduct a 'search' within the meaning of the Fourth Amendment by simply removing the blanket which covered the engine area of the pickup truck."); State v. Bennett, No. A-5727-09T4, 2011 WL 6014431, at *21 (N.J. Super. Ct. App. Div. Dec. 5, 2011) (unpublished opinion) (similarly holding that lifting a blanket that covered a car suspected to have been involved in a serious crash was not a search). The court's decision not only rested on a misunderstanding of the plain view doctrine but also on a supernatural ability to read minds by presuming to know the defendant's intent for covering up the vehicle with a blanket: "[T]he apparent purpose of placing a blanket over an engine, which otherwise would be plainly visible, would be to protect it from the elements, not to shield it from public view," and therefore the officer violated no expectations of privacy by lifting the blanket. *Ball*, 530 A.2d at 837.

Some Arizona courts, while recognizing a defendant's expectation of privacy in the portion of the vehicle that is covered, have nevertheless held that lifting a car cover does not violate any reasonable expectation of privacy: "In lifting the car cover, the only thing that the officer exposed to his view was the exterior of the vehicle"; "an examination of the exterior of a vehicle does not constitute a [Fourth Amendment] search because the exterior of a vehicle is thrust into the public eye." State v. Allen, 166 P.3d 111, 115–16 (Ariz. Ct. App. 2007) (internal quotations omitted) (alterations in original). The courts relied on *New York v. Class*, where the U.S. Supreme Court upheld an officer's removal of papers that covered the Vehicle Identification Number (VIN), but it failed to recognize that the U.S. Supreme Court's holding rested narrowly on the regulations of automobiles and the VIN mandate. The Supreme Court reasoned, "[I]t is unreasonable to have an expectation of privacy in an object [the VIN] required by law to be located in a place ordinarily in plain view from the exterior of the automobile." New York v. Class, 475 U.S. 106, 114 (1986); Collins v. Commonwealth, 790 S.E.2d 611, 620 (Va. 2016), *rev'd and remanded sub nom.* Collins v. Virginia, 138 S. Ct. 1663 (2018) ("Officer Rhodes' stated purpose in lifting the tarp was not to determine whether the tarp covered a motorcycle, but rather to verify the identity of the partially covered motorcycle and record its VIN."). In doing so, courts like Arizona and New Jersey have mistakenly conflated the plain view and automobile exceptions with a rule that there is no societal expectation of privacy in lifting a car cover. *See* State v. Emmons, 386 N.E.2d 838, 842, 844–45 (Ohio Ct. App. 1978) (applying the automobile exception in *Carroll v. United States* to justify detectives' lifting tarps that covered stolen motorcycles in a private driveway). Consequently, courts have allowed officers, once they enter a premise not considered as curtilage, to conduct additional searches.

The Ninth Circuit, however, has appropriately curbed such conduct. In *United States v. $277,000.00 U.S. Currency*, the court held that an officer's lifting of opaque car covers was a search, which was unsupported by the need to obtain the VIN. 941 F.2d 898, 902 (9th Cir. 1991). The court reasoned, "Surely the careful balancing revealed in the *Class* opinion is not to be extended so as to permit a search of any parked vehicle without probable cause just because the VIN is obscured in some way." *Id.*

B. False Statements and Police Lies

The second asymmetry rests in the double standard applied to false statements made by laypersons and those made by officers during an investigation. State and federal laws punish individuals who make false statements to officers in the course of an investigation.[77] For example, Virginia punishes a "person who knowingly and willfully makes any materially false statement or representation to a law-enforcement officer or an animal control officer . . . who is in the course of conducting an investigation of a crime" with up to one year imprisonment and $2,500 fine.[78] Vermont's criminal statute similarly prohibits giving "false information to any law enforcement officer with purpose to implicate another or to deflect an investigation from the person or another person."[79] In Florida, a person who "knowingly and willfully gives false information to a law enforcement officer who is conducting a missing person or felony criminal investigation with the intent to mislead the officer or impede the investigation" risks imposition of up to one year imprisonment and $1,000 fine.[80]

Additionally, over 300 federal statutes proscribe deception.[81] For example, a federal statute criminalizes the obstruction of proceedings before departments, agencies, and committees, punishing anyone who "willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony . . . ."[82] Such a transgression is punishable by fine and imprisonment up to five years, or up to eight years if the crime involves terrorism.[83] The federal government, along with states, also prohibits false statements through perjury laws. Both perjured statements made under oath[84] and unsworn statements, such as documents containing false or misleading information,[85] may be prosecuted under federal law.[86]

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77. In addition to criminal repercussions, deception is prohibited through "the torts of deceit, negligent misrepresentation, nondisclosure, and defamation . . . ." Helen Norton, *The Government's Lies and the Constitution*, 91 IND. L.J. 73, 84 (2015) (quoting Gregory Klass, *Meaning, Purpose, and Cause in the Law of Deception*, 100 GEO. L.J. 449, 449 (2012)).

78. VA. CODE ANN. §§ 18.2-460, 18.2-11 (West 2018).

79. VT. STAT. ANN., tit. 13, § 1754 (West 2022).

80. FLA. STAT. ANN. §§ 775.082(4)(a), 775.083(1)(d), 837.055 (West 2021). Pennsylvania also prohibits false statements through its criminal code. 18 PA. STAT. AND CONS. STAT. ANN. § 4906 (West 2013).

81. Lisa Kern Griffin, *Criminal Lying, Prosecutorial Power, and Social Meaning*, 97 CALIF. L. REV. 1515, 1522 (2009).

82. 18 U.S.C. § 1505.

83. *Id.*

84. *See, e.g.*, 18 U.S.C. § 1621 (2006).

85. For a discussion about the differences between lying, misleading, and deception, see Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 HASTINGS L.J. 157 (2001).

86. *See, e.g.*, 18 U.S.C. § 1746 (2006) (criminalizing false or misleading statements made to the IRS); *see generally* CHARLES DOYLE, CONG. RSCH. SERV., RL98-808, FALSE STATEMENTS AND PERJURY: AN OVERVIEW OF FEDERAL CRIMINAL LAW (2018) (discussing federal false statement and perjury statutes); *see also* Harvey

Additionally, the federal government has, among its most potent arsenal, the federal false statement statute codified in 18 U.S.C. § 1001, which provides the following:

> (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—
>
> (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
>
> (2) makes any materially false, fictitious, or fraudulent statement or representation; or
>
> (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
>
> shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.[87]

The false statement statute, § 1001, provides even harsher penalties than those imposed for perjury.[88] Although the purpose of § 1001 was "to protect the Government from the affirmative, aggressive and voluntary actions of persons who take the initiative; and to protect the Government from being the victim of some positive statement which has the tendency and effect of perverting normal and proper governmental activities and functions,"[89] a person may be prosecuted under § 1001 even when the individual did not intend for governmental reliance on the statement or for governmental functions to be perverted.[90] For example, a defendant was prosecuted in a federal district court for leaving a note as a practical joke, the substance of which no one believed was true.[91] Moreover, in contrast with the requirement that one must show that a deceptive act caused an actual harm to recover civil damages,[92] the government may pursue § 1001 criminal liability even

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Gilmore, *When We Lie to the Government, It's a Crime, but When the Government Lies to Us, It's . . .* Constitutional?, 30 BUFF. PUB. INT. L.J. 61, 64 (2011–2012) (discussing application of perjury statute to tax documents).

87. For a history of the federal false statement statute, see Green, *supra* note 85, at 191–92; William J. Schwartz, Note, *Fairness in Criminal Investigations Under the Federal False Statement Statute*, 77 COLUM. L. REV. 316, 317–18 (1977).

88. Stephen Michael Everhart, *Can You Lie to the Government and Get Away with It? The Exculpatory-No Defense Under 18 U.S.C. § 1001*, 99 W. VA. L. REV. 687, 710 (1997).

89. Brogan v. United States, 522 U.S. 398, 413 (1998) (Ginsburg, J., concurring) (quoting Paternostro v. United States, 311 F.2d 298, 302 (5th Cir. 1962)).

90. Steven R. Morrison, *When Is Lying Illegal? When Should It Be? A Critical Analysis of the Federal False Statements Act*, 43 J. MARSHALL L. REV. 111, 118 (2009).

91. United States v. Pickett, 209 F. Supp. 2d 84, 87–88 (D.D.C. 2002).

92. Bonnie Trunley, *A Double Standard in the Law of Deception: When Lies to the Government are Penalized and Lies by the Government are Protected*, 55 AM. CRIM. L. REV. 487, 488 (2018).

where the lies are immaterial or where officers do not rely upon them, have never heard the statements, or know the falsity of the statements.[93] The power of the federal government to employ § 1001 is not limited to materially false statements that impact an investigation[94] but also extends to instances of nondisclosure.[95] Omissions or "incomplete statements that merely mislead" also fall within the reach of § 1001.[96]

Additionally, the false statement statute's expansive breadth covers instances when a criminal defendant asserts an exculpatory "no" or false denial in response to questions during an investigation. In *Brogan v. United States*, the defendant, a union officer, was charged for accepting money from a company whose employees were represented by the defendant's union.[97] Federal agents asked the defendant if he received any money from the company when he was a union officer, and the defendant answered "no."[98] The agents already knew that the defendant's denial was false because they immediately told the defendant that they were in possession of records that proved otherwise.[99] The Court concluded that false denials of wrongdoing fell within the federal false statement statute because the statute prohibited any "false statement 'of whatever kind . . . .'"[100]

False denials, however, seldom cause harm because often the officers already know that the statement is untrue and want to catch the defendant in telling a lie.[101] On the other hand, there is great potential for harm caused by false statement prosecutions.

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93. Morrison, *supra* note 90, at 142–43.

94. Everhart, *supra* note 88, at 713 (defining materiality as "having a natural tendency or is capable of influencing the decision of the decision-maker").

95. Griffin, *supra* note 81, at 1522–23.

96. *Id.* at 1529–30.

97. 522 U.S. 398, 399–400 (1998).

98. *Id.*

99. *Id.* at 400.

100. *Id.* (internal citations omitted). Interestingly, it is questionable whether it is constitutionally appropriate to prosecute false denials, as they may be a product of a self-preservation reflex. One scholar suggests that self-denials are a manifestation of the right to remain silent:

> Although often associated with a narrow constitutional right of silence, the right of self-preservation is better understood as linked to a broader right against self-incrimination. That the right to self-preservation might include a right to falsely deny seems particularly plausible in cases in which remaining silent in the face of accusatory questioning would be tantamount to admitting guilt. . . .

Green, *supra* note 85, at 172–73. From this conception, it is plausible that false denials have a different moral dimension than other lies—that they can be "morally excused," if not justified. *Id.* at 160; *see also* Griffin, *supra* note 81, at 1547 (characterizing exculpatory no responses as "harmless self-preserving falsehoods"). Therefore, prosecuting false denials might contravene "the 'spirit' of the Fifth Amendment, by placing a suspect in the 'cruel trilemma' of admitting guilt (and incriminating himself in the underlying crime), remaining silent (and being held in contempt), or falsely denying guilt (and facing prosecution for perjury or false statements)." Green, *supra* note 85, at 199.

101. Griffin, *supra* note 81, at 1534 ("As the Ninth Circuit has recognized, a dishonest response in a confrontation with a suspect does not deter the agency because a competent investigator 'will anticipate that the defendant will make exculpatory statements.'" (quoting United States v. Medina de Perez, 799 F.2d 540, 546 (9th Cir. 1986))).

> [F]alse statement charges too often insulate the prosecution's case from scrutiny. Rather than increasing the flow of information, false statement charges can truncate investigations and lead to coarse charging decisions. They may result in more plea bargains and thereby mitigate trial risk, avert any challenge to the underlying case, and preclude meaningful judicial oversight.[102]

As Justice Ginsburg pointed out, an interpretation of § 1001 that encompasses an exculpatory no "arms Government agents with authority not simply to apprehend lawbreakers, but to generate felonies, crimes of a kind that only a Government officer could prompt."[103] False statement violations can easily occur in informal settings in which the officer casually brings up a conversation that elicits an unsuspecting person's response without being first cautioned about possible criminal sanctions for false statements.[104] This tactic provides the government with, at minimum, a federal charge for false statements, even if the government fails to prove the target offense.[105] False statements cannot exist without law enforcement's involvement, and often the circumstances giving rise to a false statement are orchestrated by the government.[106]

Originally conceived for preservation of government interests and prevention of loss of information, the false statement statute has become unmoored from that purpose by becoming an instrument to prosecute "otherwise unreachable defendants or forcing cooperation with an inquiry."[107] Section 1001 is such a powerful tool that it even allows the government to prosecute cases that otherwise could not be pursued due to the statute of limitations expiring.[108] An investigator simply revives the case by asking the defendant about the initial misconduct and procuring a false denial, which then constitutes a fresh new crime.[109]

In contrast to the hefty sanctions that can be imposed against laypersons for lying, law enforcement personnel are permitted to engage in deception during their investigations, including the use of blatant lies.[110] To be clear, an officer does not receive immunity from prosecution for making a false statement when that officer

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102. *Id*. at 1524.

103. *Brogan*, 522 U.S. at 409 (Ginsburg, J., concurring in the judgment).

104. Griffin, *supra* note 81, at 1522–23.

105. Morrison, *supra* note 90, at 138.

106. As Professor Lisa Kern Griffin explains,

> [F]alse statements are not actionable, in the way that either pretext crimes or infractions that create investigative opportunity would be, absent interactions with law enforcement. Because dishonesty is pervasive and derives its entire criminal content under § 1001 from contact with the government, the government exercises some control over when and whether an offense is committed.

Griffin, *supra* note 81, at 1518.

107. *Id.*

108. *Id*. at 1526.

109. *Id.*

110. Police deception is permitted in all states. Kate Elizabeth Queram, *States Look to Ban Police from Lying During Interrogations*, ROUTE FIFTY (June 1, 2021), https://www.newsbreak.com/news/2268344142129/states-look-to-ban-police-from-lying-during-interrogations.

is the *subject* of an investigation.[111] Rather, the asymmetry arises when officers are permitted to use deception against a private citizen during their investigation, even where that private citizen would be prohibited from making false or misleading statements in the very investigation.

Short of coercion,[112] law enforcement officers are given a license to lie about topics that run the gamut of the investigation.[113] Permissible deceptive police practices include lying about witnesses' statements,[114] fingerprints,[115] blood and other DNA evidence,[116] and a co-suspect's confession or implication of the defendant.[117]

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111. In *United States v. Pickett*, a capitol police officer was prosecuted under § 1001 for leaving a note that was intended as a practical joke. 209 F. Supp. 2d 84 (D.D.C. 2002). Also, in *United States v. Moyer*, the prosecution charged local police officers with violating § 1001 for making false statements to the FBI in relation to the officers' investigation of a criminal case. 674 F.3d 192 (3d Cir. 2012)*; see also* Louis M. Natali, Jr., *Can We Handle the Truth?*, 85 TEMP. L. REV. 839, 858–59 (2013) (discussing the cases).

112. The only restraint on police deception is physical or psychological coercion that overbears a suspect's will, but the Court has rarely found instances of psychological coercion that vitiates a suspect's confession. Coercion is prohibited because when it is used to extract confessions, it

> offend[s] an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.

Rogers v. Richmond, 365 U.S. 534, 541 (1961).

Spano v. New York is one of the few cases of psychological coercion. 360 U.S. 315 (1959). In *Spano*, after the defendant had been severely beaten by a professional boxer in a bar brawl, he returned to the bar in a dazed state and shot the boxer. *Id.* at 316. The defendant later reached out to Officer Bruno, his longtime friend for the past eight or ten years and a "fledgling" police officer, to confide in the officer what he had done. *Id.* at 317. When the defendant was in police custody and refused to make any statements during the interrogation, the police department instructed that Bruno falsely convey to the defendant that his job was at risk because the defendant "had gotten him 'in a lot of trouble,' and that [Bruno] should seek to extract sympathy from the defendant for Bruno's pregnant wife and three children." *Id.* at 319. The Court invalidated the defendant's confession because his "will was overborne by official pressure, fatigue and sympathy falsely aroused after considering all the facts in their post-indictment setting." *Id.* at 323. The "foreign-born" defendant, who had limited education, a history of mental illness, and no criminal history or experience with interrogations, was subjected to eight consecutive hours of interrogation by fourteen individuals, and after his multiple requests, was refused the opportunity to consult his counsel, whom he had retained. *Id.* at 321–23.

Also, in *Lynumn v. Illinois*, the Court found that the defendant's will was overborne when she confessed because the police convinced her that she needed to "cooperate" or otherwise her financial assistance would be terminated and that her children would be removed from her care. 372 U.S. 528, 533 (1963).

113. *See generally* Geoffrey P. Alpert & Jeffrey J. Noble, *Lies, True Lies, and Conscious Deception: Police Officers and the Truth*, POLICE Q. ONLINE (Nov. 17, 2008) (discussing types of police deception), https://www.prisonlegalnews.org/media/publications/police_quarterly_lies_true_lies_and_conscious_deception_2008.pdf.

114. *See, e.g.*, Ledbetter v. Edwards, 35 F.3d 1062, 1066–70 (6th Cir. 1994); State v. Register, 476 S.E.2d 153, 158 (S.C. 1996).

115. *See, e.g.*, Lucero v. Kerby, 133 F.3d 1299, 1310–11 (10th Cir. 1998); *Ledbetter*, 35 F.3d at 1066–70; States v. Davila, 908 P.2d 581, 585 (Idaho Ct. App. 1995) (immigration officers lying about the suspect's fingerprints being found on a bag of drugs).

116. *Register*, 476 S.E.2d at 158.

117. Frazier v. Cupp, 394 U.S. 731, 737 (1969); State v. Galli, 967 P.2d 930, 936 (Utah 1998); State v. Sanford, 569 So. 2d 147, 152 (La. Ct. App. 1990).

Courts have also permitted police lies about finding the suspect's shoe print at the scene of the crime, physical evidence connecting a suspect to a rape, videotape evidence of arson, and the presence of bruising on a victim and about the existence of a medical examiner's report determining that the suspect's son's death was

Not only are police lies permitted during an investigation, but courts have also condoned police *fabrication* of evidence. For example, police may create false ballistic reports[118] and DNA results.[119]

Also, officers are permitted to use multiple layers of deception in a case. For example, in *United States v. Haynes*, detectives created a fake ballistic report that showed a match with the defendant's gun, staged an interview room with boxes with the defendant's name on them to create the impression that the police were conducting an extensive investigation, and lied about finding the defendant's footprint at the scene.[120] In *State v. Register*, agents employed several layers of deception, including falsely telling the defendant that a witness had seen him with the victim, that his tires and shoes matched the prints at the crime scene, and that they had DNA evidence establishing his guilt.[121] The Court has also upheld police deception by withholding from the defendant information about an attorney's attempts to contact the defendant after the attorney was retained by the defendant's family.[122]

Through these various modalities of deception, courts have institutionalized the practice of governmental lies. In doing so, courts have endorsed an untenable double standard because "[l]ying of many varieties is often socially transgressive even if not prohibited by any formal stricture, such as a legal or religious imperative. Yet the practice of lying becomes more problematic if it is formally prohibited by the very system in which it takes place."[123]

C. Ignorance of the Law and Mistake of Law

The third asymmetry arises when laypersons and law enforcement are held to different standards for their knowledge of the law, or lack thereof.[124] Research reveals that laypersons have little knowledge of the law.[125] Yet, with regards to

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premeditated. United States v. Haynes, 26 F. App'x 123, 131, 134 (4th Cir. 2001); United States v. Bell, 367 F.3d 452, 462 (5th Cir. 2004); State v. Critt, 554 N.W.2d 93, 96 (Minn. Ct. App. 1996) (describing an officer's lie to a seventeen-year-old suspect that there was a videotape of the suspect starting a fire at school); State v. Marini, 638 A.2d 507, 512–13 (R.I. 1994); State v. Bunting, 51 P.3d 37, 44 (Utah 2002); State v. Kelekolio, 849 P.2d 58, 71–74 (Haw. 1993).

118. *Haynes*, 26 F. App'x at 129, 134.

119. United States v. Welch, No. 93-4043, 1994 WL 514522, at *4–5 (6th Cir. 1994) (per curiam) (creating false DNA report as evidence that the suspect's children could not have died from Sudden Infant Death Syndrome).

120. *Haynes*, 26 F. App'x at 129, 134.

121. State v. Register, 476 S.E.2d 153, 158 (S.C. 1996).

122. Moran v. Burbine, 475 U.S. 412, 422 (1986).

123. Julia Simon-Kerr, *Systemic Lying*, 56 WM. & MARY L. REV. 2175, 2182 (2015).

124. For additional critique of the mistake of law defense, see Ngov, *supra* note 6.

125. Researchers surveyed people's knowledge about the law and their confidence level for several topics and discovered through the study that there is

> no empirical support for the general presumption that people know what the law is. In fact, legal knowledge was imperfect for every surveyed subject. . . . [F]or at least some category of law, the reality of the legal rule was unrelated to people's fantasy of the law. . . . [W]hen people got the law wrong, they were optimistically wrong about two-thirds of the time, assuming that the law comported with their normative preferences.

their knowledge of the law, laypersons are held to a higher standard than police officers.

The maxim "ignorance of the law is no excuse" is strictly enforced against laypersons,[126] despite the impossibility that the average person could know all the statutes, ordinances, and regulations promulgated in a state, as well as all federal statutes and agency regulations. Even a legislator, judge, or lawyer could not conceivably know all laws, even if the legal system "presumes" them to at least know the law relevant to them, as demonstrated by *State v. King*.[127] There, the defendant was charged with possession of phentermine, which she did not know was a controlled substance.[128] But she was perhaps not the only one ignorant of phentermine being on the controlled substance list. The state legislature had added phentermine to the controlled substance list via a statute just a day before the defendant was charged and set the effective date of that amendment three months from its passage, seemingly unaware of the fact that phentermine had already been listed as a controlled substance via a regulation for over a year and thus was already prohibited at the time.[129] Regardless of whether the entire legislative body of Minnesota was ignorant of the controlled substance laws, the defendant was still convicted with no consideration given to her ignorance.[130]

Additionally, laypersons claiming a mistake of law as a defense against criminal liability have a high burden.

> A mistake of law defense is recognized under common law and the Model Penal Code if a defendant reasonably relies on an official statement of the law in a statute that is later invalidated; an opinion from the highest court that is later overruled or abrogated; or an official, but erroneous, interpretation by a public official who is charged with the statute's interpretation, administration, or enforcement, such as the state or U.S. Attorney General.[131]

People v. Marrero illustrates the difficulty of prevailing on a mistake of law defense, even for a law enforcement officer being prosecuted.[132] In *Marrero*, the defendant was charged with criminal possession of a weapon.[133] The New York statute provided exemptions for a peace officer, which was defined as "[a]n

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Arden Rowell, *Legal Knowledge, Belief, and Aspiration*, 51 ARIZ. ST. L.J. 225, 265–66 (2019).

126. *See* State v. King, 257 N.W.2d 693, 697 (Minn. 1977) ("It is a deeply rooted concept of our jurisprudence that ignorance of the law is no excuse.").

127. *Id.* at 697.

128. *Id.* at 695. *See also* Dan M. Kahan, *Ignorance of the Law* Is *an Excuse–But Only for the Virtuous*, 96 MICH. L. REV. 127, 140 (1997) (discussing the *King* case).

129. *King*, 257 N.W.2d at 695, 698 (Otis, J., dissenting).

130. *Id.* at 698.

131. Ngov, *supra* note 6, at 179–80.

132. 507 N.E.2d 1068 (N.Y. 1987). *See also* Ngov, *supra* note 6, at 183 (discussing *Marrero*).

133. People v. Marrero, 404 N.Y.S.2d 832, 832 (N.Y. Sup. Ct. 1978), *rev'd,* 422 N.Y.S.2d 384 (N.Y. App. Div. 1979).

attendant, or an official, or guard of any state prison or *of any penal correctional institution*."[134] Because the defendant was a federal corrections officer at the time, he believed he qualified under the exemption. The trial judge, too, believed that the defendant qualified as a peace officer and dismissed the charge.[135] The appellate court reversed in a close 3 to 2 decision.[136] The fact that the trial court accepted, and the appellate court almost accepted, the defendant's interpretation of the law demonstrates the reasonableness of the defendant's mistake of law and the complexity of New York's laws.[137] Yet, the defendant was not permitted to present his mistake of law defense to the jury and was consequently convicted.[138]

In contrast to the difficulties faced by a private citizen when asserting a mistake of law claim, officers are permitted wide latitude in asserting they have made a reasonable mistake of law during their investigations. In *Heien v. North Carolina*, an officer stopped a car with a broken brake light under a mistaken belief that North Carolina law required two working brake lights.[139] The statute at issue required that cars be

> equipped with *a* stop *lamp* on the rear of the vehicle. The stop *lamp* shall display a red or amber light visible from a distance of not less than 100 feet to the rear in normal sunlight, and shall be actuated upon application of the service (foot) brake. The stop *lamp* may be incorporated into a unit with one or more *other rear lamps*.[140]

Although the state law's requirement of a singular operable brake light was unambiguous,[141] the U.S. Supreme Court justified the officer's mistake of law as reasonable because a "nearby code provision require[d] that 'all originally equipped rear lamps' be functional."[142] Somehow, the officer's confusion was reasonable, even though the other provision referred to the rear red lights that illuminate when the headlights are activated—not the brake lights.[143]

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134. *Id.* (emphasis added).

135. *Id.* at 833.

136. People v. Marrero, 422 N.Y.S.2d 384, 388 (N.Y. App. Div. 1979).

137. Ngov, *supra* note 6, at 183; Kahan, *supra* note 128, at 132 ("At the end of the day, three of six judges had sided with Marrero's interpretation. It's hard to imagine a more demonstrably reasonable mistake of law.").

138. People v. Marrero, 507 N.E.2d 1068, 1068 (N.Y. 1987).

139. Heien v. North Carolina, 574 U.S. 54, 57 (2014). For an in-depth critique of *Heien*, see Ngov, *supra* note 6.

140. N.C. GEN. STAT. ANN. § 20–129(g) (West 2007) (emphasis added); *Heien*, 574 U.S. at 59.

141. *Heien*, 574 U.S. at 59.

142. *Id.* (quoting N.C. GEN. STAT. ANN. § 20–129(d) (2007)).

143. State v. Heien, 714 S.E.2d 827, 830 (N.C. Ct. App. 2011), *rev'd*, 737 S.E.2d 351 (N.C. 2012) ("It is clear from the language of subsections (a) and (d) that the 'rear lamps' provided for therein are separate and distinct from the 'stop lamp' provided for in subsection (g) . . . . From these statutory requirements, it is apparent that the purpose of rear lamps is to make a vehicle more visible to other drivers and pedestrians during times when visibility is otherwise reduced due to nighttime, inclement weather, or similar conditions.").

Heien epitomizes the disparate treatment between mistakes of law made by officers and laypersons.[144] For laypersons, as seen in *Marrero*, reliance on advice from a mere official or a subordinate officer who is not the chief enforcement officer is insufficient to invoke the mistake of law defense to avoid criminal liability. Numerous courts have rejected reliance on an official's advice to validate a mistake of law defense when that official is not the chief enforcement officer, even when there is no reason to question whether the official has such authority.

> The mistake of law defense is available only if a defendant relies on an "official interpretation" given by "the public officer or body charged by law with . . . enforcement of the law defining the offense," or "formal interpretation of the law issued by the chief enforcement officer or agency; it does not encompass extemporaneous legal advice or interpretations given by a subordinate officer."[145]

In *Marrero*, the defendant's mistake of law was not excused because, although he sought advice and guidance on the statute from his criminal justice instructor and fellow officers,[146] the state court concluded he could not prevail due to the mistake that resulted from his own interpretation of the New York law.[147] On the other hand, the officer in *Heien* also relied on his own interpretation of the brake light law, but his mistake of law was excused as reasonable, despite his failure to show that he relied on a public official charged with interpreting the law.[148] The most egregious aspect of the double standard sustained in *Heien* is that officers are the

144. In situations where an officer is claiming a mistake of law to justify the officer's actions, courts have generously interpreted the challenged law as ambiguous and have failed to apply the rule of lenity, which requires that when a statute is ambiguous, all reasonable interpretations should be made in the defendant's favor. Ngov, *supra* note 6, at 185–87*; see, e.g.*, United States v. McCullough, 851 F.3d 1194, 1201 (11th Cir. 2017) (upholding traffic stop against a challenge of license plate law); United States v. Scott, 693 F. App'x 835, 837–38 (11th Cir. 2017) (upholding traffic stop based on ambiguity of turn signal law); United States v. Diaz, 854 F.3d 197, 204–05 (2d Cir. 2017) (validating arrest based on ambiguous open container law); Dunlap v. Anchorage Police Dep't, No. 10-cv-242, 2016 WL 900625, *5–6, *aff'd*, 712 F. App'x 646 (9th Cir. 2017) (finding that officer had probable cause to arrest based on an ambiguous concealed weapons law).

However, some courts understand that an officer may not avail himself of a mistake of law claim when the law is unambiguous and have rejected an extension of *Heien* under such circumstances. *See, e.g.*, United States v. Stanbridge, 813 F.3d 1032, 1037 (7th Cir. 2016); United States v. Alarado-Zarza, 782 F.3d 246, 249–50 (5th Cir. 2015); Flint v. Milwaukee, 91 F. Supp. 3d 1032, 1058 (E.D. Wis. 2015); Jones v. Commonwealth, 836 S.E.2d 710, 714 (Va. Ct. App. 2019); People v. Burnett, 432 P.3d 617, 622–23 (Colo. 2019); State v. Sutherland, 176 A.3d 775, 783–85 (N.J. 2018); Casillas v. People, 427 P.3d 804, 812 (Colo. 2018); Harris v. State, 810 S.E.2d 660, 663 (Ga. Ct. App. 2018); People v. Maggit, 903 N.W.2d 868, 876–77 (Mich. Ct. App. 2017); State v. Stoll, 370 P.3d 1130, 1135 (Ariz. Ct. App. 2016); People v. Holiman, 291 Cal. Rptr. 3d 840, 848 (Cal. Ct. App. 2022).

145. Ngov, *supra* note 6, at 180–81 (quoting Haggren v. Alaska, 829 P.2d 842, 844 (Alaska Ct. App. 1992)).

146. *Marrero*, 507 N.E.2d at 1069 ("He claimed at trial that there were various interpretations of fellow officers and teachers, as well as the peace officer statute itself, upon which he relied for his mistaken belief that he could carry a weapon with legal impunity."); Kahan, *supra* note 128, at 131.

147. *Marrero*, 507 N.E.2d at 1071.

148. Ngov, *supra* note 6, at 183.

very persons charged with enforcing our laws; therefore, it is not unreasonable to expect that they should know the law when enforcing the law.[149]

D. Privacy and the Third Party Doctrine

The last asymmetry concerns the privacy that one reasonably expects when conducting legitimate transactions with businesses.[150] When individuals convey private information to a business, that business is generally under some obligation to keep the information confidential. In fact, individuals' privacy is guarded by a plethora of laws, including laws that establish privileges, torts, and contract claims, as well as regulations and statutes.[151]

The most familiar manifestation of society's reasonable expectation of privacy in information conveyed to others can be found in the rules of evidence on privileges and confidentiality.[152] Those occupying special relationships, such as doctors, attorneys, and clergy, are expected, through the rules and strong ethical code of professional associations and state privilege rules, to keep confidential disclosures inviolate.[153] Within these relationships, an individual's privacy is protected by not only the privilege (doctor-patient, attorney-client, or clergy-parishioner privilege) that prohibits a witness from testifying in a judicial proceeding but also by the duty of nondisclosure that extends even beyond the death of the client, patient, or parishioner.[154] The duty of nondisclosure or confidentiality also applies to information entrusted to "hospitals, attorneys, banks, insurance companies, social workers, accountants, school officials, and employees."[155] Additionally, tort law secures the layperson's privacy expectations with businesses through the invasion of privacy tort and the breach of confidentiality tort.[156] Contract law also provides privacy protections through laws on good faith and fair dealing and agreements of confidentiality.[157]

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149. *Id.* at 178 ("[L]aw enforcement officers, through their training and continual job experience, are in a better position to know the law than a layperson.").

150. For an extensive analysis of the privacy expectations with businesses and within commercial transactions, see Ngov, *supra* note 9.

151. *See id.* Part III.B.

152. *Id.* at 26–29. For example, the Hippocratic Oath incorporates a duty of confidentiality, and the American Medical Association and American Bar Association impose confidentiality through their ethical rules. *See id.* at 25–26*; see Greek Medicine*, NATIONAL LIBRARY OF MEDICINE, NATIONAL INSTITUTE OF HEALTH, https://www.nlm.nih.gov/hmd/greek/greek_oath.html (last visited November 23, 2022); AMERICAN MEDICAL ASSOCIATION, ETHICS, CONFIDENTIALITY, CODE OF MEDICAL ETHICS OPINION 3.2.1, https://www.ama-assn.org/delivering-care/ethics/confidentiality (last visited November 23, 2022); *Rule 1.6 Confidentiality of Information*, AMERICAN BAR ASSOCIATION https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/ (last visited November 23, 2022).

153. Ngov, *supra* note 9, at 25–26.

154. Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123, 135 (2007); G.W. Field & John B. Uhle, *Privileged Communications*, 37 AM. L. REG. 1, 6–7 (1889).

155. Ngov, *supra* note 9, at 29.

156. *Id.* at 27–28.

157. *Id.* at 31.

In addition to common law protections, individuals have acquired privacy protections through many federal statutes. The Privacy Act, for example, guards against unauthorized dissemination of data, and the Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act controls the collection of phone information.[158] Moreover, Congress has enacted legislation to provide targeted privacy protection in specialized areas, such as the following:

> Health Insurance Portability and Accountability Act of 1996 (HIPPA) provides privacy for health care and medical information; Children's Online Privacy Protection Rule (COPPA) protects children under the age of thirteen against the online collection of their personal information; Family Educational Rights and Privacy Act enhances the privacy of students' information; Fair Credit Reporting Act safeguards consumers' credit information; Gramm-Leach-Bliley Act protects financial information; Right to Financial Privacy Act of 1978 overturned *United States v. Miller* by extending privacy to customers' records held by financial institutions; Cable Communications Policy Act of 1984 ensures privacy for cable records and viewing habits; Video Privacy Protection Act of 1988 provides privacy protection for video rental records; and Driver's Privacy Protection Act of 1994 prohibits selling drivers' motor vehicle records.[159]

Despite the numerous layers of protection for information conveyed to businesses, law enforcement may circumvent those protections through the third party doctrine.[160] The third party doctrine allows officers to obtain information given to businesses and other third parties without first procuring a warrant because the Court has held that there is no expectation of privacy in information given to others. For example, in *United States v. Miller*, the Court held that an individual's financial records are not protected once the information is given to a bank.[161] Similarly, *Smith v. Maryland* provided law enforcement the opportunity to acquire the phone numbers dialed from a customer's phone without a warrant.[162] Thus, the third party doctrine is a loophole around the privacy expectations protected by common law and state and federal laws.

158. 5 U.S.C. § 552a; Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015, Pub. L. No. 114-23, 129 Stat. 268 (codified as amended in scattered sections of 12, 15, 18, and 50 U.S.C.).

159. Ngov, *supra* note 9, at 37–38.

160. For an extensive critique of the third party doctrine, see Ngov, *supra* note 9.

161. United States v. Miller, 425 U.S. 435, 443 (1976). In a case of first impression, the Fifth Circuit, analogizing digital currency with bank records, extended the third party doctrine to apply to Bitcoin and held that the defendant lacked an expectation of privacy in information contained in the Bitcoin blockchain. United States v. Gratkowski, 964 F.3d 307, 311–12 (5th Cir. 2020).

162. Smith v. Maryland, 442 U.S. 735, 745–46 (1979).

II. THE CONSEQUENCES OF LEGAL ASYMMETRIES

These asymmetries create negative consequences that are borne not only by the individual but also by society at large. This part identifies some potential harms caused by the asymmetries to highlight the broader need to reform criminal procedure law and the criminal justice process. These harms include cognitive dissonance, isolation, loss of social capital, loss of trust and legitimacy, and expressive harms leading to disobedience of laws.

A. Cognitive Dissonance

One of the foremost harms resulting from the asymmetries identified and critiqued in this Article, as well as from other existing asymmetries, is cognitive dissonance. Cognitive dissonance is a psychological state of discomfort that results from holding two inconsistent (dissonant) thoughts (cognition).[163] "Dissonance is aroused when a person does or says something that is contrary to a prior belief or attitude," faces a difficult decision, or is "exposed to information that is inconsistent with [her] beliefs."[164] Cognitive dissonance occurs because "[t]he world must make sense to us because we must make sense to ourselves. Accounts of coherence in the social world are driven by our need to believe that our own beliefs are ordered, coherent, and rational, and that we are rational, morally sensitive individuals."[165]

Because humans naturally strive to harmonize thoughts and actions, a person will seek to reduce the discomfort of dissonance by changing her beliefs, attitudes, or actions.[166]

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163. For an explanation of the theory and subsequent development of cognitive dissonance studies, see generally Elliot, *supra* note 12; Eddie Harmon-Jones & Cindy Harmon-Jones, *Cognitive Dissonance Theory After 50 Years of Development*, 38 ZEITSCHRIFT FÜR SOZIALPSYCHOLOGIE 7 (2007) [hereinafter Harmon-Jones, *Cognitive Dissonance*]; Eddie Harmon-Jones & Cindy Harmon-Jones, *Testing the Action-Based Model of Cognitive Dissonance: The Effect of Action Orientation on Postdecisional Attitudes*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 711 (2002) [hereinafter Harmon-Jones, *Testing the Action-Based Model*]; Eddie Harmon-Jones & Judson Mills, *An Introduction to Cognitive Dissonance Theory and an Overview of Current Perspectives on the Theory, in* COGNITIVE DISSONANCE, SECOND EDITION: REEXAMINING A PIVOTAL THEORY IN PSYCHOLOGY 3 (2019) [hereinafter Harmon-Jones & Mills, *An Introduction*].

164. Harmon-Jones & Mills, *An Introduction*, *supra* note 163, at 5–7.

165. Balkin, *supra* note 13, at 144.

166. Common instances of cognitive dissonance abound in the ordinary course of our daily lives: rationalization of smoking while being aware of the health effects, cheating on one's diet plan while endeavoring to engage in healthy eating, etc. Moria Lawler, *Real-Life Examples of Cognitive Dissonance,* EVERYDAYHEALTH.COM (Mar. 11, 2020), https://newslettercollector.com/newsletter/real-life-examples-of-cognitive-dissonance(10)/; Moria Lawler, *Cognitive Dissonance in Theory and Everyday Life*, EVERYDAYHEALTH.COM, https://www.everydayhealth.com/cognitive-dissonance/ (Nov. 9, 2022). For example,

> [a] habitual smoker who learns that smoking is bad for health will experience dissonance because the knowledge that smoking is bad for health is dissonant with the cognition that he continues to smoke. He can reduce the dissonance by changing his behavior, that is, he could stop smoking, which would be consonant with the cognition that smoking is bad for health. Alternatively, the smoker could reduce dissonance by changing his cognition about the effect of smoking on health

Faced with cognitive dissonance,

> [p]eople will have a need to alter their beliefs about the legal system or the social world . . . . [T]hey will subtly alter their judgments of justice and fairness, selectively redescribe or ignore facts, avoid or deny recalcitrant experiences, and compartmentalize situations in order to reach the conclusion that various legal doctrines are rationally reconstructive or are not amenable to rational reconstruction.[167]

An individual's beliefs about herself—how she sees herself through her beliefs, values, and actions—might result in cognitive dissonance when faced with her beliefs about the law—what the law is and what it should be.[168] The conflict that might arise between what she believes about herself and how she operates in relation to the law leads her to struggle to reconcile the two and establish an internal sense of order.[169] As Professor J.M. Balkin explains, "Legal coherence becomes not a desideratum for law but a strategy of self-affirmation; legal incoherence becomes not a focus for political critique but a method of externalizing internal conflict."[170]

An individual's struggle for legal coherence in light of accepted deceptive police practices and the third party, open fields, and mistake of law doctrines can result in

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> and believe that smoking does not have a harmful effect on health (eliminating the dissonant cognition).

Harmon-Jones & Mills, *An Introduction*, *supra* note 163, at 4.

167. Balkin, *supra* note 13, at 144–45; *see also* Harmon-Jones & Mills, *An Introduction*, *supra* note 163, at 3 ("The existence of dissonance, being psychologically uncomfortable, motivates the person to reduce the dissonance and leads to avoidance of information likely to increase the dissonance.").

Scholars have noted cognitive dissonance resulting in a variety of legal contexts. *See, e.g.*, George A. Akerlof & William T. Dickens, *The Economic Consequences of Cognitive Dissonance*, 72 AM. ECON. REV. 307, 308 (1982) (recognizing the importance of cognitive dissonance in safety regulations, "innovation, advertising, crime, and Social Security legislation"); James W. Fox, Jr., *Doctrinal Myths and the Management of Cognitive Dissonance: Race, Law, and the Supreme Court's Doctrinal Support of Jim Crow*, 34 STETSON L. REV. 293, 294–95 (2005) (observing cognitive dissonance in racial jurisprudence); David J. Giacopassi & Jerry R. Sparger, *Cognitive Dissonance in Vice Enforcement*, 10 AM. J. POLICE 39, 43–44 (1991) (noting cognitive dissonance in law enforcement); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499, 1506 (1998) (highlighting cognitive dissonance and legal scholars' use of behavioral decision-making research); Daniel S. Medwed, *The Good Fight: The Egocentric Bias, the Aversion to Cognitive Dissonance, and American Criminal Law*, 22 J.L. & POL'Y 135, 135–38 (2013) (applying cognitive dissonance to the criminal law practitioner); Kenneth A. Sprang, *After-Acquired Evidence: Tonic for an Employer's Cognitive Dissonance*, 60 MO. L. REV. 89, 140–50 (1995) (discussing cognitive dissonance in employment law); Pauline H. Tesler, *Goodbye* Homo Economicus*: Cognitive Dissonance, Brain Science, and Highly Effective Collaborative Practice*, 38 HOFTSTRA L. REV. 635, 649–53 (2009) (applying cognitive dissonance to the divorce lawyer).

168. For discussions on coherence, see generally Barbara Baum Levenbook, *The Role of Coherence in Legal Reasoning*, 3 L. & PHIL. 355 (1984) (examining contemporary views about the role of coherence in legal reasoning); Joseph Raz, *The Relevance of Coherence*, 72 B.U. L. Rev. 273 (1992) (considering the relevance of coherence in explaining the nature of law and adjudication).

169. "According to Stone and Cooper's (2001, 2003) self-standards model, dissonance occurs when people evaluate their behavior and find it discrepant from some standard of judgment. This standard can be based on personal considerations and self-expectancies or on social factors such as the normative rules and prescriptions used by most people in a culture." David C. Matz & Wendy Wood, *Cognitive Dissonance in Groups: The Consequences of Disagreement*, 88 J. PERSONALITY & SOC. PSYCH. 22, 22 (2005).

170. Balkin, *supra* note 13, at 144.

cognitive dissonance. Cognitive dissonance results, for example, from the gap between the laws, business norms, and internal industry structures that support society's expectation of privacy in information shared with businesses[171] and the third party doctrine's preclusion of privacy interests in that information. When the third party doctrine disturbs well-established privacy norms and protections—such as the privacy afforded to information disclosed to attorneys, doctors, and clergy that has long been recognized for over 500 years[172]—the doctrine upends people's natural and common sense expectations of privacy. When a person relies on one set of laws or norms, only to be confronted with an entirely different set, whether it be the unexpected loss of privacy due to the third party and open fields doctrines or loss of respect caused by police deception and the mistake of law doctrine, the person might be confused and experience a state of cognitive dissonance. Consequently, the individual might conclude that "she lives in a society whose basic norms and arrangements are morally arbitrary or incoherent."[173]

A person who learns that the third party doctrine does not protect information shared with others may experience dissonance because the knowledge that privacy is unprotected with third parties is incongruous with the cognition that she continues to share information with friends, colleagues, family, neighbors, and businesses. To reduce the dissonance, she may react by changing her behavior through limiting what she shares and with whom she shares. She may begin to cloister herself.[174] Following that, she might also begin to lose trust in the law upon learning that her reliance on the law was misplaced. Both outcomes are equally negative and can result from any of the legal asymmetries. "If the dissonance is not reduced by changing one's belief, the dissonance can lead to misperception or misinterpretation of the information, rejection or refutation of the information, seeking support from those who agree with one's belief, and attempting to persuade others to accept one's belief."[175] The problem with the resultant cognitive dissonance due to the legal asymmetries lies not in the inconsistency per se "but rather with the production of a consequence that is unwanted" and that results from individuals' coping mechanisms when faced with the inconsistency.[176]

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171. Ngov, *supra* note 9, at 12–45.

172. Field & Uhle, *supra* note 154, at 2 (dating the attorney-client privilege to the 16th century); Anne Klinefelter, *When to Research is to Reveal: The Growing Threat to Attorney and Client Confidentiality from Online Tracking*, 16 VA. J.L. & TECH. 1, 22 (stating that the attorney-client privilege was recognized over 500 years ago).

173. Balkin, *supra* note 13, at 147.

174. "[T]aking steps to prevent dissonant cognitions from arising in the first place, including avoiding possible sources of dissonance-producing cognitions," are among the strategies one can employ when confronted with cognitive dissonance. Donald Labriola, *Dissonant Paradigms and Unintended Consequences: Can (and Should) the Law Save Us from Technology*, 16 RICH. J.L. & TECH. 1, 20 (2009) (citing COGNITIVE DISSONANCE: PROGRESS ON A PIVOTAL THEORY IN SOCIAL PSYCHOLOGY 4–5 (Eddie Harmon-Jones & Judson Mills eds., 1999)).

175. Harmon-Jones & Mills, *An Introduction*, *supra* note 163, at 6.

176. Harmon-Jones, *Cognitive Dissonance*, *supra* note 163, at 10. For other examples of law related cognitive dissonance, see Balkin, *supra* note 13, at 144–51 (discussing legal coherence and cognitive dissonance); Richard

B. Isolation and Loss in Social Capital

The cognitive dissonance caused by the legal asymmetries threatens to indiscriminately undermine trust and impede individuals' social, emotional, physical, and economic growth. It is obvious that laws meant to discourage the formation of trust among criminals are beneficial. For example, "[l]aw enforcement strategies and criminal conspiracy laws work together to trigger distrust in criminal associates."[177] The negative impact of legal doctrines on trust, however, has been given little consideration and was virtually neglected when the U.S. Supreme Court developed the third party, open fields, and mistake of law doctrines, and condoned deceptive police practices. "Law can . . . have expressive effects that create or change norms by changing the 'social meaning' of behavior . . . or change behavior by altering what it signals about the actor."[178] In the case of these asymmetries, law changes norms to the detriment of society.

For example, police deception during interrogations harms society and diminishes public trust. "[I]nterrogations provide important opportunities for police to distribute information to suspects (and more indirectly, the public) about such things as integrity, honest dialogue, and trustworthiness."[179] "Lying," as Charles Fried has argued, "violates respect and is wrong, as is any breach of trust. Every lie is a broken promise [that] is made and broken at the same moment. Every lie necessarily implies—as does every assertion—an assurance, a warranty of its truth."[180]

Additionally, the third party doctrine is detrimental because it disrupts the normal understanding, trust, and efficiency between parties in a business relationship. The knowledge that the government can access information that individuals share

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H. Fallon, Jr., Marbury *and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CALIF. L. REV. 1, 5–6 (2003) (exploring the doctrinal tension between the private-rights, special-functions, and prudential roles of courts established through *Marbury v. Madison* and the resulting cognitive dissonance); Edwin Adlam Herod, Comment, *Cognitive Dissonance Undercuts Deterrence in the C-Suite: Why Otherwise Ethical FDA-Dependent Managers Keep Falling Down the Rabbit Hole of 10(B) Class Action Litigation*, 52 SETON HALL L. REV. 607, 608–09 (2021) (arguing that cognitive dissonance causes violations of securities regulations in the life science industry); Andrew J. McClung, *Good Cop, Bad Cop: Using Cognitive Dissonance to Reduce Police Lying*, 32 U.C. DAVIS L. REV. 389, 428–51 (1999) (applying cognitive dissonance theory to propose an ethical training program for police officers); Arnold S. Rosenberg, *Motivational Law*, 56 CLEV. ST. L. REV. 111, 132–34 (2008) (connecting motivational law and cognitive dissonance); Rowell, *supra* note 125, at 271–73 (explaining how people resolve cognitive dissonance between what the law actually is and their aspirational beliefs for the law—what they want the law to be); Simon-Kerr, *supra* note 123, at 2209–15 (theorizing that systemic lying results from cognitive dissonance).

177. Claire A. Hill & Erin Ann O'Hara, *A Cognitive Theory of Trust*, 84 WASH. U. L. REV. 1717, 1758 (2006).

178. Larry E. Ribstein, *Law v. Trust*, 81 B.U. L. REV. 553, 564 (2001); Robert Weisberg, *Norms and Criminal Law, and the Norms of Criminal Law Scholarship*, 93 J. CRIM. L. & CRIMINOLOGY 467, 476 (2003) ("[W]hen lawmakers make law, they do not just aim to directly control behavior through measurable, if not material, rewards and punishments; they also hope to express certain social or cultural values they attach to that behavior.") For an in-depth examination of expressive theories, see Matthew D. Adler, *Expressive Theories: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000).

179. Margaret L. Paris, *Lying to Ourselves*, 76 OR. L. REV. 817, 825 (1997).

180. Green, *supra* note 85, at 166 (quoting CHARLES FRIED, RIGHT AND WRONG 67 (1978)).

with other people and businesses creates a chilling effect,[181] restricting the amount of information exchanged. "If we thought our every word and deed were public, fear of disapproval or more tangible retaliation might keep us from doing or saying things which we would do or say if we could be sure of keeping them to ourselves or within a circle of those who we know approve or tolerate our tastes."[182] This chilling effect would lead to self-censorship, hampering the "mental breathing space to experiment with unpopular, dangerous, or even deviant ideas," such that individuals' thoughts and behavior will be modified to conform to "the mainstream, the conventional, and the boring."[183]

To maintain privacy under the third party doctrine, persons would be inclined to refrain from using cell phones, computers, any electronic medium of communication, credit cards, or anything that takes advantage of modern technological advances. Likewise, they would be wary to engage in any business transaction; hire accountants or other experts—even if only to assist with the necessities of life; work or share any information with their employers; make any purchases with recorded transactions; obtain insurance; maintain bank accounts or any accounts; enroll themselves or their children in any courses or schools; seek medical assistance; or befriend anyone—including neighbors and colleagues.[184] To escape the

181. "Firms' and governments' identification of individuals changes societal power dynamics, potentially chilling individuals' freedoms to act as they please and, on a societal level, changing the very nature of individuals' roles with institutions." Chris Jay Hoofnagle & Jan Whittington, *Free: Accounting for the Cost of the Internet's Most Popular Price*, 61 UCLA L. REV. 606, 636–37 (2014).

182. Charles Fried, *Privacy*, 77 YALE L.J. 475, 483–84 (1968). Beyond the chilling effect, disclosure of personal information could lead to more serious ramifications, such as the loss of lives, as evidenced by suicides resulting from such disclosures. *See* Neil M. Richards, Four Privacy Myths (Apr. 24, 2014) (unpublished manuscript) (manuscript at 21) (discussing Tyler Clementi plunging to his death from the George Washington Bridge when a video showing his intimate acts with another man was revealed), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2427808.

183. Richards, *supra* note 182, at 22; Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 492 (2006) ("[P]ervasive monitoring of every first move or false start will, at the margin, incline choices toward the bland and the mainstream.") (quoting Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1426 (2000)).

184. Other scholars have made similar observations based on the culmination of cases interpreting the expectation of privacy test developed in *Katz v. United States*, 389 U.S. 347 (1967):

> To maintain privacy, one must not write any checks nor make any phone calls. It would be unwise to engage in conversation with any other person, or to walk, even on private property, outside one's house. If one is to barbecue or read in the backyard, do so only if surrounded by a fence higher than a double-decker bus and while sitting beneath an opaque awning. The wise individual might also consider purchasing anti-aerial spying devices if available . . . . Upon retiring inside, be sure to pull the shades together tightly so that no crack exists and to converse only in quiet tones. When discarding letters or other delicate materials, do so only after a thorough shredding of the documents . . . ; ideally, one would take the trash personally to the disposal site and bury it deep within. Finally, when buying items, carefully inspect them for any electronic tracking devices that may be attached.

Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1789–90 (1994).

reach of the third party doctrine, individuals "must live an isolated and hermetic existence."[185] Indeed, the harm that Justice Douglas feared would stem from the third party doctrine could become a reality: "[T]his [doctrine] will lead those of us who cherish our privacy to refrain from recording our thoughts or trusting anyone with even temporary custody of documents we want to protect from public disclosure. In short, it will stultify the exchange of ideas that society has considered crucial to democracy."[186]

Similarly, the open fields doctrine is harmful to society because it has the potential to cause isolation and loss of trust. People may attempt to gain privacy by erecting higher, more formidable walls and physical barriers to expand what qualifies as curtilage and keep out police intrusion. The erosion of privacy interests to one's own private land through the open fields doctrine will force individuals underground because only there can they gain any privacy beyond the home.[187]

Consequently, the withdrawal of trust caused by these associated police practices impacts social capital. "Economists, psychologists, sociologists, and management theorists appear united on the importance of trust in the conduct of human affairs."[188] Trust is necessary for collaboration; without it, companies suffer and "societies falter and collapse."[189] Organizations rely on trust to facilitate "more effective implementation of strategy, greater managerial coordination, and more effective work teams."[190]

When trust diminishes, social capital diminishes because social capital is the product of trust. "Social capital . . . refers to features of social organizations, such as trust, norms and networks that can improve the efficiency of society by facilitating coordinated action."[191] There are varying definitions of social capital, but the commonality is that social capital refers to the benefits derived from networking

185. Daniel J. Solove, *The Myth of the Privacy Paradox*, 89 GEO. WASH. L. REV. 1, 37 (2021).

186. Couch v. United States, 409 U.S. 322, 342 (1973) (Douglas, J., dissenting).

187. Although courts will allow officers' wanton trespasses on private open fields, some have correctly recognized that the land beneath is protected. *See, e.g.*, Husband v. Bryan, 946 F.2d 27, 29 (5th Cir. 1991) (concluding that digging the land underneath falls outside of the open fields doctrine).

188. Frank B. Cross, *Law and Trust*, 93 GEO. L. REV. 1457, 1475 (2005) (quoting Larue Tone Hosmer, *Trust: The Connecting Link Between Organizational Theory and Philosophical Ethics*, 20 ACAD. MGMT. REV. 379, 379 (1995)).

189. *Id.* (quoting SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 26 (1978)).

190. *Id.* (quoting Patricia M. Doney et al., *Understanding the Influence of National Culture on the Development of Trust*, 28 ACAD. MGMT. REV. 601, 601 (1998)).

191. Jack Knight, *Social Norms and the Rule of Law: Fostering Trust in a Socially Diverse Society*, *in* TRUST IN SOCIETY 355 (Karen Cook ed., 2001) (quoting Robert Putnam and James Coleman).

and bonding.[192] The varied definition in different contexts speaks to the universality of social capital—namely that it is important to all fields, organizations, and groups.[193] Because trust facilitates efficiency,[194] reduces transaction costs,[195] promotes social order, and even encourages civic mindedness, social capital is vital to the economy and the functioning of society.[196] "When 'trust and social networks flourish, individuals, firms, neighborhoods, and even nations prosper.'"[197] But when "distrust increases, the social fabric disintegrates."[198]

The importance of trust and social capital is evidenced in the peer-to-peer market growth.[199] A 2017 report by the European Commission estimated that European consumer annual spending in the peer-to-peer economy amounted to EUR 6.6 billion for accommodations[200] and EUR 1 billion for ridesharing.[201] In

192. The meaning of social capital will vary based on the context of its application or field of discipline. *See generally, e.g.*, Tristan Claridge, Social Capital and Natural Resource Management: An Important Role for Social Capital? (2004) (Master's thesis, University of Queensland) (cataloguing a variety of definitions for social capital); James Farr, *Social Capital: A Conceptual History*, 32 POL. THEORY 6 (2004) (tracing the history, uses, and concepts of social capital). For a university desiring to encourage community activism and students to build camaraderie among their peers, social capital could be defined as the "value that comes from social networks, or groupings of people, which allow individuals to achieve things they couldn't on their own." Earl E. Bakken Center for Spirituality & Healing, *Examples of Social Capital*, UNIV. MINNNESOTA, https://www.takingcharge.csh.umn.edu/activities/examples-social-capital (last visited June 23, 2020). Another might think of social capital as "the potential of individuals to secure benefits and invent solutions to problems through membership in social networks." Margarita Poteyeva, *Social Capital*, ENCYC. BRITANNICA, https://www.britannica.com/topic/social-capital (last visited June 23, 2020). In the field of economics, social capital might mean the "value of social relationships and networks that complement the economic capital for economic growth of an organization." *Definition of Social Capital*, ECON. TIMES, https://economictimes.indiatimes.com/definition/social-capital (last visited June 23, 2020). *See also*, Tom R. Tyler, *Compliance with the Intellectual Property Laws: A Psychological Perspective*, 29 N.Y.U. J. INT'L L. & POL. 219, 231 (1996) ("Within society and the legal community there have been increasing calls for the rebuilding of social capital, i.e., the faith of citizens in the government and in each other.").

193. Some have envisioned the possibility of social capital created from digital networks and social justice programs. *See* Raymond H. Brescia, *The Strength of Digital Ties: Virtual Networks, Norm-generating Communities, and Collective Action Problems*, 122 DICK. L. REV. 479, 479 (2018); *see generally* John N. Tye & Morgan W. Williams, *Networks and Norms: Social Justice Lawyering and Social Capital in Post-Katrina New Orleans*, 44 HARV. C.R.-C.L. L. REV. 255 (2009) (conceptualizing community lawyering with social capital).

194. Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1757 (2001) ("Where trust can be harnessed, it can substantially reduce the inefficiencies associated with both agency and team production relationships."); Ribstein, *supra* note 178, at 567 (describing social capital as "the social forces that support decisions to trust without the need to establish costly transaction-specific constraints").

195. Ribstein, *supra* note 178, at 557 ("Trustworthiness, like trust, has the welfare-increasing attribute of reducing transaction costs.").

196. Cross, *supra* note 188, at 1477–78.

197. *Id.* at 1477.

198. *Id.* at 1481 (quoting Julian B. Rotter, *Interpersonal Trust, Trustworthiness, and Gullibility*, 35 AM. PSYCH. 1, 1 (1980)).

199. "The sharing economy requires and empowers individuals to trust complete strangers." Abbey Stemler, *Betwixt and Between: Regulating the Shared Economy*, 43 FORDHAM URB. L.J. 31, 35 (2016).

200. PIERRE HAUSEMER ET AL., EXPLORATORY STUDY OF CONSUMER ISSUES IN ONLINE PEER-TO-PEER PLATFORM MARKETS FINAL REPORT 1, 112 (2017); Timm Teubener & Christoph M. Flath, *Privacy in the Sharing Economy*, 20 J. ASS'N INFO. SYS. 213, 213 (2019).

201. HAUSEMER ET AL., *supra* note 200, at 46.

2015-2016, 191 million Europeans transacted in the peer-to-peer market, spending EUR 27.9 billion,[202] and it was then predicted that by 2021, over 85 million adults in the U.S. will utilize "commercial sharing services."[203] By 2025, the revenue generated from peer-to-peer markets will total over $100 billion.[204] The impact of the sharing economy cannot be overstated: *Time* magazine listed the sharing economy as one of the ten ideas that will change the world.[205]

"But the real benefit of collaborative consumption turns out to be social."[206] As one commentator explains,

> In an era when families are scattered and we may not know the people down the street, sharing things – even with strangers we've just met online – allows us to make meaningful connections. Peer-to-peer sharing "involves the re-emergence of community . . . . This works because people can trust each other."[207]

C. Expressive Harms: Perceptions of Unfairness, Loss of Buy-in, and Rejection of Legal Norms

In addition to the cognitive dissonance, isolation, loss of trust, and diminution of social capital that can occur because of the legal asymmetries, these double standards and loopholes can negatively affect the government's legitimacy and ability to encourage voluntary compliance with laws. When law engenders the trust of those being regulated, it consequently encourages law abiding behavior.[208] One basis of creating trust is to be fair, and one aspect of fairness is to use fair procedures or processes.[209] "Trust and procedural justice are closely intertwined—people

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202. *Id*. at 11.

203. Teugener & Flath, *supra* note 200, at 213.

204. *Id*. The growth of business conducted within the peer-to-peer market has been astounding. For example, Airbnb provides more than 2 million listings for more than 34,000 cities and 190 countries and was valued around $13 billion dollars within six years of its founding. Stemler, *supra* note 199, at 48. Uber has provided "over 100,000 rides a week in most major cities" and $1.5-$2 billion in revenue and was valued at $40 billion within four years of its founding. *Id*. at 32.

205. TIME, *10 Ideas That Will Change the World*, http://content.time.com/time/specials/packages/0,28757,2059521,00.html; Stemler, *supra* note 199, at 33, 55.

206. Bryan Walsh, *Today's Smart Choice: Don't Own. Share*, TIME (Mar. 17, 2011), http://content.time.com/time/specials/packages/article/0,28804,2059521_2059717,00.html.

207. *Id.*

208. *See* Ngov, *supra* note 21, at 278 ("Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system.") (quoting Taylor v. Louisiana, 419 U.S. 522, 530 (1975)); Tyler, *supra* note 24, at 391 ("In fact, legal authorities rely heavily on the voluntary cooperation of most citizens, most of the time. Thus, they benefit when their legitimacy encourages such cooperation in the form of law-abiding behavior motivated by feelings of responsibility and obligation.").

209. Scholars have observed the interrelatedness of trust and fairness:

> The key to creating trust is to act in ways that community residents will experience to be fair. This argument is the core conclusion of the literature on procedural justice. That literature demonstrates that people's reactions to their personal experiences with social authorities are rooted in

perceive procedures enacted by those they trust as being fairer, and authorities become more highly trusted when they are seen to exercise their authority in fair ways."[210] Fairness should be a central focus of courts, governmental bodies, and law enforcement entities because

> [s]ociological and psychological evidence suggests that procedural fairness or fairness of the process . . . affects the public's view of the legitimacy of the law. Consistent with intuition, research indicates that the public is more likely to comply with the law when they "buy into" the decisions and rules of governmental and legal authorities. The public is more likely to "buy in" if the public perceives the legal process and the outcome as fair.[211]

The public's perception of the legal system and authorities as being fair and legitimate is essential to society because the functioning of our legal system relies heavily on people voluntarily obeying laws. If a majority of people decide to disobey laws, authorities would be overwhelmed in trying to address violations.

> their evaluations of the fairness of the procedures that those authorities use to exercise their authority.

Tyler, *supra* note 24, at 367.

210. Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 299 (2003) [hereinafter Tyler, *Legitimacy*].

211. Ngov, *supra* note 21, at 299; Tyler, *Legitimacy, supra* note 210, at 287 ("If people believe that legal authorities are legitimate, they are more likely to defer to encounters with particular members of those groups of authorities because they act fairly."); Tom R. Tyler, *Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities*, 25 LAW & SOC. INQUIRY 983, 989 (2000) [hereinafter Tyler, *Multiculturalism*] ("[P]arties to a dispute will be more likely to obey rules and laws if they feel that legal authorities make decisions and create and enforce rules in ways that are fair."); Tyler, *supra* note 192, at 231 ("Judgments about the fairness of decision-making authorities have been found to be more central to a rule's legitimacy, and to people's willingness to accept it, than are judgments of decision favorability. In other words, people are willing to defer to laws and legal authorities on procedural justice grounds.").

Researchers have studied people's evaluations of procedural process in a variety of contexts. S*ee* Jonathan D. Casper, Tom Tyler & Bonnie Fisher, *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 482, 503 (1988) (studying the effects of procedural fairness on satisfaction in felony cases and concluding that the criminal litigants' "sense of fairness—in terms of both procedural and distributive justice—appears to have substantially influenced their evaluations" of their treatment); James L. Gibson, *Institutional Legitimacy, Procedural Justice, and Compliance with Supreme Court Decisions: A Question of Causality*, 25 LAW & SOC'Y REV. 631, 632 (1991) (studying whether the public's perception of the U.S. Supreme Court's procedural fairness is linked to public acceptance of the Court's decisions); *see generally* E. Allan Lind, Robert J. Maccoun, Patricia Ebener, William L. F. Felstiner, Deborah R. Hensler, Judith Resnik & Tom R. Tyler, *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953 (1990) (investigating civil litigants' evaluations of the legal system); Daniel S. Nagin & Cody W. Telep, *Procedural Justice and Legal Compliance*, 13 ANN. REV. L. & SOC. SCI. 5 (2017) (exploring the causal connection between procedural justice and law-abidingness); Tom R. Tyler & Kenneth Rasinski, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, 25 LAW & SOC'Y REV. 621, 627 (1991) ("If people judge procedures to be fair, they evaluate the institutional legitimacy of authorities more highly. The higher legitimacy, in turn, enhances the ability of the organization to secure compliance with decisions and rules."); Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103 (1988) (surveying citizens' experiences with the police and courts to determine the effect of procedural justice on their evaluations of legal authorities). For additional in-depth examination of procedural justice, see Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004).

Consequently, authorities must rely on the public's voluntary cooperation with laws in order to direct limited resources to resolve problems raised by those who are non-compliant.[212] Thus, voluntary cooperation within a legal regime, uncoerced by the threat of legal sanctions, depends on legitimacy and morality.[213]

Legal legitimacy serves a central role in generating law-abiding behavior because "legitimacy signifies an active belief by citizens, whether warranted or not, that particular claims to authority deserve respect or obedience for reasons not restricted to self-interest."[214] Moreover, legitimacy is a more effective means of inducing law-abiding behavior than deterrence[215] because "in a moral sense, legitimacy is a function of moral justifiability or respect-worthiness."[216]

Some studies show that the power of moral appeal is four times more effective than the threat of punishment.[217] Other studies have shown that increased severity of punishment may, in fact, have the unintended consequence of increasing crime. This makes it all the more necessary for the government to maintain legitimacy.[218] Furthermore, other research demonstrates that the loss of legitimacy will have repercussions far beyond the immediate instance and can cause resentment[219] and widespread flouting of the law in unrelated areas. "When a person evaluates particular legal rules, decisions, or practices as unjust, the diminished respect for the legal system that follows can destabilize otherwise law-abiding behavior."[220] Thus, the loss of legitimacy would naturally lead to a similar loss in legal control over public conduct.[221]

The third party and open fields doctrines risk losing public "buy-in" of the criminal justice system because the doctrines contradict people's intuition of what

212. Tyler, *Legitimacy*, *supra* note 210, at 290.

213. Tyler, *Multiculturalism*, *supra* note 211, at 985 ("Authorities need for people to take the obligation to obey the law onto themselves and to voluntarily act on that perceived obligation. They need the consent and cooperation of the governed.").

214. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795 (2005) (citing sociologist MAX WEBER, ECONOMY AND SOCIETY (Guenther Roth & Claus Wittich eds., Ephraim Fischoff et al. trans., 1968)).

215. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 66 (1990); Tyler, *Multiculturalism*, *supra* note 211, at 985 (citing studies by Nagin, Paternoster, and Tyler). For an explanation of why sanction-centered theories should be rejected, see generally Scott J. Shapiro, *What Is the Internal Point of View?*, 75 FORDHAM L. REV. 1157 (2006).

216. Fallon, *supra* note 214, at 1796.

217. TYLER, *supra* note 215, at 110.

218. Emanuela Carbonara, Francesco Parisi & Georg von Wangenheim, *Unjust Laws and Illegal Norms* 3 (Univ. Minn. L. Sch., Research Paper No. 08-03, 2008) [hereinafter Carbonara et al.]; Tyler, *supra* note 192, at 221 ("Perceived severity, in contrast, appears to play little role [in determining compliance].").

219. Griffin, *supra* note 81, at 1555 (discussing Darryl Brown's explanation of the psychology of resentment and citing Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295, 1313–14 (2001)).

220. Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1401 (2005); Griffin, *supra* note 81, at 1554 (discussing Nadler's research).

221. TYLER, *supra* note 215, at 162.

privacy means and likely strike people as unfair.[222] As John Rawls believed, the "exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in light of principles and ideals acceptable to them as reasonable and rational."[223] The third party doctrine encourages police actions and policies that people might perceive as unfair because law enforcement can gain access to previously shared private information—of which people have come to expect privacy because the information would ordinarily be protected by common law, the Constitution, and statutes—without satisfying the rigors of probable cause and obtaining a warrant. Under the third party doctrine, however, law enforcement may pry into people's private affairs. Likewise, because private citizens must respect private property or run the risk of civil and criminal sanctions, it would seem unfair to the public that law enforcement officers are given carte blanche to enter private land under the open fields doctrine. In essence, the third party and open fields doctrines appear to be loopholes to the Fourth Amendment requirements and a manipulation of our Constitution.

Similarly, police deception and the mistake of law doctrine undermine the public's perception of the criminal justice system as one of fair processes. Professor Tom Tyler's research has shown that procedural issues are the public's foremost concern when interacting with legal authorities[224] and that fair treatment of people will encourage long-term compliance.[225] Police deception is antithetical to fairness because in contrast to the harsh sanctions that can be levied against laypersons for making false or misleading statements, law enforcement officers may lie with impunity—even during the same investigation in which a defendant is later accused of making a false statement.[226]

As Professor Margaret Paris has criticized, "[Police deception] harms a society when the officers who enforce its laws behave like the worst used car salesmen. That harm is compounded because deceptive tactics employed by the police to obtain evidence reflect poorly on courts that supervise the admission of that evidence."[227] Likewise, the mistake of law doctrine is equally unfair because laypersons—those who are being governed—are held to a higher standard of legal knowledge than officers and legislators—those responsible for governing.

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222. Rosenberg, *supra* note 176, at 134 ("Cognitive dissonance . . . can weaken compliance with motivational law.").

223. Fallon, *supra* note 214, at 1798 (citing JOHN RAWLS, POLITICAL LIBERALISM 217 (1993)).

224. TYLER, *supra* note 215, at 108; Simon-Kerr, *supra* note 123, at 2228.

225. Tyler, *Legitimacy*, *supra* note 210, at 287. *See also* Stephen D. Mastrofski, Jeffrey B. Snipes & Anne E. Supina, *Compliance on Demand: The Public's Response to Specific Police Requests*, 33 J. RES. CRIME & DELINQUENCY 269, 298 (1996) ("Regardless of how citizens calculate outcomes, the processes of policing appear to matter in securing citizen compliance.").

226. *See supra* Part I.B.

227. Paris, *supra* note 179, at 831.

As a result, loss of trust could easily lead to loss of buy-in, amounting to less compliance with the law.[228] "[T]he existence of such phenomena as trust and social capital is a product of everyday norm compliance"[229] because "[t]he obligation to obey is based on trust of authorities. Only if people can trust authorities, rules, and institutions can they believe that their own long-term interests are served by loyalty toward the organization. In other words, the social contract is based on expectations about how authorities will act."[230]

It is well established that "[s]ocieties cannot prosper without interdependence among their members. Interaction and dependence requires some measure of trust, and law is one mechanism that [can] support[] it in society."[231] Deceptive police practices, such as "[u]sing false statement charges as pretexts for other harms[,] can diminish transparency and mute signals to comply."[232] Lies by law enforcement not only immediately injure the defendant but also produce profound long-term damage by eroding the public's trust and cooperation[233] because police lies can "compromise and corrupt our relationships" with the government[234] and "can inflict moral harms of disloyalty in addition to and distinct from the harms of deception."[235] Moreover, as Professor Helen Norton has pointed out, "The harms of lies in general and lies by the government in particular center on the liar's effort to manipulate the listener in ways that are inherently disrespectful of the listener's autonomy and dignity."[236] Researchers have observed that "[i]f pragmatic about their own deceptions, people become moralistic when they consider others' lies. Then the deception is wrong and reflects negatively on the deceiver. Indeed, people view duplicity as one of the gravest moral failings."[237] Therefore, the cognitive dissonance and the loss of trust due to the legal asymmetries, as well as resulting problems, should be resolved by employing our laws to signal that cooperation is desirable within society and reforming police practices and criminal procedure doctrines to enhance trust and cooperation.

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228. Tyler, *Legitimacy*, *supra* note 210, at 286 ("Cooperation and consent—'buy in'—are important because they facilitate immediate acceptance and long-term compliance. People are more likely to adhere to agreements and follow rules over time when they 'buy into' the decisions and directives of legal authorities.").

229. Knight, *supra* note 191, at 360.

230. TYLER, *supra* note 215, at 172.

231. Tamar Frankel & Wendy Gordon, *Introduction*, 81 B.U. L. REV. 321, 327 (2001).

232. Griffin, *supra* note 81, at 1515.

233. Morrison, *supra* note 90, at 141 (citing SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 19, 24 (Vintage Books 1999) (1978)).

234. Griffin, *supra* note 81, at 1521 (quoting Robert C. Solomon, *Is It Ever Right to Lie? The Philosophy of Deception*, CHRON. HIGHER EDUC. (Wash., D.C.), Feb. 27, 1998, at A60).

235. Norton, *supra* note 77, at 81.

236. *Id*. at 79.

237. Charles F. Bond, Jr. & Bella M. DePaulo, *Accuracy of Deception Judgments*, 10 PERSONALITY & SOC. PSYCH. REV. 214, 216 (2006) (citing Leonard Saxe, *Lying: Thoughts of an applied social psychologist*, 46 AM. PSYCH. 409 (1991)).

III. PROPOSAL: NORM MATCHING AND THE PURSUIT OF EQUITY BETWEEN POLICE AND PRIVATE CITIZENS

To resolve the problems created by the legal asymmetries, an elegantly simple solution can be found by aligning criminal procedure doctrines and police practices to societal norms and expectations.[238] This part employs normative arguments and a cost-benefit analysis, balancing the benefits that would accrue from this proposal with the potential cost of letting criminals go free, to conclude that aligning police practices and criminal procedure doctrines with social norms would yield greater benefits than costs. Norm matching will enhance the legitimacy of the criminal justice system, encourage law abiding behavior, provide guidance to the public, police, and courts, and may even help facilitate crime detection.

A. The Proposal: Norm Matching

Studies and case law demonstrate the value of matching legal norms with social norms. Finding support in retributive and utilitarian theories of social behavior, [239] "[m]any theorists have argued that calibrating law to reflect social norms is essential to the perceived legitimacy of law enforcement."[240] Laws that do not substantially reflect current social values may be perceived as unjust and provoke

238. "[T]he law can have an important symbolic function if it accords with public views about what is fair, but it loses that power as the formal law diverges from public morality." Tyler, *supra* note 192, at 227. The alignment of laws with social norms has been previously recognized as necessary in criminal law as well. Professor Paul Robinson has urged that "[i]n order to harness 'personal moral commitment and the power of social disapproval,' criminal law must align with societal norms." Griffin, *supra* note 81, at 1548 (quoting Paul H. Robinson, *Moral Credibility and Crime*, ATLANTIC MONTHLY, Mar. 1995, at 76). Although some behavior may change regardless of whether the law conforms to people's attitudes, the conformity between laws and people's values and attitudes would certainly optimize compliance with laws. Robert B. Seidman, *Justifying Legislation: A Pragmatic Institutionalist Approach to the Memorandum of Law, Legislative Theory, and Practical Reason*, 29 HARV. J. ON LEGIS. 1, 48 (1992). For a discussion of the interplay of law and norms, see generally Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801 (1991); Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990).

239. Considerations of a layperson's perspective on justice and the effect of a layperson's "tastes" fit respectively with a retributive and utilitarian account of public conduct. Griffin, *supra* note 81, at 1548 (citing Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 CAMBRIDGE L.J. 145 (2008)). As Professor Robinson has argued,

> Expanding the criminal law beyond the bounds of perceived desert initially weakens the stigmatizing effect that that expansion seeks to enlist. Finally, it destroys the stigmatizing effect; criminal penalties for non-condemnable conduct cause the public to sympathize with the person charged, and to despise the legal system that brings the charge. And it is the credibility of the criminal law in general that may be destroyed. Criminal conviction for a violation that the community sees as non-condemnable conduct affects not just the meaning of liability imposed for those offenses but the condemnatory message for all criminal convictions.

Griffin, *supra* note 81, at 1548. Professor Robinson's assessment of the detrimental effects of criminal law is easily applicable to criminal procedure norms.

240. Griffin, *supra* note 81, at 1517.

significant resistance, which in turn would reduce deterrence.[241] "[F]or a legal system to exist, government officials must embrace shared legal norms — such as those embodied in the Constitution — as providing reasons for action and grounds for criticism."[242]

Studies show that "normative concerns are an important determinant of law-abiding behavior. . . . The *most important* normative influence on compliance with the law is the person's assessment that following the law accords with his or her sense of right and wrong; a second factor is the person's feeling of obligation to obey the law and allegiance to legal authorities."[243] According to the norms school, a school of thought that studies law and social norms, "laws work more efficiently when they appropriate meaning from social norms—that is to align their expressive and measurable effects with consensus social interpretations of the moral value of certain actions."[244]

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241. Carbonara et al., *supra* note 218, at 2–3 ("The interaction between social norms and the law may undermine the deterrent effects of legal intervention when the law departs from commonly held opinions."). Other scholars have similarly recognized the importance of laws reflecting social norms in order to effectuate compliance:

> Given the billions of transactions people engage in each day, a social order based on laws can be maintained without massive coercion only if most people, most of the time, abide as a result of supportive social norms, by the social tenets embedded in the law. It can be maintained only if the majority of the transactions engage in are sufficiently undergirded by social norms, and thus do not require constant intervention by public authorities. Above all, laws work best and are needed least when social norms are intrinsically followed.

Amitai Etzioni, *Social Norms: Internalization, Persuasion, and History*, 34 LAW & SOC'Y REV. 157, 164–65 (2000).

242. Fallon, *supra* note 214, at 1806. "Legal legitimacy" depends on "sociological legitimacy." *Id.* at 1805 (referring to H.L.A. HART, THE CONCEPT OF LAW 116–17 (2d ed. 1994)). For example, as Professor Richard Fallon, Jr. explains, the lawfulness of the Constitution lies not in its ratification but in its acceptance as authoritative, and similarly, the loss of sociological legitimacy led to the Articles of Confederation's loss of legal legitimacy. Fallon, *supra* note 214, at 1805 (relying on Frederick Schauer, *Amending the Presuppositions of a Constitution, in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 153–57 (Sanford Levinson ed., 1995)).

243. TYLER, *supra* note 215, at 64 (emphasis added). Professor Tom Tyler explains:

> Normative commitment through personal morality means obeying a law because one feels the law is just; normative commitment through legitimacy means obeying a law because one feels that the authority enforcing the law has the right to dictate behavior. . . . [P]ersonal morality is clearly a more important influence on compliance than legitimacy.

Id. at 4, 68; *see also* Weisberg, *supra* note 178, at 467 ("[T]he norms school argues that a useful strategy for lawmakers is to accommodate, ally with, and exploit these social norms to achieve legal goals more efficaciously.").

244. Weisberg, *supra* note 178, at 476–77 (explaining principles espoused by the norms school). *Accord* Balkin, *supra* note 13, at 148 ("[E]ven people who believe that the society they live in is basically unjust in important aspects nevertheless depend heavily on the moral coherence of many concrete social norms and institutions in making their critical moral and social judgments."); Robert Cooter, *Normative Failure of Law*, 82 CORNELL L. REV. 947, 949 (1997) ("[E]mpirical research proved that inchoate social norms often control behavior in spite of the law."); Etzioni, *supra* note 241, at 164 (explaining that "studies of taxpayers, for instance, show that they are much more compliant with the law and much less resentful when they feel that tax laws square with prevailing norms of fairness"); Rowell, *supra* note 125, at 267 ("Where people's subjective beliefs about legal rules diverge from the rules themselves, it also creates troubling barriers to the law's expressive function. In

We know it is both possible and prudent to calibrate criminal procedure law with social norms because the U.S. Supreme Court has already taken some steps in that direction in its Fourth Amendment jurisprudence. For example, in determining the legality of aerial surveillance, the Court aligned police actions with permissible conduct for laypersons. In *California v. Ciraolo* and *Florida v. Riley*, the Court decided whether police aerial surveillance from a private airplane 1,000 feet[245] and from a helicopter 400 feet[246] above defendant's property, respectively, constituted Fourth Amendment searches. The Court upheld the aerial surveillance in *Ciraolo* and *Riley* because the police were flying at the same altitude at which the public was permitted to fly and "may see what may be seen from a public vantage point where [they have] a right to be."[247] *Ciraolo* further noted that the defendant's property could be viewed by a member of the public "perched on the top of a truck or a two-level bus"[248] or "a power company repair mechanic on a pole overlooking the yard."[249] In this regard, the Court premised the law on aerial surveillance on permissible public acts.

Unfortunately, by resting privacy concerns solely on navigable airspace, the Court did not go far enough to align the standard for aerial surveillance with all social norms. As Justice Powell's dissent pointed out, there was little risk that a private aircraft would be hovering over the defendant's property with the same degree of interest and length of time.

> Travelers on commercial flights, as well as private planes used for business or personal reasons, normally obtain at most a fleeting, anonymous, and nondiscriminating glimpse of the landscape and buildings over which they pass. The risk that a passenger on such a plane might observe private activities, and might connect those activities with particular people, is simply too trivial to protect against. It is no accident that, as a matter of common experience, many people build fences around their residential areas, but few build roofs over their backyards.[250]

By failing to acknowledge that aerial surveillance contravenes social norms and conventions, the Court fell short. Though the public is permitted to hover in the air, it ordinarily would not do so. There is still more progress to be made with aerial surveillance law, but the Court has at least recognized the importance of conforming the legality of police conduct with legally permissible public conduct.

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fact, expressive theorists might consider that people may glean greater expressive value from whatever they believe the law to be, than from whatever it actually is."); Clifton B. Parker, *Laws May Be Ineffective If They Don't Reflect Social Norms, Stanford Scholar Says*, STAN. REP. (Nov. 24, 2014) ("Stanford economist Matthew O. Jackson says that laws that ignore social norms may backfire . . . .").

245. California v. Ciraolo, 476 U.S. 207, 209 (1986).

246. Florida v. Riley, 488 U.S. 445, 447–48 (1989).

247. *Id.* at 449 (internal quotation marks omitted).

248. *Ciraolo*, 476 U.S. at 211.

249. *Id.* at 215.

250. *Id.* at 223–24 (Powell, J., dissenting).

A more promising example is *Florida v. Jardines*, where the Court invalidated an officer's use of a drug-sniffing canine on the defendant's porch.[251] There, the Court reasoned that the officer's intrusion transgressed the bounds of social norms and of any implied license for visitors to knock briefly on an occupant's front door.[252] Just as residents would not expect a visitor to be "exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission," they would not expect the police to use a trained dog to conduct investigations at their front door.[253] The Court explained, "Here, the background *social norms* that invite a visitor to the front door do not invite him there to conduct a search."[254] *Jardines* demonstrates the significant role of social norms in determining the Fourth Amendment's scope.

Thus, following *Jardines*, the Court should hold officers to public expectations and social norms by applying the same norms to law enforcement as are applied to laypersons.[255] If a layperson would incur civil or criminal liability for trespassing or making a false statement, then officers should not be permitted to trespass on private property—regardless of whether it is curtilage or an open field[256]—or employ false statements or deception during an investigation. If laws, regulations, and industry norms would preclude businesses from disclosing a person's protected information, then the police should not be able to obtain that information without a warrant. As a predicate to excuse an investigatory error, the police should be required to make the same showing that laypersons must make to avail themselves of a mistake of law defense.

Before the Court established the open fields and third party doctrines and allowed police deception and mistake of law defenses, officers were expected to heed citizens' expectations of privacy and were held to the same standard as lay

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251. 569 U.S. 1, 3, 11–12 (2013).

252. *Id.* at 8–9.

253. *Id.* at 9.

254. *Id.* (emphasis added).

255. Judge Richard Posner has argued:

> Lawyers think that the law is potentially significant as a shaper (not just an enforcer) of norms, much like education. The evidence for this conjecture is weak, and against it can be cited evidence that subgroups will often go their own way, adhering to norms that serve their special needs but violate the applicable legal norms, which may have been created without consideration for those needs. The divergence may come about through sheer (rational) ignorance of the law—an ignorance that is especially likely to be found precisely where the law is nonintuitive, and hence more costly to understand, because it is inconsistent with the norms of a person's immediate community.

Richard A. Posner, *Social Norms and the Law: An Economic Approach*, 87 AM. ECON. REV. 365, 368 (1997).

256. Justice Marshall has long suggested that the Court should apply the same standard of trespass imposed on laypersons to officers. Oliver v. United States, 466 U.S. 170, 195 (1984) (Marshall, J., dissenting) ("Private land marked in a fashion sufficient to render entry thereon a criminal trespass under the law of the State in which the land lies is protected by the Fourth Amendment's proscription of unreasonable searches and seizures.").

persons.[257] Stripping away existing loopholes and double standards will ensure that police practices align with societal norms and expectations and will signal to the public that the police are not above the law.

B. Cost-Benefit Analysis

1. Fairness enhances legitimacy

In addition to the above normative reasons, a cost-benefit analysis yields support for my proposed reforms. The first benefit that would naturally result from the changes, as previously explained,[258] would be the restoration or enhancement of legitimacy to the criminal justice system, which is all the more in jeopardy in light of highly publicized police misconduct in recent years. Results from a Gallup poll conducted in 2020 showed a stark decline in Americans' confidence in law enforcement, hitting the lowest point in twenty-year period of the survey, following the highly publicized deaths caused by police officers.[259] Fifty-eight percent of the public surveyed expressed a need for major changes in policing.[260] In the wake of these events, Pulitzer Prize-winning journalist Wesley Lowery[261] underscored the significance of meeting public expectations: "Obviously, this is an extremely important moment, and we're seeing departments across the country debate how we might bring policing in line with the public's expectation of it. But in order to do that, we need to understand what the public's expectation of policing is."[262]

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257. Before *Heien*, a majority of circuits and thirteen states had previously rejected affording officers a mistake of law claim to justify their actions. Ngov, *supra* note 6, at 170.

258. *See supra* Part II.C.

259. Jeffrey Jones, *Black, White Adults' Confidence Diverges Most on Police*, GALLUP (Aug. 12, 2020) (referring to the deaths of George Floyd, Breonna Taylor, and Rashard Brooks); *see also Public Perceptions of the Police*, COUNCIL ON CRIM. JUST. (Oct. 7, 2020), https://counciloncj.org/public-perceptions-of-the-police/ (displaying results of Gallup Survey of U.S. adults, aged eighteen and older, June 23–July 6, 2020); Scottie Andrew, *Americans' Confidence in Police Falls to Its Lowest Level in Nearly Three Decades, New Gallup Poll Shows*, CNN (Aug. 12, 2020), https://edition.cnn.com/2020/08/12/us/american-confidence-in-policing-new-low-trnd/index.html; *Confidence in Police Is at Record Low, Gallup Survey Finds*, N.Y. TIMES (Aug. 12, 2020), https://www.nytimes.com/2020/08/12/us/gallup-poll-police.html; N'dea Yancey-Bragg, *Americans' Confidence in Police Falls to Historic Low, Gallup Poll Shows*, USA TODAY (Aug. 12, 2020), www.usatoday.com/story/news/nation/2020/08/12/americans-confidence-police-falls-new-low-gallup-poll-shows/3352910001/.

Studies show that police misconduct not only engender negative reactions and attitudes towards police but also has "greater longevity" for Black and Latino people than for white people. Steven A. Tuch & Ronald Weitzer, *Racial Differences in Attitudes Toward the Police*, 61 PUB. OP. Q. 642, 647 (1997). *See also Police and Public Confidence*, PRISON POLICY INITIATIVE, https://www.prisonpolicy.org/prisonindex/policeconfidence.html (showing racial disparity in public confidence in police).

260. COUNCIL ON CRIM. JUST., *supra* note 259.

261. "Wesley Lowery was a national correspondent covering law enforcement, justice and their intersection with politics and policy for *The Washington Post*. He previously covered Congress and national politics. In 2015, he was a lead reporter on the 'Fatal Force' project and was awarded the Pulitzer Prize and George Polk award." *Wesley Lowery*, WASH. POST, https://www.washingtonpost.com/people/wesley-lowery/ (last visited on Jan. 29, 2023).

262. COUNCIL ON CRIM. JUST., *supra* note 259 (quoting Wesley Lowery).

One means of ascertaining public expectations would be to examine social norms and the government's own expectations of the public, as this Article proposes, and calibrate law enforcement policies to societal expectations.[263] By rejecting the permissive practices that undermine individual rights, the police can begin to restore their legitimacy.

2. Clarity provides guidance to all

Eliminating double standards and legal asymmetries may also have the benefit of furnishing a bright line rule that would provide clarity and guidance to laypersons, law enforcement, and the courts. Such a rule may help avoid litigation because of the ease of its administration.[264] Even the Court in *Oliver* understood the advantages of bright line rules and rejected employing case-by-case approaches as unworkable when considering law enforcement needs and Fourth Amendment interests.[265] The Court reasoned that "[t]he lawfulness of a search would turn on '[a] highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions. . . .'"[266] The Court recognized that "an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances" would be cumbersome for the courts, police, and public because it "not only makes it difficult for the policeman to discern the scope of his authority, [but] it also creates a danger that constitutional rights will be arbitrarily and inequitably enforced."[267]

Although the Court disapproved of the case-by-case approach, the Court effectively adopted it. Indeed, the open fields and mistake of law doctrines and legality of deceptive police practices are "incapable of determinate application,"[268] due to the multi-factored tests established by the Court and the underlying consideration of the totality of the circumstances. The legality of police deception, for example, depends on whether police conduct coerced the suspect.[269] To make this determination, a court must consider the totality of the circumstances, including such factors as the amount of time the suspect was interrogated; the suspect's mental and emotional capacity, education level, criminal history, and experience with the criminal justice system; and the number of police officers involved in the interrogation.[270]

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263. "[P]rocedural justice findings have interesting implications for efforts to draw upon legitimacy to create support for the law. The primary implication is that such efforts should be based upon an understanding of which procedures for creating and implementing laws citizens regard as fair." Tyler, *supra* note 192, at 232.

264. *See* Oliver v. United States, 466 U.S. 170, 196 (1984) (Marshall, J., dissenting) (predicting that litigation will ensue from the Court's case-by-case approach).

265. *Id.* at 181.

266. *Id.*

267. *Id.* at 181–82 (citations omitted).

268. *Id.* at 196 (Marshall, J., dissenting).

269. Rogers v. Richmond, 365 U.S. 534, 541–43 (1961).

270. Spano v. New York, 360 U.S. 315, 323 (1959) (analyzing "the totality of the situation").

In the case of the open fields doctrine, courts must employ a fact-intensive four-factored test to determine if police intrusion falls within an open field or curtilage: "(1) the proximity of the area to the home; (2) whether the area is within an enclosure surrounding the home; (3) the nature and uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by passersby."[271] Consequently,

> [p]olice officers, making warrantless entries upon private land, will be obliged . . . to make on-the-spot judgments as to how far the curtilage extends, and to stay outside that zone.[272] In addition, we may expect to see a spate of litigation over the question of how much improvement is necessary to remove private land from the category of "unoccupied or undeveloped area" to which the "open fields exception" is now deemed applicable.[273]

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271. United States v. Dunn, 480 U.S. 294, 294–95 (1987).

272. Judges are now forced to resort to distinctions such as whether the officer walked on mowed grass to determine where curtilage ends and open fields begin. Peters, *supra* note 55, at 966–72 (referring to courts' use of the "mow-line" in People v. Pittiglio, No. 208857, 1998 Mich. App. Lexis 883 (Mich. Ct. App. Dec. 1, 1998); State v. Townsend, 412 S.E.2d 477 (W. Va. 1991) (per curiam)); United States v. Jenkins, 124 F.3d 768 (6th Cir. 1997); State v. Bayless, No. 92 CA 527, 1992 Ohio App. Lexis 6280, at *8 (Ohio Ct. App. Dec. 10, 1992); and United States v. Reilly, 76 F.3d 1271 (2d Cir. 1996)).

273. *Oliver*, 466 U.S. at 196 (Marshall, J., dissenting). As Justice Marshall predicted, litigation has erupted over the boundaries between curtilage and open field because of the unmanageability of the open fields doctrine. *See, e.g.*, Collins v. Virginia, 138 S. Ct. 1663, 1670 (2018) (holding that the driveway is curtilage because it "runs alongside the front lawn and up a few yards past the front perimeter of the house" and is partially enclosed and abutting the house; "[t]he top portion of the driveway that sits behind the front perimeter of the house is enclosed on two sides by a brick wall about the height of a car and on a third side by the house"); United States v. Alexander, 888 F.3d 628, 633 (2d Cir. 2018) (holding that the area in front of a shed a few feet away from the house was curtilage); Stone v. Martin, 720 F. App'x 132, 134–35 (3d Cir. 2017) (holding that law office located "many yards" from the home was not curtilage); United States v. Beene, 818 F.3d 157, 162 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 113 (2016) (holding that a driveway that was close to the house and partially enclosed by fences did not fall within curtilage); United States v. Castleman, 795 F.3d 904, 914 (8th Cir. 2015), *cert. denied*, 577 U.S. 1109 (2016) (holding that a tote under a tarp and trash bags in a trailer were found on an open field); United States v. Douglas, 744 F.3d 1065, 1071 (8th Cir. 2014), *cert. denied*, 140 S. Ct. 1134 (2020) (holding that a rusty refrigerator containing evidence was located in an open field); United States v. Hayes, 551 F.3d 138, 147–48 (2d Cir. 2008) (determining that the path leading to a backyard was not curtilage); United States v. Nichols, 248 F. App'x 105, 107 (11th Cir. 2007) (upholding a determination that curtilage ended before the marijuana field); United States v. Titemore, 437 F.3d 251, 259 (2d Cir. 2006) (holding that defendant lacked an expectation of privacy in the part of the lawn accessed by an officer and in the porch where the officer questioned defendant and peered through the sliding glass door); United States v. Taylor, 458 F.3d 1201, 1207 (11th Cir. 2006) (holding that a pond on the defendant's property was not within curtilage); Widgren v. Maple Grove Twp., 429 F.3d 575, 579 (6th Cir. 2005) (determining the land within 200 feet of a house was in an open field); United States v. Hatfield, 333 F.3d 1189, 1199 (10th Cir. 2003) (concluding that the pasture on which an officer trespassed was an open field); United States v. Pennington, 287 F.3d 739, 745–46 (8th Cir. 2002) (holding that the underground bunker located in a field behind defendant's rural residence fell outside of the curtilage and therefore was an open field that could be entered without a warrant); United States v. Johnson, 256 F.3d 895, 909 (9th Cir. 2001) (remanding the case to the lower court to determine where curtilage ended on the property); Daughenbaugh v. City of Tiffin, 150 F.3d 594, 596, 600 (6th Cir. 1998) (finding that the unattached garage located fifty to sixty yards away from defendant's home fell within curtilage of the home); United States v. Reilly, 76 F.3d 1271, 1274–75, 1283 (2d Cir. 1996), *aff'd*, 91 F.3d 331 (2d Cir. 1996) (holding that a cottage located 375 feet from the main residence is protected under curtilage); United States v. Pace, 955 F.2d 270, 275–76 (5th Cir. 1992) (concluding that a barn situated sixty yards from a house that was enclosed by a fence was in

When Justice Marshall dissented in *Oliver* against the open fields doctrine, he proposed a "clear, easily administrable rule," namely that "private land marked in a fashion sufficient to render entry thereon a criminal trespass under the law of the State in which the land lies is protected by the Fourth Amendment's proscription of unreasonable searches and seizures."[274] He reasoned:

> One of the advantages of the foregoing rule is that it draws upon a doctrine already familiar to both citizens and government officials. In each jurisdiction, a substantial body of statutory and case law defines the precautions a landowner must take in order to avail himself of the sanctions of the criminal law. The police know that body of law, because they are entrusted with responsibility for enforcing it against the public; it therefore would not be difficult for the police to abide by it themselves.[275]

Justice Marshall's point applies to all the asymmetries highlighted in this Article. If the law imposes the same standard on police officers as it does on laypersons—whether it be regarding trespass, information held by third parties, false statements and deception, or knowledge of the law—police officers will know how to conduct themselves. Consequently, if law enforcement officials follow the same norms and laws as laypersons, courts can more clearly adjudicate those cases.

3. Catching criminals

Finally, eliminating the aforementioned asymmetries may even enhance crime detection. When the U.S. Supreme Court considers challenges to law enforcement actions, it often engages in a cost-benefit analysis, equating the cost that would be incurred with the risk that criminals would go free.[276] The Court has been preoccupied with the concern that restricting police practices will hamper crime detection; it,

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an open field); Husband v. Bryan, 946 F.2d 27, 28–29 (5th Cir. 1991) (holding that digging land beneath an open field was a search); United States v. Hatch, 931 F.2d 1478, 1481–82 (11th Cir. 1991), *cert. denied*, 502 U.S. 883 (1991) (holding that marijuana patch located thirty yards from the home was an open field).

274. *Oliver*, 466 U.S. at 195 (Marshall, J., dissenting).

275. *Id.* at 195–96 (Marshall, J., dissenting).

276. The Court uses this approach predominantly when considering the application of the exclusionary rule. For example, in *Davis v. United States*, the Court explained the exclusionary rule analysis to encompass the following:

> The analysis must also account for the "substantial social costs" generated by the rule. Exclusion exacts a heavy toll on both the judicial system and society at large. It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence. And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment. Our cases hold that society must swallow this bitter pill when necessary, but only as a "last resort."

564 U.S. 229, 237 (2011) (citations omitted); *see also* Herring v. United States, 555 U.S. 135, 148 (2009) ("[T]he criminal should not 'go free because the constable has blundered.'") (quoting People v. Defore, 150 N.E. 585, 587 (1926)); United States v. Leon, 468 U.S. 897, 907–08 (1984) ("An objectionable collateral consequence of this interference with the criminal justice system's truth-finding function is that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains. Particularly when law enforcement

however, has neglected to consider how the permissive police practices associated with the legal asymmetries can have the unintended adverse effect of letting criminals go free. In particular, police deception exacerbates the risk that the true criminals will escape punishment because it promotes false confessions[277] and risks the incarceration of innocent persons.[278]

Numerous scholars have concluded that misuse of interrogation techniques has the propensity to lead even persons with normal intellectual and psychological functioning to falsely confess.[279] Since the late 1980s, studies have documented

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officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system.").

277. There is a high rate of confessions: forty-two to fifty-five percent of suspects confess. Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCH. SCI. PUB. INT. 33, 44 (2004).

278. Wrongful convictions due to false confessions happen because many people involved in the criminal justice system, including law enforcement and jurors, find confessions highly probative of guilt. *See* Saul M. Kassin, *The Psychology of Confession Evidence*, 52 AM. PSYCH. 221, 229 (1997) [hereinafter Kassin, *The Psychology*]; Kassin & Gudjonsson, *supra* note 277, at 57 ("More recent studies as well have shown that juries may be corrupted by confessions whether they judge them to be voluntary or coerced."); Saul M. Kassin, *Confession Evidence: Commonsense Myths and Misconceptions*, 35 CRIM. JUST. & BEHAV. 1309, 1315 (2008) ("Mock jury studies show that confessions have more impact than other potent forms of evidence and people do not fully discount confessions even when they are judged to be coerced and when it is logically and legally appropriate to do so.") [hereinafter Kassin, *Confession Evidence*]; Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 491–92 (1998) ("[C]onfession evidence substantially biases the trier of fact's evaluation of the case in favor of the prosecution and conviction, even when the defendant's uncorroborated confession was elicited by coercive methods and the other case evidence strongly supports his innocence.").

Studies confirm that jurors accord great weight to false confessions. Research shows that suspects who made false confessions faced at least a three-fold increase in the likelihood of being convicted—resulting in a seventy-three percent conviction rate in one study, *id.* at 481–82, and eighty-one percent in another study. Kassin, *Confession Evidence*, *supra* note 278, at 1315; Megan Crane, Laura Nirider & Steven A. Drizin, *The Truth About Juvenile False Confessions,* 16 INSIGHTS ON L. & SOC'Y 10, 15 (2016), https://www.prisonpolicy.org/scans/aba/Juvenile_confessions.pdf ("A full 81% of proven false confessors whose case went to trial were convicted—and that figure does not account for those false confessors who pled guilty before trial. (Of the first 125 DNA exonerees who falsely confessed, 11% pled guilty.)").

Additionally, people find it implausible that an innocent person would confess. One source reports:

> Sixty-eight percent indicated that they believed a suspect would confess falsely "not very often" (40 percent) or "almost never" (28 percent). This quantifies the perception of trial attorneys who report that the vast majority of potential jurors insist that it is not possible for someone to confess to a crime he did not commit.

Facts and Figures, FALSECONFESSIONS.ORG, https://falseconfessions.org/fact-sheet/ (last visited Apr. 25, 2022). To comprehend the possibility of false confessions, one need only recall that the police received around 200 confessions for the kidnapping of Charles Lindberg's baby. Kassin, *The Psychology*, *supra* note 278, at 225; Ian Herbert, *The Psychology and Power of False Confessions*, ASS'N FOR PSYCH. SCI. (Feb. 21, 2011), https://www.psychologicalscience.org/observer/the-psychology-and-power-of-false-confessions.

279. *See* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 984 (1997). For detailed explanations of the interrogation techniques used by law enforcement, see generally *id.*; Kassin, *The Psychology*, *supra* note 278, at 221–23; Kassin & Gudjonsson, *supra* note 277; Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Interrogation in America*, 18 CRIME, L. & SOC. CHANGE 35 (1992); Natali, *supra* note 111. For a detailed and

around 250 cases of false confessions due to interrogations.[280] "In about 30% of DNA exoneration cases, innocent defendants made incriminating statements, delivered outright confessions or pled guilty."[281]

Innocent people are lured into falsely confessing because the interrogators depict the situation as hopeless and present a confession as the only means of resolving it. Interrogators may also convince suspects that they committed a crime which they, for whatever reasons, do not remember.[282] Interrogators can engage in highly suggestive techniques that alter the innocent person's memory, "rendering the original contents irretrievable."[283]

For example, in the case of the Central Park jogger, five Black and Hispanic youths between the ages of fourteen and sixteen falsely confessed to an attack.[284] Their confessions contained vivid details of how, when, and where they attacked the jogger, which, in hindsight, were wrong because the innocent boys could not have known about the true details of the crime.[285] One boy even reenacted how he removed the jogger's pants.[286] As a result, the boys were convicted and imprisoned until the real killer confessed thirteen years later.[287]

Police additionally deploy maximization and minimization techniques[288] to respectively scare or lull persons being interrogated into a false sense of security through sympathy or justifications.[289] They may also feed details of crimes to false confessors. In one case, an officer obtained a false confession to murder from a female suspect, whose innocence was only later proven through her unassailable alibi.[290] Reflecting back on the case, the detective realized that he had provided the details of the crime, which the suspect merely repeated in her confession.[291] As

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comprehensive study of false confession cases, see Kassin & Gudjonsson, *supra* note 277; Leo & Ofshe, *supra* note 278.

280. FALSECONFESSIONS.ORG, *supra* note 278.

281. *Id.*

282. Ofshe & Leo, *supra* note 279, at 986.

283. Kassin, *The Psychology*, *supra* note 278, at 226.

284. Kassin & Gudjonsson, *supra* note 277, at 34.

285. *Id.*

286. *Id.*

287. The youths in the Central Park jogger case were convicted because of their false confessions, despite DNA evidence excluding the youths as donors and their confessions not matching the facts of the attack known to law enforcement at the time. *Id.*

288. *See, e.g.*, Frazier v. Cupp, 394 U.S. 731, 738 (1969) "([T]he officer sympathetically suggested that the victim had started a fight by making homosexual advances . . . ."); State v. Hatfield, 840 P.2d. 300, 301, 303 (Ariz. Ct. App. 1992) (describing the officer minimizing suspect's role in statutory rape by implying that thirteen-year-old girl was "sexually experimenting and [the suspect] was handy"); State v. Ulch, No. L-00-1355, 2002 WL 597397, at *3 (Ohio Ct. App. Apr. 19, 2002) (describing the detective telling the defendant that the detective had done things to her own child that she "was not proud of").

289. Kassin, *The Psychology*, *supra* note 278, at 223; Kassin & Gudjonsson, *supra* note 277, at 40. Another tactic involves police promises of leniency, which some have argued is impermissible because it amounts to the police engaging in plea bargaining, which lies squarely within the discretion of prosecutors. Welsh S. White, *Confessions Induced by Broken Government Promises*, 43 DUKE L.J. 947, 954 (1994).

290. Natali, *supra* note 111, at 861 (citing Jim Trainum, *Get It on Tape*, L.A. TIMES, Oct. 24, 2008, at 23).

291. *Id.*

one researcher has observed, "Looking through a behavioral lens, one is struck by the ways police investigators can shape suspects' behavior, as if they were rats in a Skinner box."[292]

Faced with deceptive tactics, individuals who are intellectually or psychologically-challenged become all the more vulnerable to falsely confessing.[293] In fact, 22% of false confessions are made by persons with mental retardation and 10% are elicited from persons with diagnosed mental illness.[294] "In a study of 125 proven false confessions, 63% of false confessors were under the age of twenty-five and 32% were under eighteen, a strikingly disproportionate result. Another study of 340 exonerations found that 42% of juveniles studied had falsely confessed, compared with only 13% of adults."[295] Police, however, are not always cautioned to bear in mind the vulnerability of certain populations. For example, the Reid method, an interrogation method used by many law enforcement offices, instructs officers to isolate a suspect, convey false sympathy, minimize the crime, and use other kinds of deception, regardless of a suspect's age or mental or psychological capacity.[296]

A 2008 study, mimicking the use of fabricated evidence by police, demonstrated how deceptive tactics can lead to false confessions. The experiment found that when researchers presented falsely incriminating evidence to subjects and varied their vulnerability, "69% of all participants signed [a] confession, 28% internalized guilt, and 9% confabulated details to support their false beliefs" of guilt, even though none were actually guilty of the accused act.[297] In the group where the

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292. Kassin & Gudjonsson, *supra* note 277, at 43. The influence of police interactions in shaping a suspect's behavior has been shown through several studies. Studies found that "through automatic process of social mimicry[,] . . . increased movement among police officers triggered movement among interviewers—fidgeting behavior that is perceived as suspicious." *Id.* at 42 (first citing T.L. Chartrand & J.A. Bargh, *The Chameleon Effect: The Social Perception-Behavior Link and Social Interaction*, 76 J. PERSONALITY & SOC. PSYCH. 893, 893–910 (1999); and then Lucy Akehurst & Aldert Vrij, *Creating Suspects in Police Interviews*, 29 J. APPLIED SOC. PSYCH. 192, 192–210 (1999)).

293. Ofshe & Leo, *supra* note 279, at 1117.

294. FALSECONFESSIONS.ORG, *supra* note 278. For example, a jury convicted Juan Rivera, a twenty-year-old man with mental retardation, based on his false confession that was obtained after thirty-three hours of interrogation, despite an electronic leg monitor proving that he was home on the night of the murder and DNA evidence excluding him as the donor. Leo & Ofshe, *supra* note 278, at 490–91.

295. Crane et al., *supra* 278, at 12; *see also Age and Mental Status of Exonerated Defendants Who Confessed: National Registry of Exonerations*, THE NAT'L REGISTRY OF EXONERATIONS, UNIV. OF MICH. (Mar. 17, 2020), https://www.law.umich.edu/special/exoneration/Documents/Age%20and%20Mental%20Status%20of%20Exonerated%20Defendants%20Who%20Falsely%20Confess%20Table.pdf [https://perma.cc/P5JA-ZCPS] (finding in a study that thirty-six percent of exonerated defendants under eighteen at the time of the crime had falsely confessed).

296. Natali, *supra* note 111, at 841. States, like Illinois and Oregon, are beginning to respond to the interrogation tactics used on the vulnerable by prohibiting police deception when interrogating minors. Queram, *supra* note 110; Jaclyn Diaz, *Illinois Is the 1st State To Tell Police They Can't Lie to Minors in Interrogations*, NPR (July 16, 2021), https://www.npr.org/2021/07/16/1016710927/illinois-is-the-first-state-to-tell-police-they-cant-lie-to-minors-in-interrogat; *Oregon Deception Bill is Signed into Law, Banning Police from Lying to Youth During Interrogations*, INNOCENCE PROJECT (July 14, 2021), https://innocenceproject.org/deception-bill-passes-oregon-legislature-banning-police-from-lying-to-youth-during-interrogations/.

297. Kassin, *The Psychology*, *supra* note 278, at 227.

researchers increased the participants' vulnerability by decreasing the certainty about their actions and increasing their stress by increasing the pace of the activity, 100% of the participants in the subgroup "signed [a] confession, 65% came to believe they were guilty, and 35% confabulated details to fit that newly created belief."[298] Ultimately, the "false evidence nearly doubled the number of [participants] who signed a written confession, from 48% to 94%."[299] This study reveals that innocent people are susceptible to internalizing guilt for an act they did not commit and that the introduction of deception is more likely to yield false confessions.[300]

False confessions that result from police deception deprive the defendant of liberty and harm society because the actual perpetrator is still at large, roaming free to reoffend.[301] For example, police extracted a false confession from Melvin Lee Reynolds, who had mental disabilities, for kidnapping and murdering a four-year-old boy.[302] Reynolds was interrogated for almost thirteen hours.[303] His erroneous conviction caused him to spend four years in prison, and during those years, the real serial killer remained at large and was able to kill other victims.[304] In the Central Park jogger case, because of the boys' false confessions, the real killer, Matias Reyes, remained free for thirteen years, during which time he subsequently committed three more rapes and a murder.[305] In the cases of George Parker and Laverne Pavlinac, who were convicted and imprisoned as a result of their false confessions, the real killers were allowed to roam free for five years.[306] Sadly, in Earl Washington's case, he—an adult with mental retardation—falsely confessed to rape and murder and was sentenced to death.[307] Despite DNA evidence exonerating Washington, Virginia's governor only commuted his sentence to life imprisonment and refused to pardon and release him.[308] Even worse, one person was executed due to a false confession.[309]

Furthermore, while there is substantial proof that police deception is ineffective because it leads to false confessions and wrongful convictions,[310] which consequently

298. *Id.*
299. Kassin, *Confession Evidence*, *supra* note 278, at 1314.
300. Kassin, *The Psychology*, *supra* note 278, at 227–28.
301. Trunley, *supra* note 92, at 505.
302. Leo & Ofshe, *supra* note 278, at 485.
303. *Id.*
304. *Id.* at 486.
305. Kassin & Gudjonsson, *supra* note 277, at 34.
306. Leo & Ofshe, *supra* note 278, at 487.
307. *Id.*
308. *Id.*
309. *Id.* at 494.
310. People are convinced by false confessions because they mistakenly believe that they are skilled at ferreting out the truth. Kassin & Gudjonsson, *supra* note 278, at 37. As social psychologist Saul M. Kassin notes,

> Research has consistently shown that people are poor intuitive judges of truth and deception. In fact, even so-called experts who make such judgments for a living—police investigators; judges; psychiatrists; and polygraphers for the Central Intelligence Agency, the Federal Bureau of Investigation, and the military—are highly prone to error.

allows the actual perpetrator to remain at large and free to commit more crimes, there is no proof that police deception is necessary to combat crime.[311] There is no evidence that suspects will not confess absent police deception.[312]

On the other hand, we know that crime detection can be effective without police deception because the European Court of Human Rights[313] and other countries,

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Kassin, *The Psychology*, *supra* note 278, at 222 (first citing Miron Zuckerman, Bella M. DePaulo & Robert Rosenthal, *Verbal and Nonverbal Communication of Deception*, 14 ADVANCES IN EXPERIMENTAL SOC. PSYCH. 1, 1–59 (1981); then Paul Ekman & Maureen O'Sullivan, *Who Can Catch a Liar?*, 46 AM. PSYCH. 184, 184–85 (1991); DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS 219 (1991); and then Richard A. Leo, *Miranda's Revenge: Police Interrogation as a Confidence Game*, 30 LAW & SOC. REV. 259, 259–88 (1996)).

As one researcher summarized, "[T]he accuracy of human lie detectors is low." Bond & DePaulo, *supra* note 237, at 216 (quoting Robert Kraut, *Humans as Lie Detectors: Some Second Thoughts*, 30 J. COMMUNICATION 209, 209–16 (1980)). The accuracy rates for these "experts" range from forty-five to sixty percent, compared with the average accuracy rate for laypersons being around fifty-four percent. Kassin & Gudjonsson, *supra* note 277, at 37 (citing ALDERT VRIJ, DETECTING LIES AND DECEIT: THE PSYCHOLOGY OF LYING AND THE IMPLICATIONS FOR PROFESSIONAL PRACTICE (2000)); Kassin, *Confession Evidence*, *supra* note 278, at 1310; Bond & DePaulo, *supra* note 237, at 230–31. Researchers explain that in one study, participants who were trained in the Reid technique and manual, an interrogation approach popularly adopted by law enforcement agencies, had a significantly lower accuracy rate at detecting truth and deception than those who did not receive the training. The study suggests that investigators naturally had a bias toward concluding there was deception and guilt. Kassin & Gudjonsson, *supra* note 277, at 38. Additionally, once a person forms a belief, she or he develops a confirmation bias to reaffirm the earlier belief when faced with new information that might challenge the earlier formed belief. *Id*. at 41.

The accuracy rate for detecting lies is low because detectives have relied on "nervousness, fear, confusion, hostility," and contradictions or changing stories as indicators of lying. Others have cited poor eye contact, delayed responses, poor posture, and monosyllabic responses as telltale signs of lying. Natali, *supra* note 111, at 849. But these behaviors are also indicative of a highly stressed person, such as a person who is being falsely accused. Kassin, *The Psychology*, *supra* note 278, at 222 (quoting DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS 219 (1991)); *see* Bella M. DePaulo, James J. Lindsay, Brian E. Malone, Laura Muhlenbruck, Kelly Charlton & Harris Cooper, *Cues to Deception*, 129 PSYCH. BULL. 74, 106 (2003). In a study, researchers examined 158 behaviors that have been reported as cues to deception. They concluded that "many behaviors showed no discernible links, or only weak links, to deceit." *Id*. at 74.

Thus, it is not difficult to see how people are unreliable judges of determining when someone is being truthful. It is shocking to believe that a person's liberty and perhaps life hang on the balance of an officer's being wrong more than half the time. As some scholars have pointed out, one should wonder if polygraph tests are inadmissible in court because there is no proven reliability, why are confessions that result from dubious interrogation methods admissible? Natali, *supra* note 111, at 846; *see* Kassin, *Confession Evidence*, *supra* note 278, at 1311.

311. Some scholars support the limited use of police deception. Professor Christopher Slobogin argues that "empirical evidence suggests, although it does not prove, that deception is a necessary component of a successful interrogation in a subset of cases where the suspect initially denies involvement in the crime." He proposes that, if the preceding assumption is true, then "deception might generally be permissible if the police are stymied using straightforward questioning, and if . . . they limit its use to the post-arrest, pre-charge context." Christopher Slobogin, *Lying and Confessing*, 39 TEX. TECH L. REV. 1275, 1284 (2007). Professor Michael Mannheimer proposes that police deception should be prohibited when "(1) it causes the suspect to falsely believe that the benefits of speaking outweigh its costs, and (2) a reasonable person in the suspect's position would have the same belief." Michael J. Zydney Mannheimer, *Fraudulently Induced Confessions*, 96 NOTRE DAME L. REV. 799, 802 (2020).

312. Natali, *supra* note 111, at 839.

313. Jacqueline Ross, *Do Rules of Evidence Apply (Only) in the Courtroom? Deceptive Interrogation in the United States and Germany*, 28 OXFORD J. LEGAL STUD. 443, 455 (2003).

like Germany, prohibit police deception during interrogations[314] and yet still manage to fight crime and foster public trust. It is not surprising that concomitantly the public in European countries place higher trust in their police; seventy-seven percent of the public in Germany and seventy-five percent in England and Wales trust the police compared with forty-eight percent of Americans.[315]

Germany prohibits police deception because the police in Germany serve a neutral function as quasi-assistants to the trial judge in obtaining reliable information during the pretrial investigation and facilitate truth-seeking functions.[316] There, police are restricted from asking leading questions based on facts that the police already know are false or that are not yet established.[317] Additionally, German police may not feign false sympathy for the accused by falsely implying that the police believe the accused acted in a justified manner.[318] The prohibition against deception even extends to the use of undercover agents and jailhouse snitches.[319] German law provides some of the broadest protection against deception, even to the extent of prohibiting questions that pose alternative theories because they may suggestively convey to the witness or suspect that only two options exist.[320] The police may not, for example, ask whether the culprits fled on foot or by car because the question implies only two possible modes of escape.[321] Because German procedures focus on obtaining quality evidence, German law dictates that trial judges must not consider statements obtained through deception, including lies made by police during an interrogation.[322]

Finally, the rationale that police deception is "necessary" for fighting crime does not sufficiently justify police deception and the other types of police practices associated with the legal asymmetries critiqued in this article.[323] The concern over crime detection should not compel society to forego respecting individual rights; otherwise, society would still permit torture, coercion, and the third degree[324] and

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314. Simon-Kerr, *supra* note 123, at 2181.

315. James Craven, *Our Police Embrace Deceit. Is It Any Wonder We Don't Trust Them?*, CATO INST. (Dec. 21, 2020), https://www.cato.org/blog/our-police-embrace-deceit-it-any-wonder-we-dont-trust-them.

316. Ross, *supra* note 313, at 445, 455–56.

317. *Id.* at 460.

318. *Id.* at 461.

319. *Id.* at 447. In contrast to the German approach against using snitches and undercover agents, the U.S. Supreme Court has approved of such uses. *See, e.g.*, On Lee v. United States, 343 U.S. 747, 757 (1952); Hoffa v. United States, 385 U.S. 293, 311 (1966); Lewis v. United States, 385 U.S. 206, 210 (1966). For a discussion of the use of snitches and undercover agents, see Ngov, *supra* note 9.

320. Ross, *supra* note 313, at 460.

321. *Id.*

322. *Id.* at 447, 462.

323. As the Court has reminded us, the "police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." Spano v. New York, 360 U.S. 315, 320–21 (1959).

324. Natali, *supra* note 111, at 840 ("[T]hat rationale is flawed in many ways, as one could make the same argument about the costs of not torturing a suspect, of not using coercion, or rejecting the third degree. Thus, as in many other instances involving egregious police practices, pragmatism must yield to basic guarantees of individual rights.").

would eliminate the right to counsel and Miranda warnings—as surely these protections hinder crime detection. We must not forget that the Fourth, Fifth, Sixth, and Eighth Amendments reflect the considered determination of the Framers that the protection of individual rights—not catching criminals—is paramount. Thus, crime detection should not and cannot be achieved at all costs.

CONCLUSION

Justice Brandeis aptly captured the harms posed by double standards and legal asymmetries, like the open fields, mistake of law, and third party doctrines and use of police deception:

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.[325]

The harms resulting from the legal asymmetries, such as cognitive dissonance, isolation, loss of trust, diminished legitimacy, and loss of voluntary law compliance, can be remedied by eliminating double standards and aligning police conduct with the norms expected by the public. Courts should align norms by embracing a public-centered approach to their decision-making. But, if they become entrenched in maintaining the jurisprudence that animated these legal asymmetries, then state and local governments should adopt the necessary changes. Most importantly, if law enforcement entities seek to improve their perception among the public, enhance their legitimacy, and encourage obedience to laws, they should be the first to initiate my proposal. The public will construe such acts, if uncoerced by courts or other governmental bodies, as an independent desire to amend police practices and to act fairly with the public. Police rejection of the criminal procedure double standards and loopholes permitted by the U.S. Supreme Court would send the strongest message that the police recognize they are not above the law.

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325. Olmstead v. United States, 277 U.S. 438, 485 (Brandeis, J., dissenting); *see also* Robert M. Bloom, *Judicial Integrity: A Call for Its Re-emergence in the Adjudication of Criminal Cases*, 84 J. CRIM. L. & CRIMINOLOGY 462, 465–66 (1993) (discussing Brandeis's dissent and judicial integrity).