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The Criminal Rules Enabling Act

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THE CRIMINAL RULES ENABLING ACT

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The Rules Enabling Act (the "REA") authorizes the Supreme Court to prescribe "general rules of practice and procedure" as long as those rules do not "abridge, enlarge or modify" any substantive right.[1] *The Supreme Court has frequently considered the effect of these restrictions on the Federal Rules of Civil Procedure ("Civil Rules"). In order to avoid REA concerns, the Court has imposed limiting constructions on a number of the Civil Rules. A significant academic literature has grown up analyzing and criticizing the Court's approach in these cases. The literature frequently argues for more expansive interpretations of the REA that would place more significant constraints on the Civil Rules. The impact of these statutory restrictions on the Federal Rules of Criminal Procedure ("Criminal Rules"), however, has been virtually unstudied. Neither the Supreme Court nor academics have focused on the Criminal Rules when interpreting the REA.*

This article argues that this approach is a mistake. Even under the most constrained view of the REA, several Criminal Rules are potentially invalid because they are insufficiently procedural. After outlining the current doctrine on the REA and the Civil Rules, Professor Minzer provides a framework for applying the REA to the Criminal Rules and

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1. 28 U.S.C. § 2072 (2006).

examine the constraints of the REA with respect to four of the Criminal Rules that face validity challenges. In addition to identifying these REA issues, this article proposes potential interpretations of these Criminal Rules that can reduce their substantive effect by either reading them narrowly or grounding the doctrines in federal common law, rather than the REA.

The Federal Rules of Criminal Procedure form the backbone of criminal litigation in U.S. District Courts. Federal courts have frequently considered the constitutional validity of various rules.[2] In addition to the Constitution, though, the Criminal Rules face another important limit on their scope: The Rules Enabling Act (the "REA"). Like the Federal Rules of Civil Procedure ("Civil Rules") and the Federal Rules of Evidence, Congress constrained the Federal Rules of Criminal Procedure ("Criminal Rules"). Section 2072(a) limits all three sets of rules to questions of "practice and procedure" while § 2072(b) commands that the rules not "abridge, enlarge or modify any substantive right."[3] In judicial opinions and academic literature, the effect of this restriction on the Criminal Rules has been largely unstudied.

This gap is surprising, given the significance of the REA for the Civil Rules. Academic literature on the relationship between the REA and the Civil Rules is enormous, and the Supreme Court has frequently confronted the question of the validity of the Civil Rules. The Court has applied a generous standard under the REA and simply asked whether the rule "really regulates procedure;"[4] and under this standard, the Court has never struck down one of the Civil Rules as beyond the scope of the REA. The Supreme Court, however, has repeatedly invoked the limits of the REA to constrain the interpretation of the Civil Rules and has read numerous rules narrowly to avoid running afoul of the REA.[5] More-

2. *See, e.g.*, United States v. Kuchinski, 469 F.3d 853, 856 (9th Cir. 2006) (challenging Rule 11 on separation of powers grounds); United States v. Renick, 273 F.3d 1009, 1011 (11th Cir. 2001) (challenging Rule 29 on Double Jeopardy grounds); United States v. Kelley, 956 F.2d 748, 750 (8th Cir. 1992) (outlining history of constitutional challenges to Rule 35).

3. 28 U.S.C. § 2072(a)–(b) (2006).

4. Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941).

5. *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503 (2001) (reading Rule 41 narrowly out of Rules Enabling Act concerns); Gasperini v. Ctr. for Humanities, 518 U.S. 415, 420 (1996) (reading Rule 59 narrowly); Walker v. Armco Steel Corp., 446

over, in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, the Supreme Court's most recent opinion on the REA, the Court failed to produce a majority opinion on the appropriate test to use to determine whether a rule violates the REA.[6] Justice Stevens cast the deciding vote for the majority's decision to apply Rule 23 and hold it valid, but he did so only after proposing a new, more vigorous interpretation of the REA.[7]

This article considers potential REA challenges to the Criminal Rules. The goals of this article are two-fold. First, I argue that under current REA doctrine, including the Supreme Court's recent decision in *Shady Grove*, several of the Criminal Rules pose significant concern because of their effects on "substantive rights." For some rules, a limiting interpretation of the rule can alleviate these concerns. For others, the doctrine reflected in the rule can survive by grounding it in federal common law rather than Criminal Rules. The second goal is to simply reintroduce the Criminal Rules into the important conversation about the interpretation of the REA. The vast majority of the academic literature has called for a more robust interpretation of the REA constraints. These proposals, though, tend to focus exclusively on the Civil Rules and do not consider the impact on criminal cases. Adding the Criminal Rules to the discussion provides a new proving ground for these proposals. In particular, analyzing the Criminal Rules shows that *Shady Grove* failed to answer two important questions about the REA. The first question relates to the policy goals of the rules and the relative importance of both federalism and separation of powers to the REA; the second question involves the independent significance of the language in § 2072(b). Looking at these questions through the lens of the Criminal Rules exposes important implications of the competing positions on the REA.

Section I introduces the academic literature and the case law on the REA and explains why the Criminal Rules have been overlooked. Because the Supreme Court initially tied the interpretation of the REA to its *Erie* jurisprudence and to concerns about federalism in diversity cases, the Civil Rules took center stage. Even after the Supreme Court disentangled *Erie* and the inter-

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U.S. 740, 746 (1980) (reading Rule 3 narrowly).

6. 559 U.S. ___, 130 S. Ct. 1431 (2010).

7. *Id.* at ___, 130 S. Ct. at 1449–52 (Stevens, J., concurring).

pretation of the REA with its 1965 decision in *Hanna v. Plumer*,[8] both academics and the courts continued to emphasize federalism as the reason for limits in the REA. Moreover, to the extent that academics argued for an expanded interpretation of the REA, they focused on language that did not yet apply to the Criminal Rules. By the late 1980s, however, academics had revisited the goals of the REA limitations and brought new attention to separation of powers concepts rather than federalism. Additionally, Congress amended the REA in 1988 to place identical limits on the Criminal and Civil Rules.

Section II outlines a theoretical approach for applying the limits of the REA to the Criminal Rules. While aspects of the interpretation of the REA transfer easily from the civil to the criminal side, there are important differences. For example, state law provides the source of substantive rights in diversity cases, while criminal substantive rights derive from a mix of statutes, the Constitution, and federal common law. Furthermore, civil plaintiffs and defendants both clearly hold substantive rights; and while it is unclear whether the government possesses substantive rights in criminal cases, defendants and victims almost certainly do. Finally, Section II concludes with an analysis of the hard question of the doctrines that regulate police investigations and whether they are "substantive" for REA purposes.

Sections III and IV each analyze a pair of Criminal Rules that raise validity questions under the REA. Section III considers Rule 6(e) and Rule 41(g). Rule 6(e) imposes a broad secrecy requirement on those who come into contact with grand jury information. The secrecy obligation extends beyond the life of the proceeding, reaches nonparties, and creates a privilege rule in state and federal court. Rule 41(g) creates a remedy for those aggrieved by law enforcement searches. This rule grants both defendants and third parties a right to recover seized objects without requiring a showing that the seizure was illegal. While both of these doctrines are substantive under the REA, the doctrines in the Criminal Rules can survive as a matter of federal common law. Grounding these rules in the common law provides a stronger foundation for the effect of the rules and better describes the source of federal court jurisdiction.

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8. 380 U.S. 460 (1965).

Section IV examines Rules 5 and 48. Rule 5 expands defendants' constitutional right against impermissible detention by limiting the period of time a defendant may be held without presentment to a federal magistrate. Rule 48 provides district judges implicit control over the preclusive effect of criminal litigation by transferring from the prosecution to the court the authority to decide whether the government will be allowed to dismiss without preclusive effect. Rule 5 and Rule 48 can be saved by narrowly reading the rules in a manner largely consistent with current doctrine. Rule 5 can be limited by restricting the remedy for violations to exclusion of unlawful confessions, while Rule 48 can be read to restrict the grounds on which a court can deny the government's motion to dismiss.

Section V concludes by returning to the debates left open by *Shady Grove*. First, the *Shady Grove* decision failed to decide whether § 2072(b) imposed any restriction on the rules beyond the limits in § 2072(a). In his plurality opinion Justice Scalia's arguments relating to concerns about interstate disuniformity and statutory *stare decisis* are far weaker with respect to the Criminal Rules. If his position is correct, the REA imposes *greater* restrictions on the Criminal Rules than the Civil Rules. In turn, however, those supporting Justice Stevens in his position that § 2072(b) has independent significance must confront the silence in the 1988 amendments that applied that provision to the Criminal Rules. If § 2072(b) is independently important, Congress significantly changed the Criminal Rules without comment.

Second, *Shady Grove* did not resolve the questions about the relative roles of federalism and separation of powers in the REA limitations. If the REA is solely about federalism, then the limitations apply in fundamentally different ways in diversity cases on one hand, and in criminal and federal question cases on the other. If, though, the REA is mostly about separation of powers, the Criminal Rules should be the central focus. Not only would REA violations infringe on Congress's authority to make the law, they would do so by expanding or contracting the authority of the executive branch.

I. THE RULES ENABLING ACT

The Criminal Rules and Civil Rules spring from the same statutory well: the REA. In its current form, § 2072 reads:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.[9]

The REA both authorizes and constrains the rulemaking process. The Supreme Court has the power to make rules[10] as long as they meet the requirements of § 2072(a), meaning that they are "rules of practice and procedure" or "rules of evidence," and the requirements of § 2072(b), which prohibit rules that "abridge, enlarge, or modify any substantive right."[11]

The scholarship on the REA constraints and the Civil Rules is vast.[12] Scholars have frequently argued that the Court has been too limited in its interpretation of the REA,[13] inconsistent and unclear in applying the provisions,[14] or has gotten it just about right.[15] There is very little literature, though, that looks at the corresponding questions for the Criminal Rules.[16] What character-

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9. 28 U.S.C. § 2072(a)–(b) (2006).

10. Supreme Court approval is merely the last step in the process before a proposed rule is sent to Congress. Rules must first get the approval of the Advisory and Standing Committees. For a description of the civil rulemaking process, see Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1103–04 (2002).

11. These two constraints may not be independent. For a discussion of whether the second clause puts an additional limitation on top of that imposed by the first clause, see *infra* Section I.B.

12. *See, e.g.*, Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's* "Substance" and "Procedure" in the Rules Enabling Act, 1989 DUKE L.J. 1012 (1990) [hereinafter *Hold the Corks*]; Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) [hereinafter *Rules Enabling Act of 1934*]; Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281 (1987); John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974); Leslie M. Kelleher, *Taking "Substantive Rights" (In the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47 (1998); Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26 (2008).

13. *See, e.g.*, *Rules Enabling Act of 1934*, *supra* note 12, at 1032; Ely, *supra* note 12, at 698.

14. *See, e.g.*, Redish & Murashko, *supra* note 12, at 35 (The Supreme Court has "failed miserably in its efforts either to rationalize the test, ground it in the Act's text and purpose, or explain it in terms of a coherent theory of statutory interpretation.").

15. *See* Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court Is Doing a Halfway Decent Job in Its* Erie-Hanna *Jurisprudence?* 73 NOTRE DAME L. REV. 963, 966 (1998).

16. I am only aware of one article that analyzes the question in any detail. *See* Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Crim-*

istics would make a Criminal Rule no longer about "practice and procedure" under § 2072(a)? In the criminal context, what might make a rule "abridge, enlarge or modify" a substantive right under § 2072(b)?

Section I.A describes the key pre-*Shady Grove* doctrine and scholarship, focusing on why the Criminal Rules have played such a minor role in the interpretation of the REA. The Civil Rules have dominated for two straightforward reasons. First, much of the scholarship relating to the REA has focused on the requirements of § 2072(b), prohibiting rules that "abridge, enlarge or modify" a substantive right. This language did not apply to the Criminal Rules until 1988. Second, federalism concerns have always played an important role in interpreting the REA; such concerns are generally absent in the criminal context. Section I.B describes the current understanding of the meaning of the REA constraints on the civil side with a particular focus on the opinion in *Shady Grove* and the major questions left open as a result of the Supreme Court's split in that case.

A. *The REA and the Criminal Rules*

To a large degree, history explains the limited impact of the statutory constraints in the REA on the Criminal Rules. From its inception, the REA restrictions developed in conjunction with the Supreme Court's *Erie* doctrine. *Erie* abandoned the doctrine of *Swift v. Tyson*[17] and required the application of state substantive law in diversity cases.[18] *Erie*'s holding drew on both statutory and constitutional doctrines. First, the Court held that the Rules of Decision Act[19] (the "RDA") applied to both statutory and common law.[20] The RDA requires that the "laws of the several states" shall apply in all civil actions.[21] After *Erie*, this requirement applies equally to statutory and common law rules in civil actions in federal court. Second, *Erie* drew on constitutional notions of federalism, suggesting that the prior interpretations of *Swift* unconstitu-

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inal Procedure, 2007 UTAH L. REV. 861, 873 (2007) (arguing that victims possess substantive rights).

17. 41 U.S. (16 Pet.) 1 (1842).
18. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
19. 28 U.S.C. § 1652 (2006).
20. *Erie*, 304 U.S. at 71, 78–80.
21. 28 U.S.C. § 1652.

tionally permitted federal courts to develop rules of general federal common law beyond their powers.[22]

Erie was handed down only months before the Civil Rules became effective.[23] As a result, the Supreme Court soon faced the question of the relationship between *Erie* and the limitations of the REA. In *Sibbach v. Wilson & Co.* the Court answered the question in a two-part holding.[24] The Court first conflated the doctrines and then drew a bright line between substance and procedure.[25] Under *Sibbach*, the REA allowed the Court to promulgate rules up to the extent that *Erie* and the RDA would require imposing state substantive law.[26] *Sibbach* set forth the still-current[27] but almost tautological test of validity: A rule is procedural if it "really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[28] If the rule crossed that line and did not "really regulate procedure," it was both invalid under the REA and contrary to the obligation to apply state substantive law under both the RDA and *Erie*.[29] On the other hand, procedural rules, even those with incidental effects on substantive rights, were both valid under the REA and consistent with *Erie*.[30]

After *Sibbach*, the limitations of the REA had little room to develop independent of *Erie*[31] and the Supreme Court read the rules through the lens of the *Erie* doctrine. Most notably, in the 1949

22. *Erie*, 304 U.S. at 79–80.

23. *See* Kelleher, *supra* note 12, at 91 n.190.

24. 312 U.S. 1 (1941).

25. *Id.* at 14.

26. *Id.*

27. *See* Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. ___, ___, 130 S. Ct. 1431, 1442 (2010) (quoting *Sibbach*, 312 U.S. at 14).

28. 312 U.S. at 14.

29. *Id.*

30. *See* Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 445 (1946) ("Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants who, agreeably to rules of practice and procedure, have been brought before a court authorized to determine their rights.") (citing *Sibbach*, 312 U.S. at 11–14).

31. Ely, *supra* note 12, at 698–99. ("By essentially obliterating the Enabling Act in *Sibbach v. Wilson & Co.*, in 1941 [the Court] created a need for limits on the Rules, a need it subsequently filled not by reconsidering *Sibbach*, but rather by an undefended application of the *Erie* line of precedents.").

decisions in *Woods v. Interstate Realty Co.*,[32] *Ragan v. Merchants Transfer & Warehouse Co.*,[33] and *Cohen v. Beneficial Industrial Loan Corp.*,[34] the Court faced cases where a federal rule arguably compelled the result. In each of these cases, rather than ask whether the rule applied and was valid under the REA, the Supreme Court suggested that the "outcome determinative" test from *Guaranty Trust Co. v. York*[35] answered whether the federal rule applied.[36] As a result of these cases, the Supreme Court appeared to draw the same line between substance and procedure for REA and *Erie* purposes and asked the same question about the applicability of federal law whether or not the case involved a federal rule.[37]

The Supreme Court began the process of disentangling the REA from *Erie* in *Hanna v. Plumer*.[38] *Hanna* examined the validity of the Rule 4 service of process rules through the lens of the REA rather than through the *Erie* doctrine itself.[39] *Hanna* recognized that both doctrines "say, roughly, that federal courts are to apply state 'substantive' law and federal 'procedural' law, but from that it need not follow that the tests are identical."[40] Unlike the "unguided" *Erie* cases, however, the REA instructed federal courts to apply the federal rules.[41] As a result, when a federal rule of procedure is on point, federal courts are to apply it if it is valid under the REA. The Court, however, did not articulate a new test

32. 337 U.S. 535 (1949).

33. 337 U.S. 530 (1949).

34. 337 U.S. 541 (1949)

35. 326 U.S. 99 (1945).

36. The analysis in each of the three cases was slightly different. In *Ragan*, the Court directly faced the question of whether Rule 3 governed over a contrary state law provision and used *Erie* and *Guaranty Trust* to require the application of state law. 337 U.S. at 532–33. *Woods*, in contrast, did not analyze the potential applicability of Rule 17 even though it arguably applied. 337 U.S. at 538. *Cohen* concluded that there was no conflict between the federal rule and state law, while the dissent found that there was a conflict. The *Cohen* majority and dissent relied exclusively on *Guaranty Trust* and *Erie*. 337 U.S. at 555–59.

37. *See* Kelleher, *supra* note 12, at 91; Edward Lawrence Merrigan, Erie *to* York *to* Ragan—*A Triple Play on the Federal Rules*, 3 VAND. L. REV. 711, 711 (1949); Ralph U. Whitten, Erie *and the Federal Rules: A Review and Reappraisal After* Burlington Northern Railroad v. Woods, CREIGHTON L. REV. 1, 11 (1987).

38. 380 U.S. 460 (1965).

39. *Id.* at 463–64, 469–70.

40. *Id.* at 471.

41. *Id.*

for determining a rule's validity. The *Hanna* Court simply pointed to *Sibbach* and its progeny and declared Rule 4 valid, maintaining the bright line between substance and procedure.[42]

After *Hanna* undermined the first holding of *Sibbach* by separating the validity of the rules from the *Erie* doctrine, John Hart Ely took aim at the second holding with a law review article widely regarded as "the most influential article ever written on the [*Erie* doctrine]."[43] In his efforts to help interpret *Hanna*, he argued for broader attention to the entire language of the REA.[44] *Sibbach*'s holding suggested that the second sentence of the REA was surplusage: any rule that was a valid "rule of procedure" within the meaning of § (a) would, by definition, "not abridge, enlarge or modify any substantive right."[45] Professor Ely challenged this reading. He claimed that the first sentence tracked the constitutional limitation inherent in *Erie*, but that the second sentence imposed an additional restriction on the federal rules.[46] Under his approach, the central question becomes whether the federal rule displaces a state law adopted for procedural reasons—that is, "one designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes."[47] If so, the federal rule could require the state law to step aside. On the other hand, if the state law was adopted for a nonprocedural reason, the second clause of the REA would invalidate the federal rule.

Before the 1980s, there was little reason to seriously consider challenges to the Criminal Rules under the REA. The Supreme Court's early doctrine on the limits of the REA was centrally focused on the relationship between the REA, the RDA, and *Erie*. By its terms, the RDA only applies to civil cases,[48] and the federalism concerns that infuse both the RDA and *Erie* are simply absent in the federal criminal context. By the 1970s, *Hanna* and Professor Ely managed to separate the REA from the rest of *Erie*

42. 380 U.S. at 464 (citing Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)). *See* Ely, *supra* note 12, at 720.

43. Kevin M. Clermont, *The Repressible Myth of* Shady Grove, 86 NOTRE DAME L. REV. 987, 988 (2011); Ely, *supra* note 12.

44. Ely, *supra* note 12, at 718.

45. *See id.* at 723; *see also* 28 U.S.C. § 2072 (2006).

46. Ely, *supra* note 12, at 718–19.

47. *Id.* at 724.

48. 28 U.S.C. § 1652 (2006).

but retained the emphasis on federalism while doing so. Whether one takes the pre-*Hanna* view that the REA is about *Erie* broadly or the John Hart Ely post-*Hanna* view that the REA is about federalism more narrowly, the REA has little to say about the Criminal Rules.

Equally important, Professor Ely emphasized the second clause of the REA as providing the key operating restriction on the Civil Rules.[49] Rules might be adequately "procedural" under the first clause of the statute but still "abridge, enlarge or modify" a substantive right under the second clause. At that time, however, the second clause did not apply to the Criminal Rules.[50] Section 2072 only gave the Supreme Court the power to prescribe rules "in civil actions."[51] Prior to 1988, the Criminal Rules Enabling Acts were codified separately from the Civil Rules Enabling Act.[52] While these acts authorized criminal "rules of practice and procedure," a limitation comparable to that now present in § 2072(a), they did not include the limitation in § 2072(b).[53] Professor Ely's view that the second clause breaks down the clear division between substance and procedure set up in *Sibbach* carried no weight for the Criminal Rules in which the clause was absent.[54]

Prior to the 1980s, therefore, the strongest support for broad limits on the Civil Rules under the REA lacked both a statutory foundation and a theoretical basis when applied to the Criminal Rules. Things changed during the Reagan administration. First, in 1982, Professor Stephen Burbank challenged the consensus that federalism was the central focus of the REA constraints.[55] Returning to the legislative history of the 1934 Act, he demonstrated that separation of powers concerns dominated the thinking of the original adopters of the Act.[56] The goal of the REA was not to insulate state law from federal encroachment, but instead to insulate congressional power to make substantive law from ju-

49. Ely, *supra* note 12, at 723.

50. 28 U.S.C. § 2072 (1970).

51. *Id.*

52. Section 3771 authorized pre-verdict procedural rules while § 3772 covered post-verdict procedural rules. 18 U.S.C. § 3771 (2006); 18 U.S.C. § 3772 (repealed 1988).

53. *See* 28 U.S.C. § 2072(b) (1970).

54. Professor Burbank points to the absence of the clause in the Criminal Rules Enabling Acts as evidence that it is surplusage in the Civil Rules Enabling Act. *See Rules Enabling Act of 1934*, *supra* note 12, at 1170 n.664.

55. *See id.* at 1187.

56. *Id.*

dicial encroachment. Congress was trying to protect itself, not state lawmakers, from an overly enthusiastic rulemaking process. This separation of powers view of the legislative history, rather than the federalism account from *Sibbach*, is now the dominant understanding among academics.[57]

Additionally, six years later, Congress altered the statutory framework and amended the REA.[58] Crucially, Congress repealed the separate Criminal Rules Enabling Acts, and combined all rulemaking authority into § 2072 by deleting the restriction to "civil actions" and expanding the REA to include all "cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals."[59] By removing the Criminal Rules from their statutory enclaves in §§ 3771 and 3772, Congress imposed identical limitations on the Civil and Criminal Rules. While the Criminal Rules had previously been free from the prohibitions in § 2072(b), the 1988 amendments lifted that immunity. Since the statutory change, several of the courts of appeals have recognized the existence of "substantive rights" in criminal cases, albeit with limited analyses.[60] Additionally, in 2002, the Advisory Committee on Criminal Rules noted that the restrictions in § 2072 constrained its ability to modify one of the Criminal Rules.[61]

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57. *See, e.g.*, Kelleher, *supra* note 12, at 92; Redish & Murashko, *supra* note 12, at 56.

58. The 1988 amendments were motivated, in part, by a desire to expand public involvement in the rulemaking process. *See generally* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficiency*, 87 GEO. L.J. 887, 893–903 (1999); Struve, *supra* note 10, at 1103–04, 1107–08 (describing the current process and the motivations behind the amendments). Under the original structure of Civil Rules Enabling Act, rules could be promulgated directly by the Supreme Court and sent to Congress for approval. *See* Shady Grove Orthopedic Assoc. v. Allstate Ins. Co., 559, U.S. ___, ___, 130 S. Ct. 1431, 1442 (2010). A 1958 amendment to the REA inserted the Judicial Conference into the process. Act of July 11, 1958, Pub. L. No. 85-513, 72 Stat. 356 (codified at 28 U.S.C. § 331 (2006)). After the 1988 statutory change, the REA mandated the involvement of the Judicial Conference, the Advisory Committee and the Standing Committee on the Rules. *See* 28 U.S.C. § 2075(b) (1988).

59. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642, 4648–49 (1988).

60. *See In re* Grand Jury Proceedings, 616 F.3d 1186, 1196 (10th Cir. 2010) (evaluating the validity of FED. R. APP. P. 4); United States v. Poland, 562 F.3d 35, 36–40 (1st Cir. 2009) (REA challenge to FED. R. CRIM. P. 35); United States v. Daychild, 357 F.3d 1082, 1092 n.13 (9th Cir. 2004) (imposing a limiting construction on FED. R. CRIM. P. 45 to avoid altering substantive rights under the Speedy Trial Act); United States v. Walsh, 75 F.3d 1, 5–6 (1st Cir. 1996) (challenging FED. R. CRIM. P. 23).

61. For example, Rule 6 imposes a grand jury secrecy obligation that is enforceable by contempt proceedings. *See* discussion *infra* Section III.A. The 2002 Advisory Committee on

Congress made this change to the Criminal Rules without any discussion in the legislative history. The House Report accompanying the 1988 bill is brief, but incorporates by reference a prior House Report,[62] drafted in connection with an unsuccessful 1985 attempt to pass a virtually identical bill.[63] This 1985 Report is frequently identified as an important source of congressional intent for the REA.[64] The 1985 Report extensively describes the limits on Court rulemaking under the REA and endorses a separation of powers interpretation of the REA.[65] Neither House Report, however, reflects an intent to alter the scope of the Criminal Rules. While the 1985 Report provides examples of substantive law that are beyond the scope of the rule-making process, these examples focus on the Civil Rules.[66] The more limited legislative history on the Senate side simply suggests that the changes were designed to "carr[y] forward the scope of current law."[67] Academics have disputed which of these documents provides a more accurate window into the intent of Congress.[68] Neither source, however, suggests that Congress thought it was making an important change to the Criminal Rules.

If the REA was ambiguous, the absence of legislative history might suggest that the 1988 amendments did not intend to impose any additional limits on the Criminal Rules.[69] The statutory text, though, is crystal clear—now neither the Civil Rules nor the Criminal Rules may "abridge, enlarge or modify any substantive right."[70] Moreover, the Supreme Court has never placed much

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the Criminal Rules noted that "[b]ecause the provision defines an offense, altering its scope may be beyond the authority bestowed by the Rules Enabling Act." FED. R. CRIM. P. 6 advisory committee's note (2002) (citing 28 U.S.C. § 2072(b)).

62. *See* H.R. REP. NO. 100-889, at 29 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 5989–90 (citing H.R. REP. NO. 99-422 (1985)).

63. H.R. REP. NO. 99-422 (1985).

64. *See Hold the Corks*, *supra* note 12, at 1030; Kelleher, *supra* note 12, at 101 n.241.

65. *See* H.R. REP. NO. 99-422, at 21.

66. *See id.* at 21–22 (discussing statutes of limitation, preclusion, and attorneys' fees).

67. *See Hold the Courts*, *supra* note 12, at 1034 (quoting 134 CONG. REC. S16,300 (daily ed. Oct. 14, 1988)).

68. *See* Kelleher, *supra* note 12, at 101 n.241, 104 n.255. *Compare Rules Enabling Act of 1934*, *supra* note 12, at 1107 & n.420 (arguing that the 1928 Senate Report is "the most detailed and informative of all the legislative materials concerning the act"), *with* Redish & Murashko, *supra* note 12 at 71 (arguing that "reliance on one statement in a prior Congress's legislative report . . . amounts to the height of folly").

69. *See, e.g.*, Ratzlaf v. United States, 510 U.S. 135, 147–48 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear.").

70. 28 U.S.C. § 2072(b) (2006).

weight on the legislative history of the 1988 reenactment of the statute. For example, the House Report clearly rejects the purely federalist interpretations of the REA in favor of an approach oriented toward separation of powers,[71] but the Court has continued to emphasize the role of federalism in its REA decisions.[72]

B. *The Substantive Rights Limitation Before and After* Shady Grove

Now that the same limits apply to the Civil and Criminal Rules, those limits should be defined. While the REA requires drawing a line between substance and procedure, the only clarity about that line is its murkiness.[73] The academic literature has come to at least some agreement about two relevant questions to ask when trying to locate a doctrine on the substance/procedure continuum for REA purposes.[74] Drawing on Justice Harlan's concurrence in *Hanna*, the first question examines the conduct regulated by the legal rule.[75] Substantive rules regulate "primary decisions respecting human conduct,"[76] that is, the choices that clients (present or future) make in their ordinary lives to enter into an agreement, to drive safely, or to sell property. Procedural rules govern the behavior of lawyers during the litigation process after these substantive choices have been made. Procedural rules may determine the consequences of these real-world choices, but under this definition cannot regulate them directly.

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71. *See* H.R. REP. NO. 99-422, at 20–21 (1985) ("[I]t is not the purpose of proposed section 2072 merely to restate whatever may be the constitutional restraints on the exercise of Congress' lawmaking power as against that of the States . . . .").

72. *See* Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17, 42 (2010) (noting that the Court has never cited the 1988 legislative history).

73. As Professor Risinger has stated "organized confusion is the official doctrine." D. Michael Risinger, *"Substance" and "Procedure" Revisited with Some After Thoughts on the Constitutional Problems of "Irrebuttable Presumptions,"* 30 UCLA L. REV. 189, 202 (1982); *see also* Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 816 (2010) (noting that, for example, statutes of limitations "are routinely classified as substantive for *Erie* purposes yet are procedural for conflict of law analyses").

74. *See* 19 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4509 (2d ed. 1996) (identifying these two questions).

75. Hanna v. Plumer, 380 U.S. 460, 475 (1965) (Harlan, J., concurring).

76. *Id.* Professors Kelleher and Whitten take a related approach, arguing that the validity of a rule depends on whether Congress has legislated with respect to the subject matter at issue or left the matter to the courts. *See* Kelleher, *supra* note 12, at 110–21; Ralph U. Whitten, *Separation of Powers Restrictions on Judicial Rulemaking: A Case Study of Federal Rule 4*, 40 ME. L. REV. 41, 54 (1988).

While often used as a starting point, this definition is frequently seen as underinclusive.[77] A broader approach considers the purpose of the legal rule rather than simply considering the conduct it regulates. Procedural rules aim to reach accurate substantive litigation decisions at the lowest cost. Substantive rules do something else. John Hart Ely's definition is commonly used here: Procedural rules are "designed to make the process of litigation a fair and efficient mechanism for the resolution of disputes" while a substantive right is one "granted for one or more nonprocedural reasons, for some purpose or purposes not having to do with the fairness or efficiency of the litigation process."[78] Much of the academic literature has cited Ely's approach as a relevant dividing line between substance and procedure in the context of the REA.[79]

Once the right in question is identified as substantive, the secondary question becomes the extent to which a rule of procedure can alter its scope.[80] The case law and academic literature provide a range of tests to evaluate whether a federal rule would go too far in its effect on these substantive rights. Even the relatively mild constraints in *Sibbach* and *Shady Grove* would invalidate any rule that would "alter[] the rights themselves;"[81] the validity of rules with more limited effects on substantive rights, however, is more controversial. The Court has accepted that rules may survive even if they "incidentally affect litigants' substantive rights."[82] Some academics endorse these relatively weak limits,[83] while others argue for a more robust interpretation of the REA. For instance, Professors Burbank and Ely argue that a more lim-

77. *See* 19 WRIGHT & MILLER, *supra* note 74, at § 4509 ; Ely, *supra* note 12, at 725–26.

78. Ely, *supra* note 12, at 724–25. Professor Bone, in turn, provides three purpose-based questions designed to ensure that the rule furthers goals related to procedural rather than substantive values. *See* Bone, *supra* note 58, at 951–52.

79. *See, e.g.*, Kelleher, *supra* note 12, at 68–69; Redish & Murashko, *supra* note 12, at 27–28; Olin Guy Wellborn, III, *The Federal Rules of Evidence and the Application of State Law in the Federal Courts*, 55 TEX. L. REV. 371, 403 (1977).

80. 19 WRIGHT & MILLER, *supra* note 74, at § 4509.

81. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. ___, ___, 130 S. Ct. 1431, 1443 (2010).

82. Burlington N. R.R. v. Woods, 480 U.S. 1, 5 (1987) (citing Hanna v. Plumer, 380 U.S. 460, 464–65 (1965)).

83. Professors Redish and Murashko adopt *Burlington Northern* as the appropriate approach to the REA. *See* Redish & Murashko, *supra* note 12, at 33. They argue that the validity of the rule depends on whether the substantive effects were (a) anticipated and (b) not necessary to achieve the procedural goal giving rise to the rule. *Id.* at 29–30. In their view, unanticipated substantive effects or effects that are necessary to the rule's goal are consistent with the REA. *Id.*

ited impact on substantive rights should invalidate rules. Professor Burbank has argued that the REA invalidates any rule with a "predictable and identifiable" effect on substantive rights.[84] Professor Ely returns to the goal of the rulemaker, arguing that provisions with mixed goals are too substantive for REA purposes.[85]

Despite the frequent academic attention to the definition of substantive rights, the Supreme Court has not focused on defining substantive rights. The Supreme Court's opinion last term in *Shady Grove*[86] clarified the debates on the meaning of the REA, but did not come close to resolving them. *Shady Grove* wrestled with the interplay between Civil Rule 23 and a state statute that barred class actions to recover penalties.[87] All of the Justices agreed that if Rule 23 was on point and valid, it would displace the contrary state law, but they could not agree on anything else.[88] In a splintered opinion, the Court held that Rule 23 applied and was valid, but it failed to articulate a rationale. Justice Scalia, writing for a plurality of the Court, held that Rule 23 "answer[ed] the question in dispute" and that, as a result, the Court did not need to "wade into *Erie's* murky waters."[89]

While the Justices in the plurality agreed that the rule complied with the requirements of the REA, they could not agree on the analysis. Writing alone, Justice Stevens called on the spirit of Professor Ely[90] and emphasized the second clause of the REA and the motivations behind the state law.[91] While he saw a high bar for finding a rule invalid, he implied that an otherwise valid rule might cross the line if the state has made a substantive choice through the adoption of its procedural rules.[92] "A federal rule . . . cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but is so intertwined with a state right or remedy that it functions to define the scope of the state-created right."[93] Such a choice would

84. *Hold the Corks*, *supra* note 12, at 1019–20.

85. Ely, *supra* note 12, at 726–27.

86. 559 U.S. ___, 130 S. Ct. 1431 (2010).

87. *See id.* at ___, 130 S. Ct. at 1437.

88. *See id.*; *id.* at ___, S. Ct. at 1460 (Ginsburg, J., dissenting).

89. *Id.* at 1437 (plurality opinion). The majority rejected the dissent's attempt to read the rule narrowly to avoid a clash with the state provision. *Id.* at 1440–41.

90. *See id.* at 1453 n.7 (Stevens, J., concurring) (citing Ely, *supra* note 12, at 719).

91. *See id.* at 1452–53.

92. *See id.* at 1457–58 (Stevens, J., concurring).

93. *Id.* at 1452.

preclude the application of a federal rule because it would "abridge, enlarge or modify" a substantive right.[94] In this case, Justice Stevens could not conclude that the state bar on class actions served such a purpose and, as a result, Rule 23 was valid.[95]

Justice Stevens first looked to the statutory text, noting that the rule did not apply simply to cases under New York law, but that it covered class actions more broadly, whether arising under federal law or the law of another state.[96] Because the restriction was wide ranging, Judge Stevens found that it looked more procedural.[97]

Justice Stevens then turned to the legislative history. While he saw some evidence that the limitation on class actions was designed to operate as a substantive damages cap,[98] other statements suggested that the limitation on class relief was intended to restrict the use of class actions only when it is necessary to do so.[99] As a result, the legislative history "reveals a classically procedural calibration of making it easier to litigate claims in New York courts (under any source of law) only when it is necessary to do so, and not making it *too* easy when the class tool is not required."[100] Since the evidence failed to establish that the state legislature intended the provision to have a substantive effect, the federal rule could displace it.[101]

Justice Scalia's plurality opinion rejected the Stevens approach and purported to apply *Sibbach*.[102] The central question remained whether the rule "really regulate[d] procedure."[103] Repeating the common refrain that the Court has never invalidated a federal rule, the plurality found it "obvious" that Rule 23, like other party joinder rules, was valid.[104] "Such rules neither change plaintiffs' separate entitlements to relief nor abridge defendants' rights;

94. *Id.* at 1453 (quoting 28 U.S.C. § 2072(b) (2006)).
95. *See id.* at 1459–60.
96. *Id.* at 1457.
97. *See id.* at 1459–60.
98. *See id.* at 1450 (citing Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996)).
99. *See id.* at 1456.
100. *Id.* at 1459.
101. *See id.* at 1460.
102. *See id.* at 1442 (plurality opinion).
103. *Id.* (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).
104. *See id.* at 1443.

they alter only how the claims are processed."[105] Notably, Justice Scalia's plurality opinion refused to examine the state law displaced by the federal rule: "it is not the substantive or procedural nature or purpose of the affected state law that matters, but the substantive or procedural nature of the Federal Rule."[106] For the plurality, *Hanna* and *Sibbach* required looking only at the federal rule; the state law being displaced was irrelevant.[107]

In rejecting Justice Stevens's call for an analysis of the nature of the state law at stake,[108] the plurality recognized the force of the textual argument about § 2072(b).[109] "[I]t is hard to understand how it can be determined whether a Federal Rule 'abridges' or 'modifies' substantive rights without knowing what state-created rights would obtain if the Federal Rule did not exist."[110] While the plurality recognized that the statutory argument had real power, it also noted that *Sibbach* was long-standing precedent, protected by the increased power of statutory *stare decisis*,[111] and emphasized the potential "chaos" that would result from having the validity of the rules vary by state.[112] In the eyes of the plurality, it is better to have federal courts answer "a single hard question of whether a Federal Rule regulates substance or procedure" rather than face "hundreds of hard questions" about "the substantive or procedural character of countless state rules."[113]

After *Shady Grove*, the appropriate test for the validity of a federal rule is uncertain. Two major questions remain. The first is the relative importance of federalism and separation of powers concerns in applying the REA. Starting with *Sibbach* and *Hanna*, the Supreme Court has consistently grounded its interpretation of the REA in doctrines of federalism,[114] and that concern persists in the opinions in *Shady Grove*.[115] While the academic work describing the separation of powers goals contained in the legisla-

105. *Id.*
106. *Id.* at 1444.
107. *Id.*
108. *Id.* at 1448–49 (Stevens, J., concurring).
109. *See id.* at 1445–47 (plurality opinion).
110. *Id.* at 1445–46.
111. *See id.* at 1446.
112. *Id.*
113. *Id.* at 1447.
114. *See* Burbank & Wolff, *supra* note 72, at 44.
115. *See Shady Grove*, 559 U.S. at ___, 130 S. Ct. at 1456 (plurality opinion); *id.* at ___, 130 S. Ct. at 1468 (Ginsburg, J., dissenting).

tive history of the original REA has been generally acknowledged among academics, even among scholars viewing *Sibbach* as plausibly correct,[116] the Supreme Court has not accepted it.

The second important question is whether evaluating the meaning of a rule requires looking beyond the language of the rule itself. Professors Ides and Struve usefully characterize this question as whether the review of the rule occurs on a "facial" or an "as-applied" basis.[117] The analysis in Justice Scalia's plurality opinion, buttressed by *Sibbach*, is "facial" in the sense that it rejects the relevance of the procedural or substantive nature of the state law being displaced.[118] Rules are valid or invalid broadly, independent of the state law at issue.[119] This type of approach has some scholarly support.[120]

Justice Stevens, of course, along with Professor Ely, argued that the rule must be considered "as-applied," in light of the state policy interests that are displaced.[121] Professors Burbank and Wolff have taken an alternative as-applied approach that rejects a federalism orientation, but which still accepts that the validity of the rule depends on the context, in the sense that both the rule and the REA depend on the scope of federal common law in the case at hand.[122] Similarly, Professor Kelleher argues in favor of a

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116. *See* Clermont, *supra* note 43, at 1007–08 (describing *Sibbach* as a "defensible reading" of the REA).

117. *See* Allan Ides, *The Standard for Measuring the Validity of a Federal Rule of Civil Procedure: The* Shady Grove *Debate Between Justices Scalia and Stevens*, 86 NOTRE DAME L. REV. 1041, 1042–44 (2011); Catherine T. Struve, *Institutional Practice, Procedural Uniformity, and As-Applied Challenges Under the Rules Enabling Act*, 86 NOTRE DAME L. REV. 1181, 1184, 1190 (2011).

118. *See Shady Grove*, 559 U.S. at ___, 130 S. Ct. at 1444 (plurality opinion) (noting that if a federal rule regulates procedure, "it is authorized by § 2072 and is valid in all jurisdictions . . . regardless of its incidental effect on state-created rights").

119. Despite this holding, Professor Struve notes that language in Justice Scalia's opinion leaves open the possibility that other types of as-applied challenges might survive. For instance, Rule 23 might be invalid in cases involving defendant or non-opt out plaintiff classes. *See* Struve, *supra* note 117, at 1187–88.

120. For instance, Professor Hendricks has argued against the consideration of state law in the REA analysis as a mechanism to force states to adopt statutes clearly identifying substantive rights as such, rather than cloaking them as procedural doctrines. *See* Jennifer S. Hendricks, *In Defense of the Substance Procedure Dichotomy*, 89 WASH. U. L. REV. 103, 107–08 (2011).

121. See *Shady Grove*, 559 U.S. at ___, 130 S. Ct. at 1458; Ely, *supra* note 12, at 722; *see also* Rowe, *supra* note 13, at 982 (arguing that certain state policies can require displacing federal rules under § 2072(b)).

122. *See* Burbank & Wolff, *supra* note 72, at 48–49 ("[T]he role that federal common law plays in providing content that the rulemakers did not prospectively entertain should be recognized and analyzed accordingly.").

multipart test that includes, but is not limited to, the context-specific nature in which the rule is applied.[123]

This second question is very closely related, but not exactly identical, to the issue of the meaning of the "abridge, enlarge or modify" language of § 2072(b).[124] It is possible to argue in favor of an "as-applied" approach without granting this language in the second clause independent significance. Most notably, Professor Burbank, relying on the legislative history, takes the position that the second sentence is surplusage but argues that the first sentence imposes strong constraints on the rulemaking process.[125] That proposition, however, is the minority viewpoint. Both Justices Stevens and Scalia frame their debate about the role of context in terms of § 2072(b). For Justice Stevens, the language strongly suggests that the Court must consider the law being displaced in order to give meaning to the requirements of the second clause;[126] and indeed, Justice Scalia suggests that he would agree in a case of first impression.[127] Similarly, scholars arguing against the bright line rule in *Sibbach* and the plurality approach in *Shady Grove* generally ground their arguments in § 2072(b) language.[128]

II. SUBSTANTIVE RIGHTS AND RULES OF CRIMINAL PROCEDURE

This section outlines a theoretical approach to applying the REA limits outlined in the previous section to the Criminal Rules. While much of the case law and academic commentary on the REA substance/procedure line transfers comfortably from the civil to the criminal side,[129] certain aspects of the criminal system require special attention. Section II.A first examines the sources of criminal substantive rights for REA purposes. On the civil side, at least in diversity cases, the source of the substantive rights is

123. Kelleher, *supra* note 12, at 109–21.

124. 28 U.S.C. § 2072(b) (2006).

125. *Rules Enabling Act of 1934*, *supra* note 12, at 1108.

126. *Shady Grove*, 559 U.S. at ___, 130 S. Ct. at 1445 (Stevens, J., concurring).

127. *Id.*

128. *See, e.g.*, Ely, *supra* note 12, at 721; Ides, *supra* note 117, at 1041, 1047–50; Kelleher, *supra* note 12, at 97; Redish & Murashko, *supra* note 12, at 75; Rowe, *supra* note 12, at 982.

129. I take as my starting point the dominant approach in the academic literature (and the approach of Justice Stevens in *Shady Grove*) that analyzing the validity of the rules requires looking at the substantive rights otherwise in place.

straightforward—state law defines the substantive obligations of the parties. In the federal criminal context, of course, there is no state law to consider and the substantive rights derive from statutes, the Constitution, and federal common law.[130] Section II.B considers who (in addition to the defendant) might hold substantive rights in criminal cases. Do either the government or third parties have substantive rights, or does the statute only prohibit enlarging or abridging the substantive rights of criminal defendants? Section II.B also proposes an explanation as to why violations of the REA have, so far, gone unlitigated in the criminal context. Section II.C explores the application of the substantive rights limitation to an aspect of the criminal process with no clear counterpart on the civil side: doctrines regulating law enforcement investigation. Rules relating to police searches and interrogation are neither obviously substantive nor obviously procedural. I argue that, as an initial matter, a useful consideration is whether the remedy for violation of the rule is exclusionary in nature. If the right is protected by an exclusionary remedy, it should be seen primarily as procedural in nature; however, violations that lead to damages or other nonexclusionary remedies should be seen as substantive.

A. *The Sources of Substantive Federal Criminal Rights*

On the criminal side, three sources of law set out substantive rights: statutes, the Constitution, and federal common law. The substantive nature of criminal statutes and at least some of the Constitutional rights is straightforward. Federal criminal statutes establish the required factual basis for criminal liability by defining the elements of crimes. The Supersession Clause of § 2072(b) allows rules that comply with the REA to displace statutes, but a Criminal Rule that purports to expand the reach of a criminal statute, by (for example) reducing or eliminating the mens rea requirement for the crime, would violate the REA prohibitions. Similarly, criminal statutes also provide a statutory maximum penalty. These crime-specific maximum penalties have a general constitutional counterpart in the Eighth Amendment.

130. In this way, federal criminal cases look like civil federal question cases. *See* Burbank & Wolff, *supra* note 72, at 43–44 (noting the difficulties of the Court's doctrine in federal question cases). This article returns to the question of the application of the REA in federal question cases in Section V.

The Cruel and Unusual Punishments Clause restricts the maximum penalty available in any criminal case. Any rule that expanded the available punishment for a crime would certainly violate the REA.[131]

These examples are not especially interesting, however, because the rule changes might well be unconstitutional in addition to being violations of the REA. Only Congress is authorized to define the elements of crimes,[132] and rules permitting punishment prohibited by the Eighth Amendment are unconstitutional.[133] However, statutes provide the only protection for other substantive rights. For instance, the classic common law criminal defenses are neither clearly mandated by the Constitution nor expressly created by statute. The Supreme Court has not decided whether this silence means that they do not exist at all[134] or that they are incorporated into criminal law statutes even absent an explicit reference.[135] The courts of appeal have frequently permitted defendants to raise common law defenses.[136]

Under both the Court's current doctrine and the major academic approaches to the REA, these affirmative defenses are almost certainly "substantive" for REA purposes even though they exist only as a matter of common law. The defenses regulate the con-

131. A state statutory cap on damages available in a particular case, the civil equivalent of a statutory maximum sentence, is commonly used as an example of a substantive state law for REA purposes. *See Shady Grove*, 559 U.S. at ___, 130 S. Ct. at 1431, 1472 (Ginsburg, J., dissenting).

132. Since the Supreme Court has rejected the concept of common law crimes, elements are now exclusively defined by statute. *See, e.g.*, Liparota v. United States, 471 U.S. 419, 424 (1985) (citing United States v. Hudson, 11 U.S. (7 Cranch) 32 (1812)) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute."). *But see* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP CT. REV. 345, 347 (1994) (arguing that federal common law retains an important role in defining federal crimes).

133. Both of these examples describe cases where the rule change works to the detriment of criminal defendants and is unconstitutional as a result. As discussed in the next section, more interesting examples would occur in cases where rules benefit defendants, for example, by reducing the authorized punishment or limiting the scope of criminal statutes. *See infra* Section II.B.

134. *See* United States v. Oakland Cannabis Buyers Coop., 532 U.S. 483, 490 (2001) ("[I]t is an open question whether federal courts ever have authority to recognize a necessity defense not provided by statute.").

135. *See* Dixon v. United States, 548 U.S. 1, 8 (2006) (duress); *Oakland Cannabis Buyers*, 532 U.S. at 490–91 (2001) (necessity); United States v. Bailey, 444 U.S. 394, 415–16 n.11 (1980) (duress).

136. *See, e.g.*, United States v. Gore, 592 F.3d 489, 491–92 (4th Cir. 2010) (self-defense); United States v. Nevels, 490 F.3d 800, 805 n.3 (10th Cir. 2007) (dictum) (self-defense).

duct of ordinary citizens, rather than prosecutors and defense lawyers, and do so for purposes of retribution, deterrence, and incapacitation rather than to achieve process-oriented goals. On the civil side, the Supreme Court has read the Civil Rules in order to avoid having them prescribe an affirmative defense. For instance, in *Semtek International Inc. v. Lockheed Martin Corp.*, the Court recognized that a federal rule defining the scope of the affirmative defense of preclusion would face REA problems and interpreted Rule 41 to avoid this outcome.[137]

Since these defenses are substantive, how far can the Criminal Rules go in altering them? On one hand, any Criminal Rule that attempted to create an affirmative defense would be invalid. For example, former Deputy Attorney General Larry Thompson has proposed that the Criminal Rules authorize an affirmative defense in corporate prosecutions where the corporation had an effective compliance policy.[138] As Professor Alschuler has noted, such a defense would almost certainly run afoul of the REA.[139]

In contrast, rules that restrict the timing and nature of the assertion of a defense are valid under the REA. For example, Rules 12.1, 12.2, and 12.3 place requirements on defendants who intend to assert an alibi, public authority, or insanity defense.[140] These rules require that a defendant give notice to the government that the defense will be raised,[141] require the defendant to identify the witnesses that will support the defense,[142] and in the case of an insanity defense, outline procedures relating to a mental examination of the defendant.[143] A failure to comply with these procedures permits the court to bar the defendant from asserting the defense and, to that extent, provides the court some authority to restrict a defendant's "substantive rights." This imposition, though, is almost certainly valid under the REA given the limited nature of the impact and the procedural goals served by the rules.

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137. 531 U.S. 497, 503 (2001).

138. Larry Thompson, *The Blameless Corporation*, 46 AM. CRIM. L. REV. 1323, 1326–27 (2009).

139. Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1388 (2009).

140. FED. R. CRIM. P. 12.1, 12.2, 12.3.

141. FED. R. CRIM. P. 12.1(a)(2), 12.2(a), 12.3(a)(1).

142. FED. R. CRIM. P. 12.1(a)(2)(B), 12.3(a)(4).

143. FED. R. CRIM. P. 12.2(b)–(c).

B. *Who Has Substantive Rights in the Criminal Process?*

The examples described in the previous section focus on rules that operate to the detriment of criminal defendants. The defendant is the one participant in the criminal process who indisputably holds "substantive rights" within the meaning of the REA. Does the government, however, possess substantive rights that a Criminal Rule could unlawfully "abridge?" For instance, in *United States v. Albertini*, the Supreme Court interpreted 18 U.S.C. § 1382, which makes it unlawful to reenter a military base after being ordered to depart by the commanding officer, and concluded that it created strict liability.[144] Whether or not the defendant knew of the ongoing effectiveness of the order was irrelevant to liability.[145] A Criminal Rule that altered the *Albertini* result by, for example, prohibiting strict liability crimes, would eliminate criminal liability for certain defendants. More starkly, a Criminal Rule that prohibited the federal death penalty would certainly not abridge the substantive rights of any criminal defendant; but if the government has such rights, that rule might well restrict them.

The notion of the government possessing substantive rights, however, is difficult to square with many aspects of federal criminal process even for those items that would, in theory, be at the core of its rights. If any rule is substantive, those that determine liability and the remedies for their violation are.[146] Compared to civil plaintiffs, the government generally has much weaker procedural protections to insist on a conviction, which provides at least some evidence that the government lacks a substantive claim to those outcomes. While civil plaintiffs have a right to demand a judgment in their favor when the evidence is overwhelming, the government has no right to a directed verdict.[147] Similarly, the government has traditionally held very limited appeal rights in criminal cases.[148] Criminal appeals of dismissals of in-

144. United States v. Albertini, 472 U.S. 675, 682–83 (1985).

145. *Id.* at 683.

146. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941).

147. United States v. Martin Linen Supply Co., 430 U.S. 564, 572 (1977) ("[A] trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict.").

148. *See* United States v. Wilson, 420 U.S. 332, 336–37 (1975); United States v. Sanges, 144 U.S. 310, 312 (1892).

dictments were not authorized until the 20th Century.[149] Some of these limitations are a function of the constitutional protections of the Double Jeopardy Clause,[150] but even in areas where the Constitution would permit a criminal appeal, the Supreme Court has insisted on explicit congressional authorization to appeal.[151] If the government has substantive rights, it is a strange result that it would be so limited in its ability to protect those rights through an appeal.

As a theoretical matter, it may not matter much whether both the government and the defendant possess substantive rights. The substantive rights limitation contains a symmetrical restriction against increasing or decreasing substantive rights in the "abridge, enlarge or modify" clause. Any rule that abridged the government's substantive rights would almost certainly enlarge the corresponding right of the defendant. However, as a practical matter, whether a rule benefits the government or defendants may not matter a great deal. Because the United States tends to be less aggressive than criminal defendants when taking litigating positions, there is limited case law on these questions.

The constraints in the REA look a great deal like 18 U.S.C. § 3501, which purported to authorize the admission of confessions even when a *Miranda*[152] violation has occurred, as long as the confession was voluntary.[153] Because the government did not rely on § 3501 to attempt to introduce confessions taken in violation of *Miranda*, the constitutionality of the statute went unlitigated for an extended period of time. It took over three decades before the Court struck down the statute in *Dickerson v. United States*.[154] For Criminal Rules that are similarly situated and operate only to benefit defendants, any potential REA violation is unlikely to be litigated.[155]

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149. *See Wilson*, 420 U.S. at 336–37 (outlining the history of criminal appeals of dismissals of indictments).

150. U.S. CONST. amend. V.

151. *Martin Linen Supply*, 430 U.S. at 568.

152. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

153. 18 U.S.C. § 3501(a) (2006), *invalidated by* Dickerson v. United States, 530 U.S. 428, 432 (2000).

154. 530 U.S. at 432.

155. Notably, all four rules analyzed in the following two sections are unlikely to be litigated. The primary variation of the rule from prior practice is to either expand the substantive rights of defendants or limit the substantive rights of the government. As a result, in most situations, only the government would be in a position to raise REA objec-

In addition to the government and defendants, third parties almost certainly hold some substantive rights in criminal cases. As a matter of statute, for example, victims have rights in criminal prosecutions. The most straightforward substantive right victims possess is a claim to restitution in prosecutions for certain types of crimes, including violent crimes and drug crimes.[156] These restitution orders are mandatory and the victims have the procedural right to seek them independently from the government. More broadly, the 2004 Crime Victim's Rights Act gives victims a range of rights in criminal proceedings.[157] Some of these rights are obviously procedural for REA purposes. For example, victims have a right to notice of public court appearances[158] and a right not to be excluded from those proceedings.[159] Other rights, though, are more substantive in nature, including the victim's right "to be reasonably protected from the accused"[160] and right to be "treated with fairness and with respect for . . . dignity and privacy."[161] Paul Cassell has argued that this right to fair treatment is substantive under the REA and imposes limitations on the Criminal Rules.[162]

C. *Substantive Rights and Regulating Law Enforcement*

The most difficult theoretical questions for REA purposes relate to doctrines regulating law enforcement investigations. For example, the Fourth Amendment restricts search and seizure[163] while the Fifth Amendment restricts interrogation.[164] These doctrines are neither obviously procedural nor straightforwardly substantive. They regulate conduct that generally precedes litigation and often occurs before the filing of charges, without any judicial involvement whatsoever. Law enforcement officers can in-

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tions. *See infra* sections II.C, III.

156. For example, 18 U.S.C. § 3663A (2006) is the general restitution statute while other subject specific statutes also include restitution requirements. *See, e.g.*, 18 U.S.C. § 2259 (2006) (providing a right to restitution in cases of sexual exploitation of children); 18 U.S.C. § 2327 (2006) (providing restitution in cases of telemarketing fraud).

157. 18 U.S.C. § 3771 (2006).

158. *Id.* § 3771(a)(2).

159. *Id.* § 3771(a)(3).

160. *Id.* § 3771(a)(1).

161. *Id.* § 3771(a)(8).

162. Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 UTAH L. REV. 861, 872–73 (2007).

163. U.S. CONST. amend IV.

164. U.S. CONST. amend V.

terview witnesses and suspects without judicial approval, in both custodial and non-custodial circumstances. While the Fourth Amendment is often described as expressing a preference for search warrants,[165] warrantless searches are both frequent and constitutionally acceptable.[166]

Equally important, these doctrines apply even if litigation never occurs. Constitutional criminal procedure governs interactions between the public and law enforcement, not just defendants and law enforcement. On the other hand, the regulated conduct invariably occurs with an eye toward litigation even if that is not the primary purpose. Law enforcement officials do interview people for public safety reasons[167] and execute search warrants for evidence when the person in possession of the items is clearly uninvolved in criminal activity.[168] Even in these cases, however, the possibility is always present that the conversation may lead to litigation involving the interviewee or the target of the search. Individuals previously thought uninvolved in the crime may make surprising confessions, and searches frequently uncover contraband in plain view.

Determining whether these rights are "substantive" may be difficult in the abstract but somewhat easier in practice. One approach is to look at the remedy applied to the violation of the right to help define whether it is procedural or substantive. As Professor Stuntz pointed out, these police regulatory rules are "more like a species of tort law, defining liability rules for a given set of actors in the criminal justice system but using the threat of reversal in criminal litigation rather than damages or injunctive relief to enforce those standards."[169] Of course, these rules can also be enforced by other means as well; *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* allows damages ac-

165. *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 236 (1983).

166. *See, e.g.*, California v. Greenwood, 486 U.S. 35 (1988) (warrantless search of garbage bags left outside a home); United States v. Robinson, 414 U.S. 218 (1973) (search incident to a lawful arrest); Carroll v. United States, 267 U.S. 132 (1925) (automobile exception).

167. *See* Davis v. Washington, 547 U.S. 813, 822 (2006) (determining whether interrogation is "to enable police assistance to meet an ongoing emergency" for Confrontation Clause purposes).

168. *See* Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (authorizing search warrant of college newspaper to determine the identity of suspects).

169. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 17 (1997).

tions for some constitutional violations.[170] In situations where the remedy for the violation is exclusionary, there is at least a strong argument that the rule is procedural in nature. The exclusionary rule makes a classic procedural choice—the accuracy of the proceeding is reduced, by excluding relevant evidence, in exchange for increasing the perceived fairness, by remedying misconduct by one of the parties. Because the key decision is whether the evidence is admitted during the court proceeding, these constitutional rules may do nothing more than regulate the conduct of the litigants in the proceeding.

The Supreme Court initially grounded its exclusionary rules in *Miranda v. Arizona*[171] and *Weeks v. United States* on this theory.[172] The Court concluded that it was empowered to establish a procedural rule to restrict the admissibility of the evidence.[173] The Court subsequently expanded the exclusionary remedy to exist as part of the substantive constitutional right in *Mapp v. Ohio*[174] and *Dickerson v. United States*.[175] At least as a starting point, though, the difference between an exclusionary remedy for a violation and a nonexclusionary remedy is an important indication of whether the rule is procedural or substantive.

For example, federal criminal defendants have a right under the Due Process Clause to disclosure of both exculpatory evidence[176] and prior statements of government witnesses that might be useful for impeachment purposes.[177] Both of these doctrines have strong procedural components. They are designed to ensure a fair and accurate outcome in the ultimate trial on the merits. Defendants' discovery rights in federal court grew as a result of *Jencks v. United States* and its subsequent statutory codification in 18 U.S.C. § 3500.[178] Section 3500 requires the government to produce any prior statement in its possession, made by a witness, that relates to the subject matter of the testimony, even if the

170. 403 U.S. 388, 397 (1971).
171. 384 U.S. 436, 491–92 (1966).
172. 232 U.S. 383, 398 (1914).
173. *Miranda*, 384 U.S. at 491–92; *Weeks*, 232 U.S. at 398.
174. 367 U.S. 643, 660 (1961).
175. 530 U.S. 428, 444 (2000).
176. Brady v. Maryland, 373 U.S. 83, 85–86 (1963).
177. Giglio v. United States, 405 U.S. 150 (1972).
178. 18 U.S.C. § 3500 (2006); 353 U.S. 657 (1957).

statement is consistent with testimony at trial.[179] These doctrines are at least a step more substantive than *Brady v. Maryland*[180] and *Giglio v. United States*;[181] the breadth of the disclosure requirements has significant real-world implications on the types of records that federal agents keep when investigating cases.[182] The Criminal Rules further expand § 3500 by: (1) applying the obligation at other stages of the criminal process, including preliminary hearings, suppression hearings, and sentencings and (2) making the obligation reciprocal by requiring the defendant to make disclosures on par with those required of the government.[183] The Advisory Committee recognized that § 3500 does not require the disclosure of such statements but imposed the obligation anyway.[184]

If the Criminal Rules held that a defendant who did not comply with the disclosure obligations would (for instance) forfeit his suppression motion, such a rule might raise questions of its validity under the REA (as well as the Constitution). However, the only sanction under the rules is exclusionary.[185] The testimony of the witness is inadmissible if a party fails to comply with the rules.[186] As a result, these expansions of § 3500 are comfortably procedural.

III. KEEPING RULES SUBSTANTIVE

This section looks at two Criminal Rules that are substantive under the REA but that can be justified by grounding their doctrines in federal common law. Part II.A examines Rule 6(e), which governs grand jury secrecy in federal court.[187] The rule imposes significant burdens on out of court conduct and does so for

179. 18 U.S.C. § 3500(b) (2006).

180. 373 U.S. 83.

181. 405 U.S. 150.

182. *See* Ellen Yaroshefsky, *Prosecutorial Disclosure Obligations*, 62 HASTINGS L.J. 1321, 1343 n.112 (2011) (collecting sources suggesting that law enforcement is trained not to create *Jencks* material during investigations).

183. FED R. CRIM. P. 26.2(a), (g).

184. *See* FED. R. CRIM. P. 12 advisory committee's notes (1983) ("[C]ourts have consistently held that in light of the Jencks Act, 18 U.S.C. § 3500, . . . production of statements cannot be compelled at a pretrial suppression hearing. This result, which finds no express Congressional approval in the legislative history . . . , would be obviated by new subdivision (i) of Rule 12."); FED. R. CRIM. P. 26.2 advisory committee's notes (1993).

185. FED. R. CRIM. P. 26.2(e).

186. *Id.*

187. FED. R. CRIM. P. 6(e).

reasons other than procedural accuracy.[188] Part II.B considers Rule 41, which creates a remedy for those harmed by law enforcement seizures.[189] In addition to the exclusionary rule and a damages action under *Bivens*, parties may move for a return of seized property.[190] Even though these rules are substantive for REA purposes, federal common law justifies them. Part II.C argues in favor of grounding these doctrines in the common law and identifies the doctrinal benefits of doing so. Treating these as federal common law rules provides for a jurisdictional basis that is currently lacking and explains the effects of the rules beyond federal court.

A. *Rule 6(e): Grand Jury Secrecy*

Rule 6(e) imposes a broad nondisclosure obligation on most people who come into contact with grand jury material in the course of their work. The grand jurors, interpreters, court reporters, and prosecutors are all prohibited from disclosing any "matter occurring before a grand jury" except when authorized by the court or under specifically identified circumstances.[191] The consequences of violating the grand jury secrecy requirements can be severe; knowing violations are punishable by contempt and more severe violations also fall within the scope of the criminal obstruction of justice statute.[192]

Taken just on its face, Rule 6(e)'s grand jury secrecy requirement is difficult to classify as procedural. In *Shady Grove*, the plurality justified the Rule 23 joinder requirements on the grounds that they simply allowed simultaneous, rather than separate, adjudication of parties' rights.[193] The class action rule left "the parties' legal rights and duties intact and the rules of decision unchanged."[194] Rule 6 does something very different. It im-

188. FED. R. CRIM. P. 6(e) advisory committee's notes (1983).

189. FED R. CRIM. P. 41(g), (h).

190. FED R. CRIM. P. 41(g).

191. FED R. CRIM. P. 6(e)(2)(B), (e)(3).

192. FED R. CRIM. P. 6(e)(7) (stating that knowing violations of secrecy obligations are punishable as contempt); *see also* United States v. Brenson, 104 F.3d 1267 (11th Cir. 1997) (prosecution of grand juror for obstruction of justice for violation on grand jury secrecy requirements).

193. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. ___, ___, 130 S. Ct. 1431, 1443 (2010).

194. *Id.*

poses an independent obligation not to speak that reaches purely private conduct.[195] Unlike the obstruction statute,[196] it does not merely prohibit disclosure of conduct that might undermine the effectiveness of the prosecution to potential defendants or their associates. The secrecy obligation imposed by Rule 6(e) extends well beyond the courtroom into the private lives of those covered by the rule.

Additionally, unlike the requirements of most procedural rules, the obligation extends beyond the parties to employees of the court and the grand jurors themselves.[197] Because Rule 6 binds nonparties, it is significantly different from its potential civil counterpart: a Rule 26 protective order.[198] Under the discovery rules, the court has the power to limit the disclosure of information produced to the opposing party.[199] Discovery is a classically procedural doctrine designed to regulate "the manner and the means by which litigants' rights are enforced."[200] In addition to authorizing parties to demand information from each other, the rules permit parties to seek restrictions on these demands, including limiting the use of the information produced during discovery and its disclosure.[201] However, unlike the grand jury secrecy obligation, protective orders do not generally bind nonparties,[202] and district courts have very limited authority to issue orders directed at nonparties.[203]

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195. FED. R. CRIM. P. 6(e)(2).

196. 18 U.S.C. § 1512 (2006 & Supp. IV 2011).

197. FED. R. CRIM. P. 6(e)(2)(B).

198. FED. R. CRIM. P. 6(e)(2); FED. R. CIV. P. 26(C).

199. FED. R. CRIM. P. 16(d); FED. R. CIV. P. 26.

200. Shady Grove Orthopedic Assocs. V. Allstate Ins. Co., 559 U.S. ___, ___, 130 S. Ct. 1431, 1442 (2010) (quoting Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 446 (1946)) (internal quotation marks omitted); *see also* Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Legitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, 39 ARIZ. L. REV. 461, 483 (1997) (arguing that mandatory disclosure provisions of Rule 26 are "incontestably procedural").

201. FED. R. CRIM. P. 16(d); FED. R. CIV. P. 26(c).

202. *See, e.g.*, Sec. & Exch. Comm'n v. Merill Scott & Assocs., 600 F.3d 1262, 1274 (10th Cir. 2010).

203. Rule 65(d) limits the reach of the court to the parties and those who work in concert with them. FED. R. CIV. P. 65(d)(2). Wright, Miller, and Kane suggest that this limitation is compelled by the REA. 11A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2956 (2d ed. 1995). District courts can issue third party subpoenas to require nonparties to appear and present evidence and can impose sanctions for a failure to comply. FED. R. CIV. P. 45. Rule 65 imposes limits on the type of orders that can be directed to nonparties for other types of conduct.

Additionally, grand jury secrecy covers far more information than a protective order could reach. Protective orders generally prohibit parties from disclosing information produced in discovery. Grand jury secrecy, however, does not just cover the evidence or facts revealed in the investigation. It extends to any "matter occurring before the grand jury" which covers the identity of grand jury witnesses, the potential crimes under investigation, and "anything else that might indirectly reveal what happened in the grand-jury room."[204]

The purpose of the rule also suggests significant nonprocedural motivations. Five classic justifications support grand jury secrecy: (1) preventing targets from fleeing, (2) ensuring freedom for grand jurors in the deliberations and preventing targets from interfering with the grand jurors, (3) avoiding witness tampering, (4) encouraging witness testimony, and (5) protecting those exonerated by the grand jury.[205] While some of these justifications are procedural in nature, only one of them actually explains current grand jury practice that imposes the obligation of secrecy even after an indictment has been returned. Once the grand jury issues an indictment, the first three justifications, preventing flight, protecting grand jurors, and protecting witnesses, are no longer relevant.[206] Similarly, protecting those exonerated by the grand jury does not justify secrecy for those who are indicted.[207]

Only the fourth justification explains why grand jury secrecy should extend past the point of indictment; witnesses in grand jury proceedings might be deterred from coming forward if they know their information might be disclosed after the fact. "[T]he compelling need for secrecy is less obvious after the grand jury has finished its investigation. . . . The primary reason for secrecy after the investigation is over is the need to encourage future grand jury witnesses to come forward and provide information about crimes."[208] The Supreme Court has emphasized this "effect upon the functioning of future grand juries" in justifying the ongoing secrecy obligation as necessary to "aid the grand jury in the

204. 1 CHARLES ALAN WRIGHT & ANDREW D. LEIPOLD, FEDERAL PRACTICE AND PROCEDURE § 106 (4th ed. 2008) (citing FED. R. CRIM. P. 6(b)).

205. Douglas Oil Co. of Cal. v. Petrol Stops N.W., 441 U.S. 211, 219 n.10 (1979) (citing United States v. Procter & Gamble Co., 356 U.S. 677, 681–82 n.6 (1958)).

206. Wright & Leipold, *supra* note 204, at § 106.

207. *See id.*

208. *Id.*

performance of its duties."[209] As I argue below, this is a valid concern for the Court to emphasize as a matter of federal common law, but it is difficult to see how this concern relates to the fairness and efficiency of litigation. The goal is to ensure that grand juries can identify and charge criminal activity that has not yet taken place. Providing incentives for witnesses to future crimes to come forward is certainly a laudable goal, but it is not a procedural one.

The ongoing nature of the grand jury secrecy rule distinguishes it from other rules of secrecy that exist in criminal cases. Other secrecy requirement rules expire when the proceedings end. For instance, Rule 6(e)(4) allows the indictment to be sealed until a defendant is arrested.[210] Trial judges routinely instruct jurors not to discuss the case prior to the close of the presentation of the evidence,[211] and Rule 24 imposes an affirmative obligation on judges to ensure that alternates do not discuss the case.[212] This obligation, though, is closely tied to the procedural goal of ensuring that jurors do not prematurely judge the outcome of the case.[213] As a result, unlike the grand jury secrecy rule, the obligation expires at the conclusion of the trial. Trial jurors are ordinarily free to disclose (or not disclose) their deliberations. Moreover, the obligation not to discuss the case does not extend past the actual decisionmakers. Court reporters are free to discuss the evidence with anyone (other than the trial jurors). In contrast, grand jury secrecy binds everyone but the witness.[214]

Rule 6 is substantive in another sense—it is a rule of privilege. In state court proceedings, grand jury secrecy must protect those it covers from being forced to testify.[215] A federal grand juror facing a subpoena may raise secrecy as a defense. Rule 6 presumes that the secrecy requirement has this effect, since the rule permits the court to lift grand jury secrecy when the information is

209. *Douglas Oil*, 441 U.S. at 222.

210. FED. R. CRIM. P. 6(e)(4).

211. *See, e.g.*, United States v. Jadlowe, 628 F.3d 1, 16–17 (1st Cir. 2010) ("[T]he prevailing view in the federal courts remains that it is improper for jurors to discuss the case other than during their formal deliberations.").

212. FED. R. CRIM. P. 24(c)(3) ("The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged.").

213. *See, e.g.*, Winebrenner v. United States, 147 F.2d 322, 329 (8th Cir. 1945).

214. *See* FED. R. CRIM. P. 6(e)(2)(B).

215. *Cf.* FED. R. CRIM. P. 6(e)(3) (providing limited exceptions to the grand jury secrecy requirement).

needed in another "judicial proceeding."[216] While the location of the substance/procedure line is unclear, privilege is one of the few areas where Congress has expressed a view. When the Rules of Evidence were initially promulgated, the Advisory Committee proposed a set of rules relating to evidentiary privileges that would apply in federal court.[217] Congress rebelled, delaying the imposition of the Rules of Evidence until the privilege rules were stripped out.[218] As a result, the Rules of Evidence leave privilege questions to the federal common law and, in diversity cases, where state law provides the rule of decision, to state law.[219]

Rule 6 does far more than just set up a privilege rule in federal court. The proposed privilege rules, by their terms, applied in federal court.[220] While a rule privileging confidential communications between husbands and wives might, or might not, shape out-of-court behavior, the central focus is in-court conduct.[221] Will the witness be obliged to testify in the federal proceeding? Rule 6 binds conduct that occurs in federal court but also the taking of testimony in state court as well.[222] In fact, the primary effect of grand jury secrecy is to restrict conduct that occurs in no court at all but rather to prevent disclosure in daily life. If the federal court privilege rules are too "substantive" under the REA, it is virtually impossible to justify a federal rule that establishes a privilege in state court as "procedural."[223]

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216. FED. R. CRIM. P. 6(e)(3)(E).

217. For a summary of this history, see 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE §§ 5421 & 5422 (1980).

218. *Id.*

219. FED. R. EVID. 501.

220. H.R. 5463, 93d Cong. (1st Sess. 1973) (proposing to establish rules of evidence for federal courts).

221. *See id.* (proposing Federal Rule of Evidence 505—the husband-wife privilege); *see also Rules Enabling Act of 1934*, *supra* note 12, at 1129–30 (distinguishing between the rules of admissibility and the rules of taking evidence under the REA).

222. Because of the disclosure procedure under the rule, there is only limited case law on the effect of the rule in state court, but it supports the notion that the rule protects those covered by the rule from a subpoena. *See In re* Harrisburg Grand Jury, 638 F. Supp. 43, 48 (M.D. Pa. 1986) (holding that the appropriate response to a congressional subpoena for grand jury material was to raise Rule 6 as a defense in any contempt proceeding); United States v. Marks, 949 S.W.2d 320, 324–25 (Tex. 1997) (finding that Rule 6(e) provided a basis for state law to deny a litigant access to material that would otherwise be available); *see also* Better Gov. Ass'n v. Blagojevich, 899 N.E.2d 382, 389 (Ill. App. 2008) (assuming that Rule 6(e) could block a state Freedom of Information Act request for specifically prohibited information, but concluding that grand jury secrecy did not protect a subpoena recipient).

223. Related problems show up in other rules, such as Rules 12.1, 12.2, and 12.3, which

Grand jury secrecy, of course, did not start with Rule 6. The secrecy obligation long predates the rule, dating in some of its aspects back to the 14th Century.[224] The secrecy rule evolved over time, initially protecting the grand jury deliberations from the government as well as the defendant and the public. By the early 20th Century, it had taken its modern form in which the government has access to grand jury materials but the deliberations are secret from all others.[225] While grand jury secrecy is old, Rule 6 does not simply restate the prior practice. Rule 6 enumerates the people bound by the secrecy obligation and grand jury witnesses are not on the list. The rule is now explicit that the list is exclusive.[226] This decision was a conscious shift from the preexisting rule. At the time that Rule 6 was adopted, witnesses were frequently bound to the secrecy obligation. George Dession, a member of the Criminal Rules Advisory Committee, authored a two-part *Yale Law Journal* article published shortly after the rules went into effect, in which he noted that the new rules "substantially restate[d] the former policy and practice with respect to secrecy" and that "[t]he rather common practice of requiring witnesses before the grand jury to take an oath of secrecy [was] . . .

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establish the procedures for providing notice of alibi, insanity, and public authority defenses; each of these rules purports to make evidence of a withdrawn intention inadmissible "in any civil or criminal proceeding" against the person providing the notice. FED. R. CRIM. P. 12.1, 12.2, 12.3. Similarly, Federal Rule of Evidence 410, formerly part of Criminal Rule 11, excludes the introduction of evidence of withdrawn plea negotiations "in any civil or criminal proceeding." FED. R. EVID. 410. The problems raised by the application of Rule 410 in state court were brought to Congress when the Federal Rules of Evidence were adopted but went unresolved. *See* 25 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE & PROCEDURE, § 5348 (1980) (concluding that the limitation on the application of Rule 410 to cases in federal court means that it does not bar the introduction of evidence in state court). Of course, a similar interpretation of Rule 6 would seriously undermine the Rule.

224. *See, e.g.*, Fred A. Bernstein, Note, *Behind the Gray Door:* Williams, *Secrecy, and the Federal Grand Jury*, 69 N.Y.U. L. REV. 563, 594–96 (1994); Richard Calkins, *The Fading Myth of Grand Jury Secrecy*, 1 JOHN MARSHALL J. PRAC. & PROC. 18, 18–19 (1967); Mark Kadish, *Behind the Locked Door of an American Grand Jury: Its History, Its Secrecy, and Its Process*, 24 FLA. ST. U. L. REV. 1, 13 (1996).

225. Bernstein, *supra* note 224, at 594; Calkins, *supra* note 224, at 19.

226. *See* FED. R. CRIM. P. 6(e)(2)(a). The 1944 Advisory Committee notes explicitly state that the rule does not "impose any obligation of secrecy on witnesses." *Id.* advisory committee's note (1944). Prior to 2002, when the rule was clarified, some courts continued to bind witnesses. *See, e.g., In re* Grand Jury Subpoena, 103 F.3d 234, 240 n.8 (2d Cir. 1996); *In re* Subpoena to Testify Before Grand Jury Directed to Custodian of Records, 864 F.2d 1559, 1563–64 (11th Cir. 1989).

no longer authorized, [as] such [a] restriction [was] considered impractical and unfair."[227]

Dession noted that in thirty-three of the eighty-five districts, grand jury witnesses had been bound to secrecy prior to the adoption of the rules.[228] If the prior common law defines "substantive rights" for REA purposes, Rule 6 certainly "enlarges" the substantive rights of grand jury witnesses. Before the rules, they were bound to silence, just like grand jurors and prosecutors, and that obligation was enforceable by contempt. As a result of the rule, that prohibition has been lifted.

B. *Rule 41: Remedies for Searches*

The Fourth Amendment grants suspects the right to be free from unconstitutional searches and seizures.[229] With respect to charged defendants, the Fourth Amendment provides a remedy for violations. The Exclusionary Rule makes illegally seized evidence generally inadmissible. Damages may also be available as a remedy. For instance, § 1983 allows actions for damages against state officials,[230] while those injured by unconstitutional federal searches can seek damages in a *Bivens* action.[231]

In addition to these statutory and constitutional remedies, Rule 41 identifies an additional remedy. The defendant, or any person "aggrieved by an unlawful search and seizure of property or by the deprivation of property," may file a motion for the return of the property.[232] This remedy resembles the equitable remedy of replevin.[233] This type of replevin remedy is not an inevitable side effect of the other remedies and can exist standing alone.

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227. George H. Dession, *The New Federal Rules of Criminal Procedure: II*, 56 YALE L.J. 197, 203–04 (1947).

228. *Id.* at 204 n.99. The 1944 Advisory Committee notes point out that the "existing practice on this point varies among the districts; [t]he seal of secrecy . . . seems an unnecessary hardship and may lead to injustice if a witness is not permitted to make disclosure to counsel or to an associate." FED. R. CRIM. P. 6 advisory committee's note (1944). *See generally* J. Robert Brown, Jr., *The Witness and Grand Jury Secrecy*, 11 AM. J. CRIM. L. 169, 171–72 (1983) (describing the pre-rule practice).

229. U.S. CONST. amend. IV.

230. 42 U.S.C. § 1983 (2006).

231. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971).

232. FED. R. CRIM. P. 41(g).

233. Okoro v. Callaghan, 324 F.3d 488, 490 (7th Cir. 2003) ("Rule 41(g) creates a remedy analogous to the common law writ of replevin.").

For instance, both exclusionary and damages remedies are available even in cases where return of property is prohibited. For example, defendants cannot recover contraband such as drugs or child pornography under Rule 41;[234] however, they can exclude those items from evidence[235] or recover damages for an illegal seizure.[236] Similarly, nondefendants (or defendants who lack standing to challenge the search) can recover property even though they cannot benefit from an exclusionary remedy. Furthermore, as discussed below, individuals can recover property in circumstances where no *Bivens* action would be available because there was no Fourth Amendment violation.

Remedies can be difficult to classify as substantive or procedural.[237] One theoretical approach is to divide remedies from the rights they enforce.[238] Under this approach, the primary right, the rule governing day-to-day out of court conduct, is clearly substantive.[239] On the other hand, the substantive or procedural status of the secondary remedial right—that is, the right to a remedy that the plaintiff receives by successfully pursuing a claim—is less clear. It can be procedural or substantive depending on the circumstances.[240] Critics of this analytic method, led in part by Professor Daryl Levinson, have attempted to break down the distinction between rights and remedies. Drawing on private law analogies, Professor Levinson argues in favor of a unified view of rights and remedies especially in the realm of constitutional interpretation.[241]

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234. The Advisory Committee notes make clear that Rule 41 does not authorize recovery of "contraband or instrumentalities of crime." FED. R. CRIM. P. 41(g) advisory committee's notes (2009); *see also* United States v. Howell, 425 F.3d 971, 976–77 (11th Cir. 2005) (holding that a convicted felon was not entitled to return of firearms because he was not legally permitted to possess them); United States v. Van Cauwenberghe, 934 F.2d 1048, 1061 (9th Cir. 1991) (holding that a motion for return of property "may be denied if the defendant is not entitled to lawful possession of the seized property").

235. *See* Mapp v. Ohio, 367 U.S. 643, 657–60 (1961).

236. *See, e.g.*, *Bivens*, 403 U.S. at 397.

237. Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 166 (2008).

238. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 136 (1994) (providing the foundation for this theory). *But cf.* Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights*, 34 U.C. DAVIS L. REV. 673, 683–84 (2001) (identifying and criticizing authors taking this approach).

239. *See* HART & SACKS, *supra* note 238, at 136–37.

240. *See* Thomas, *supra* note 238, at 685–86.

241. Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L.

Taking this latter perspective, of course, a right/remedies combination is either substantive or procedural as a whole. Even under the more traditional view, however, there is strong reason to believe that remedies are too substantive under the REA to be enlarged or restricted by a rule of procedure, at least when the remedy relates to non-litigation conduct. Even the plurality opinion in *Shady Grove* suggests that a rule that altered "the available remedies" would run afoul of the REA.[242] The Supreme Court has certainly accepted that procedural rules can create remedies. For example, in *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, the Court upheld the validity of Rule 11 sanctions;[243] and in *Burlington Northern Railroad Co. v. Woods*, the Court approved the provisions for awarding damages and costs in cases involving frivolous appeals under Federal Rule of Appellate Procedure 38.[244] In those cases, however, the remedies occurred in response to litigation conduct, rather than behavior in the real world.[245] For instance, in *Business Guides*, the Supreme Court noted that:

> Rule 11 sanctions are not tied to the outcome of litigation; the relevant inquiry is whether a specific filing was, if not successful, at least well-founded . . . . The main objective of [Rule 11] is not to reward parties who are victimized by litigation; it is to deter baseless filings and curb abuses. Imposing monetary sanctions on parties that violate the Rule may confer a benefit on other litigants, but the Rules Enabling Act is not violated by such incidental effects on substantive rights.[246]

In contrast, while the Court has never confronted a rule that explicitly expands or contracts the damages available to plaintiffs for primary conduct, it has been careful to read the rules to avoid such a result and has assumed that such rules are substantive.[247]

REV. 857–58 (1999).

242. *See* Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. ___, ___, 130 S. Ct. 1431, 1443 (2010).

243. 498 U.S. 533, 553–54 (1991).

244. 480 U.S. 1, 7–8 (1987).

245. This difference exposes the distinction between evidence gathering in the criminal and civil contexts. Under Rule 26, the district court certainly could require the return of evidence obtained as a result of court-authorized discovery. *See* FED. R. CIV. P. 26(c). The Civil Rules, though, could not require a plaintiff to return an object to a defendant that was taken prior to litigation, even if the item were stolen.

246. *Business Guides*, 498 U.S. at 553.

247. *See* Gasperini v. Ctr. for Humanities, Inc., 415, 428 (1996) ("[A] statutory cap on damages would supply substantive law for *Erie* purposes."). While the *Shady Grove* plurality did not reach the question, both Justice Stevens and the four dissenters recognized

The Court has made similar assumptions about provisions permitting the award of attorneys' fees based on the outcome of the lawsuit itself rather than conduct during litigation.[248]

Assuming that a search is pursuant to a warrant, Rule 41 might be viewed as creating a remedy for litigation-related conduct. A search warrant might (or might not) be seen as part of a broader criminal case. Rule 41 does more, though. It creates a replevin remedy for warrantless searches as well.[249] Law enforcement could certainly justify a warrantless search for a kidnapping victim on exigent circumstances grounds even if there is no real prospect of recovering evidence relating to the kidnapping itself.[250] The goal of such a search is rescue, not evidence gathering. Anything seized in such a search is subject to Rule 41, even though there might never be any other litigation.

The fact that Rule 41 refers to such a remedy, though, does not necessarily mean that the rule created it. To some degree, the development of the rule has attempted to keep up with the Fourth Amendment case law. In this sense, the rule might not alter substantive rights but simply follow the development of those rights under the Constitution. The initial 1944 rule explicitly stated that it did not intend to change the remedy that was then in place for recovery of property—the rule was merely "a restatement of existing law and practice."[251] The 1989 amendments to Rule 41, though, both moved away from the preexisting case law and substantially expanded the remedies available under the rule. These

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that a rule that directly altered the damages available to a plaintiff would face REA problems. *See* 559 U.S. at ___, 130 S. Ct. at 1457–58 (Stevens, J., concurring); 559 U.S. at ___, 130 S. Ct. at 1472 (Ginsburg, J., dissenting).

248. In *Chambers v. Nasco, Inc.*, the Court upheld a fee award based on the district court's inherent power to sanction bad faith litigation conduct. 501 U.S. 32, 52 (1991). The Court distinguished situations where the "fee-shifting rules . . . embody a substantive policy, such as a statute which permits a prevailing party in certain classes of litigation to recover fees." *Id.*; *see also* Marek v. Chesny, 473 U.S. 1, 35 (1985) (Brennan, J., dissenting) ("The right to attorney's fees is 'substantive' under any reasonable definition of that term."); Alyeska Pipeline Serv. Co. v. Wilderness Sac's, 421 U.S. 240, 259 n.31 (1975).

249. FED. R. CRIM. P. 41(g).

250. *See, e.g.*, State v. Larsen, 736 N.W.2d 211, 217–18 (Wis. Ct. App. 2007) (collecting cases where courts upheld warrantless searches for kidnap victims); 3 WAYNE R. LEAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 6.5(d) n.177 (4th ed. 2004).

251. FED. R. CRIM. P. 41 advisory committee's note (1944); *see also* Smith v. Katzenbach, 351 F.2d 810, 814 (D.C. Cir. 1965) ("[Rule 41] is a crystallization of a principle of equity jurisdiction."). The foundational Supreme Court Fourth Amendment case of *Weeks v. United States* involved a return of property motion. 232 U.S. 383 (1914).

changes both altered the standard used by courts to determine whether to return the property and expanded the range of beneficiaries of the rule. Before 1989, the rule allowed individuals to seek the return of property only if (1) the person was entitled to lawful possession and (2) the property was illegally seized.[252] In that year, both requirements changed. Under the current version of the rule, any person aggrieved by an unlawful seizure or by the deprivation of property from a lawful seizure may file a motion.[253] As a result, the rule clearly provides rights to nondefendants to seek return of property. Moreover, it allows them to seek recovery of property even if the seizure was not a violation of the Fourth Amendment.[254]

The committee changed the rule for reasons that are hard to describe as procedural. In adopting the language that allowed any person "aggrieved" by a seizure to seek recovery of property, even when the seizure was lawful, the Advisory Committee was concerned with the effect on nonparties in the real world.[255] The committee recognized that the prior version of the rule "failed to address the harm that may result from the interference with the lawful use of property by persons who are not suspected of wrongdoing."[256] The Ninth Circuit, sitting en banc, recently affirmed a district court order requiring the return of documents and drug-testing samples of Major League Baseball players.[257] It noted that the moving party, the Major League Baseball Players Association, was aggrieved by the seizure because it "breache[d] its negotiated agreement for confidentiality, violate[d] its members' privacy interests and interfere[d] with the operation of its business."[258] The interests served by the return are substantive by any definition.

252. *See* FED. R. CRIM. P. 41 advisory committee's note (1972).

253. FED. R. CRIM. P. 41(g).

254. *See* FED. R. CRIM. P. 41 advisory committee's note (1989); United States v. Comprehensive Drug Testing, Inc., 621 F.3d 1162, 1173 (9th Cir. 2010) (en banc). The 1989 changes also separated the exclusionary remedy from the recovery remedy. FED. R. CRIM. P. 41 advisory committee's note (1989).

255. *See* FED. R. CRIM. P. 41 advisory committee's note (1989).

256. *Id.*

257. *Comprehensive Drug Testing*, 621 F.3d at 1167, 1174.

258. *Id.* at 1174.

C. *Grounding the Doctrines in the Common Law*

While both grand jury secrecy and the right to recover seized property are too "substantive" for the rules to create the doctrine, neither doctrine needs to disappear. As an initial matter, Congress could save the rules by enacting them as statutes as it did in 1975 with the Rules of Evidence.[259] Even absent congressional action, though, both rules can find a different foundation as doctrines of federal common law. While *Erie* invalidated the general federal common law,[260] federal common law survives in enclaves where federal lawmaking is necessary because state control is clearly inappropriate.[261] The Supreme Court has already recognized the role of federal common law when interpreting the Civil Rules. In *Semtek International, Inc. v. Lockheed Martin Corp.*, the Court concluded that Rule 41 could not be the source of federal preclusion law because such a rule would face serious concerns under the REA.[262] Instead, the preclusive effect of federal court judgments was determined by federal common law.[263]

Both of these doctrines fit very naturally as forms of federal common law. The grand jury is an independent institution created by the Constitution but overseen by the courts.[264] Some law must regulate its activities and federal grand juries involve "uniquely federal interests" that are "so committed by the Constitution and laws of the United States to federal control" that governance by state law is inappropriate.[265] Absent congressional regulation, federal common law must control.

The justifications for grand jury secrecy described above support this result. None of the procedural justifications for secrecy, such as ensuring the accuracy of the indictment process, justify continuing the nondisclosure obligation past the arrest of the defendant. However, the secrecy requirement makes sense as part

259. *See* Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (1975) (codified as amended at 28 U.S.C. app. (1976)).

260. Erie R.R. v. Tompkins, 304 U.S 64, 71 (1938).

261. *See, e.g.*, Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981); *see also* Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 821 (2008) (describing this as "enclave" federal common law).

262. 531 U.S. 497, 503 (2011).

263. *Id.* at 508.

264. U.S. CONST. amend. V.

265. Boyle v. United Techs. Corp., 487 U.S. 500, 504 (1988) (quoting *Texas Indus.*, 451 U.S. at 640).

of an effort to protect the grand jury itself and the availability of witnesses in future proceedings. With respect to Rule 41, the Supreme Court already recognized a common law right to a damages remedy in federal court for Fourth Amendment violations in *Bivens*.[266] For those who accept a federal common law damages remedy, a comparable common law replevin remedy is a sensible and natural adjunct to *Bivens*.[267]

A fair question to ask at this point is whether any of this matters. Is it relevant whether Rules 6 and 41 set up standards in their own right or merely reflect underlying federal common law rules grounded in some constitutional provision? Even if the basic standards remain the same, there are important implications from seeing these doctrines as common law provisions rather than rules of procedure. As an initial matter, this approach suggests that the limitation on the scope of grand jury secrecy in Rule 6 is arguably invalid. If the identity of the parties to be bound by secrecy does not come from the rules, but instead from common law, the courts that have disregarded the language of the rule and required witnesses to remain silent may be correct in their conclusion that they have this power.[268]

More broadly, while the source of law-making power is always significant,[269] it is especially important when cases raise separation of powers concerns. Both rules have changed over time in ways that operate to the detriment of the government. Rule 6 frees witnesses from the requirements of grand jury secrecy even though they might have been bound prior to the imposition of Rule 6.[270] If anyone is likely to be injured by that change in law, it

266. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395–96 (1971).

267. Of course, those who advocated for a more limited view of federal common law might take a different approach. *See, e.g.*, Carlson v. Green, 446 U.S. 14, 31–32 (1980) (Rehnquist, J., dissenting) (rejecting *Bivens*). One of the leading academic critics of an expansive view of federal common law, Thomas Merrill, has emphasized the limitations of separation of power, federalism, electoral accountability, and the Rules of Decision Act on the development of federal common law. *See generally* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 2–3 (1985). If these critics are right, then both the remedy in Rule 41 and the secrecy obligation of Rule 6 are invalid because they would not be authorized by either the REA or federal common law.

268. *See, e.g.*, *In re* Grand Jury Proceedings, 417 F.3d 18, 25–26 (1st Cir. 2005) (discussing whether Rule 6 allows the court to impose secrecy).

269. *See Rules Enabling Act of 1934*, *supra* note 12, at 705 (arguing that it matters whether decisions are grounded in the Civil Rules or federal common law).

270. *See* FED. R. CRIM. P. 6(e)(2).

is apt to be the executive branch. While the grand jury is not part of the executive branch, it is clear that the primary beneficiary of the rule that witnesses cannot disclose grand jury matters is the prosecution.

Similarly, Rule 41 has expanded the availability of the return of property remedy. Now anyone aggrieved by the seizure can seek the property's return and to do so, they need not show that the seizure was illegal. This change obviously works to the detriment of the government. While 1989 amendments to the rule were designed to include protections for the circumstances where evidence would be needed at trial,[271] the government is certainly better off not having to return the property in the first place. Whether these changes come under the cloak of the REA affects their legitimacy. Seen through the lens of Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,[272] the foundation of the Court's authority matters a great deal. If the courts have reduced the influence of the executive branch pursuant to a validly promulgated Criminal Rule, the judiciary has much more latitude than if it acts only under its own authority to identify and make federal common law.[273]

Furthermore, grounding these doctrines in federal common law answers an awkward jurisdictional question. Federal courts only have the jurisdiction authorized by Congress.[274] Section 3231, the general criminal jurisdiction statute, grants district court's jurisdiction "of all offenses against the laws of the United States."[275] In cases that lead to charges against a defendant, it is certainly reasonable to conclude that a motion to unseal the grand jury transcripts or a motion to return seized property falls within the jurisdiction given to the court as part of the criminal case, especially where the motion is made by a charged defendant. Even after the criminal case is resolved, the district court may retain continuing jurisdiction to resolve issues relating to the disposition of seized property or to release the grand jury transcripts,

271. *See* FED. R. CRIM. P. 41 advisory committee's note (1989).

272. 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

273. *Cf. id.* at 635 ("Presidential powers are not fixed but fluctuate depending upon their disjunction or conjunction with those of Congress.").

274. U.S. CONST. art. III, § 1.

275. 18 U.S.C. § 3231 (2006).

just as district courts retain some limited continuing jurisdiction to modify their protective orders after a civil case is resolved.[276]

However, in cases where no charges are filed and no criminal case existed in the first place, the source of the district court's jurisdiction over a motion to unseal a grand jury transcript or to return seized property is very unclear.[277] No federal statute generically authorizes the district court to take jurisdiction over either type of motion.[278] Litigants have frequently tried to ground jurisdiction for motions to unseal in the All Writs Act,[279] but the Supreme Court has been clear that the All Writs Act does not create jurisdiction where it otherwise would not exist.[280] The courts of appeals have grounded motions to return property in cases where charges have not been filed on the nonstatutory theories of "anomalous jurisdiction"[281] or "equitable jurisdiction."[282] Such theories fit uncomfortably with the Supreme Court's repeated insistence on clearly identifying the constitutional and statutory sources of federal court subject matter jurisdiction.[283] Finally, it is doubtful whether the Criminal Rules can create jurisdiction. While there is no counterpart in the Criminal Rules to Civil Rule 82, which specifically states that the Civil Rules cannot alter the jurisdiction of the district courts,[284] it would be a strange outcome that the Criminal Rules could create jurisdiction where the Civil Rules could not.

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276. *See* Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 381 (1994) (dictum); United Nuclear Corp. v. Cranford Ins. Co., 905 F.2d 1424, 1427 (10th Cir. 1990).

277. The closest the Supreme Court has come to answering this question for grand jury transcripts is to note that the motion should be filed with the district court where the grand jury was located because that court possesses the transcripts. *See* Douglas Oil Co. of Cal. v. Petrol Stops Nw., 441 U.S. 211, 225 (1979). *See generally* United States v. Campbell, 324 F.3d 497, 499 (7th Cir. 2003) (Easterbrook, J., concurring) (noting the subject matter jurisdiction problem with respect to motions to unseal grand jury transcripts).

278. *Cf.* 18 U.S.C. § 3322(b)(1) (2006) (authorizing certain limited motions to unseal grand jury transcripts in cases involving banking law violations).

279. 28 U.S.C. § 1651(a) (2006).

280. Syngenta Crop Prot., Inc. v. Henson, 537 U.S. 28, 34 (2002); *see also* Carlisle v. United States, 517 U.S. 416, 429 (1996).

281. *See, e.g.*, *In re* Grand Jury Proceedings, 115 F.3d 1240, 1246 (5th Cir. 1997).

282. *See, e.g.*, Ramsden v. United States, 2 F.3d 322, 324 (9th Cir. 1993).

283. *See, e.g.*, Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 552 (2005); Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994); Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986).

284. *See* FED. R. CIV. P. 82 ("[R]ules do not extend or limit the jurisdiction of the district courts . . . .").

If, however, the scope of grand jury secrecy and the right to recover seized property are matters of federal common law coming from the relevant constitutional clauses, rather than an aspect of the rule, jurisdiction is easy enough to find. Motions for access to or return of property would then be civil actions "arising under" the law of the United States within the meaning of § 1331.[285] Section 1331 gives jurisdiction to the district courts over any claim arising under federal law, including rights created under federal common law.[286] These motions then would have a well-established jurisdictional basis.

Finally, seeing this question as a matter of federal common law explains the problem of the applicability of these rules outside federal court. Even if Rule 6(e) is a valid rule of procedure that imposes a secrecy requirement in federal court, it is hard to see how the rule could have such an effect in state court.[287] It is clear, though, that the grand jury secrecy must bar state court prosecutors (or defendants) from compelling grand jurors to testify about the evidence presented to a federal grand jury. Rule 6 sets up a process for obtaining access to grand jury material when it is needed in another proceeding. However, if the federal court refuses access or a state court subpoena is issued without going through this process, state court action must be preempted. While the federal rules cannot easily serve this purpose, federal common law does so in a straightforward manner.[288] Federal common law binds state courts under the Supremacy Clause just as a federal statute would. If grand jury secrecy is grounded in the common law, it can easily reach into state court while a similar doctrine grounded in the rule could not.

Rule 41 raises related, albeit slightly different, questions. Sovereign immunity questions arise in some Rule 41 cases. The

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285. *See* 28 U.S.C. § 1331 (2006).

286. Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972) ("Section 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin.").

287. *See* FED. R. CRIM. P. 1(a)(1) (stating that rules are applicable in federal court criminal proceedings). Under Rule 1, some of the Criminal Rules do cover proceedings in state court. *See* FED. R. CRIM. P. 1(a)(2). For example, Rule 41(b) authorizes state court judges to issue warrants under certain circumstances. *See* FED. R. CRIM. P. 41(b)(1). Rule 6 does not include similar language. *See* FED. R. CRIM. P. 6.

288. *See* Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules, and Common Law*, 63 NOTRE DAME L. REV. 693, 711 (recognizing a similar problem with the Court's interpretation of Rule 3).

United States has generally waived sovereign immunity for claims for injunctive relief,[289] which cover most cases involving motions for the return of property. However, Rule 41 movants sometimes discover that the government has destroyed, sold, or otherwise disposed of the seized property. In such cases, some circuits permit the court to award money damages as a substitute for its inability to grant the equitable remedy while others reject the availability of money damages on sovereign immunity grounds.[290] Similarly, federal agents often work in concert with state law enforcement at the investigation stage. Federal and state agents may jointly conduct a search pursuant to a federal search warrant. Alternatively, a defendant might be arrested and searched by state law enforcement but turned over to the federal government for prosecution (or vice versa). In these cases, by the time of a Rule 41 motion, the defendant's property may not be in the hands of the United States. It is unclear whether Rule 41 permits a motion to recover property under those circumstances. Some courts of appeals have suggested that states can be required to return property if local law enforcement is acting as an agent of the federal government or if the federal government is in constructive possession of the property.[291] In theory, because Rule 41 is not limited to motions by defendants, and the motions can occur even when no prosecution exists, these cases might permit a nondefendant to seek a federal court order requiring state officials to return property. Whether sovereign immunity is waived for claims arising under federal common law is certainly not an easy question, regardless of whether the sovereign immunity in question belongs to the federal government or to a state.[292] However, it is much harder to imagine the circumstances under which

289. *See* 5 U.S.C. § 702 (2006).

290. *Compare* United States v. Hall, 269 F.3d 940, 943 (8th Cir. 2001) (barring recovery on sovereign immunity theory), *with* Mora v. United States, 955 F.2d 156, 161 (2d Cir. 1992) (recognizing the availability of money damages), *and* United States v. Martinson, 809 F.2d 1364, 1367–68 (9th Cir. 1987) (same).

291. *See* United States v. Copeman, 458 F.3d 1070, 1072 (10th Cir. 2006) (holding that the test for constructive possession is whether property "is being held for potential use as evidence in a federal prosecution"); United States v. Huffhines, 986 F.2d 306, 308 (9th Cir. 1993) (asking whether "there was actual cooperation between federal and state law enforcement agencies in either obtaining the warrant or conducting the search itself"). *But see* United States v. White, 718 F.2d 260, 261 (8th Cir. 1983) ("[S]ince the [federal] government [did] not possess [the defendant's] property, it [could not] return his property.").

292. *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 9.2 (5th. ed. 2007).

it would be appropriate to waive sovereign immunity through a rule of procedure.

Even aside from these doctrinal concerns, there are issues with having prospective rules set up substantive rights in an area where the Supreme Court is developing parallel rules on a case-by-case basis. For example, in 1972, the Advisory Committee was forced to amend Rule 41 in significant ways as a result of the Supreme Court's evolving Fourth Amendment jurisprudence.[293] The pre-1972 rule identified five explicit substantive grounds that would support a motion for the return of property, but those grounds were removed in part because "the categories [were] not entirely accurate."[294] Similarly, the rule has been forced to chase the Court's evolving doctrine under the exclusionary rule. The 1989 amendments eliminated language that required the exclusion of illegally seized evidence in recognition that evidence seized in violation of the Fourth Amendment is often still admissible.[295] Constraining Rule 41 to the procedures for obtaining the right to a return of property or suppression, while leaving both the scope of the remedy and the substantive bases for claims to the common law, would avoid these problems.

IV. MAKING RULES PROCEDURAL

This section looks at two Criminal Rules that have strong substantive aspects under the REA but can be read narrowly to comply with the REA restrictions. First, Section IV.A considers Rule 5(a), which restricts how long criminal suspects may be held prior to presentment to a federal magistrate. Rule 5(a) provides protections in addition to those compelled by the Constitution and does so for substantive reasons. Second, Section IV.B examines Rule 48(a), which inserts the district judge into the prosecution's decision to dismiss an indictment. The rule limits the government's previously unrestricted right to abandon a prosecution. Because of the interaction between the Double Jeopardy Clause and the government's decision to dismiss, Rule 48(a) gives the district court substantive control over preclusion. Section IV.C identifies limiting constructions of these rules to retain their substantive

293. *See* FED. R. CRIM. P. 41 advisory committee's note (1972).

294. *Id.*

295. *See id.* advisory committee's note (1989); United States v. Leon, 468 U.S. 897, 926 (1984) (recognizing the good faith exception to the exclusionary rule).

character. Rather than interpreting Rule 5 to limit detention (a substantive goal), the rule simply imposes an exclusionary sanction prohibiting the admissibility of statements made in violation of its provisions. Rule 48(a) can be read to permit the judiciary to require a preclusive dismissal for procedural reasons (such as harassment or delay) but not on substantive grounds. Although courts have not grounded the analysis in the REA, to a large degree, this approach to interpreting the rules is already reflected in the current Rule 5 doctrine. For Rule 48, though, the interpretation answers an important open question about the appropriateness of denying joint motions to dismiss indictments and calls into question the appropriateness of using Rule 48 as a mechanism for vacating a criminal conviction post-verdict at the government's request.

A. *Rule 5(a): Delay in Presentment*

Rule 5 regulates the initial appearance of criminal defendants in federal court. At the initial appearance, the defendant is advised of his or her rights, is appointed counsel, and the magistrate makes a bail determination on whether the defendant is eligible for release or should be detained.[296] Rule 5(a)(1)(A) specifically limits the scope of the detention of arrestees prior to the initial appearance. Defendants must be brought before a magistrate "without unnecessary delay."[297]

Both the existence of a time limit in the rule and the specific phrase "without unnecessary delay" date back to the original version of the Criminal Rules.[298] The drafters intentionally overrode a variety of preexisting statutes that imposed different time limits based on either the underlying substantive crime or the identity of the arresting officer to fix one uniform time limit for federal court presentment.[299] In addition to these statutes, the rule also was drafted in light of the Supreme Court's then-recent decision

296. FED. R. CRIM. P. 5(a)(1)(A), (d)(1)(B)–(E), (d)(3).

297. FED. R. CRIM. P. 5(a)(1)(A). The same time bar appears elsewhere in the Criminal Rules that govern arrest. *E.g.*, FED. R. CRIM. P. 32(a)(1) (relating to arrests for violations of conditions of supervised release); FED. R. CRIM. P. 40(a) (relating to arrests for failure to appear in another district).

298. FED. R. CRIM. P. 5(a).

299. FED. R. CRIM. P. 5(a) advisory committee's notes (1946).

in *McNabb v. United States*.[300] *McNabb* involved the Court's first exercise of its "supervisory authority" over criminal cases,[301] and it excluded confessions of defendants who had been held by law enforcement without presentment to a magistrate.[302] Even though the Court concluded that the Constitution did not require exclusion, the Court decided it had the power to render the statements inadmissible as part of its "duty of establishing and maintaining civilized standards of procedure and evidence."[303] *McNabb* emphasized the coercive nature of the interrogation in that case and viewed exclusion as a means to restrict "those reprehensible practices known as the 'third degree.'"[304]

McNabb was immediately controversial. Congressional opponents, supported by the Department of Justice, suggested possible legislative overruling but were ultimately unsuccessful.[305] This debate was much on the minds of the drafters of Rule 5(b). The rule was initially drafted with language explicitly incorporating the *McNabb* rule, but was later altered by the Advisory Committee, in part as a response to objections from the American Bar Association.[306] The final draft was intentionally silent on the point.[307] Soon after the rule went into effect, the Court made clear that *McNabb* survived the rule. *Upshaw v. United States* not only reinforced *McNabb* itself, but also made clear that the rule did not simply exclude involuntary confessions made in response to coercion, but made even voluntary confessions inadmissible.[308]

Partly in response to the *McNabb* doctrine, and more directly in response to *Miranda v. Arizona*, Congress adopted 18 U.S.C. §

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300. 318 U.S. 332 (1943); *see also* George H. Dession, *The New Rules of Criminal Procedure: I*, 55 YALE L.J. 694, 706–07 & n.48 (1946).

301. *See* Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1445 (1984).

302. 318 U.S. at 344–45, 347.

303. *Id.* at 340.

304. *Id.* at 343–44.

305. *See* Dession, *supra* note 300, at 710–12 (discussing the legislation proposed by Representative Hobbs of Alabama).

306. *See* Fred E. Inbau, *The Confession Dilemma in the United States Supreme Court*, 43 ILL. L. REV. 442, 452 & n.17 (1948).

307. *See* Dession, *supra* note 300, at 707 (describing the relationship between Rule 5 and *McNabb*).

308. Upshaw v. United States, 335 U.S. 410, 412–13 (1948); *see also* Mallory v. United States, 354 U.S. 449, 453 (1957).

3501,[309] which purported to expand the admissibility of voluntary confessions in federal court.[310] In particular, § 3501(a) aimed at *Miranda* by stating that confessions would be admissible if voluntarily given.[311] Section 3501(c) confronted *McNabb*, providing that confessions are not inadmissible based on delay in presentment to a magistrate if made voluntarily and within six hours of arrest.[312] Despite arguments that § 3501(a) eliminated *McNabb* entirely, the Supreme Court recently held that the *McNabb* exclusionary rule continues to apply after the six hour safe harbor created by § 3501(c).[313]

Rule 5 and *McNabb* regulate law enforcement conduct against a constitutional background. The Fourth Amendment mandates a "prompt" judicial determination that probable cause exists.[314] In *County of Riverside v. McLaughlin*, the Supreme Court clarified the definition of "prompt."[315] *County of Riverside* viewed the Fourth Amendment requirement as a balancing test between the needs of law enforcement to process defendants administratively and the defendant's right to a prompt and reliable determination of probable cause by a judicial officer.[316] The Court held that, "as a general matter," law enforcement complies with the Fourth Amendment time bar if the defendant appears before a magistrate within forty-eight hours of arrest.[317]

Applying the *Sibbach* and *Shady Grove* standard to Rule 5, it is difficult to see how the requirement of presentment "without unnecessary delay" is procedural. The rule reduces the length of time a defendant can be held without appearing before a magistrate and, as a result, enlarges the Fourth Amendment right recognized in *Gerstein v. Pugh* and *County of Riverside*. While Rule 5(a) does not explicitly define "unnecessary delay," it is certainly shorter than the constitutionally required forty-eight hour time

309. Yale Kamisar, *Can (Did) Congress "Overrule"* Miranda?, 85 CORNELL L. REV. 883, 886 n.7, 895–96 & n.69 (2000) (discussing commentary on § 3501's purported overruling of the "*McNabb-Mallory* rule" and *Miranda v. Arizona*, 384 U.S. 436 (1966)).

310. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, sec. 701(a) § 3501(a), 82 Stat. 197, 210–11 (codified as amended at 18 U.S.C. § 3501(a) (2006)).

311. 18 U.S.C. § 3501(a) (2006).

312. *Id.* § 3501(c).

313. Corley v. United States, 556 U.S. 303, 322 (2009).

314. Gerstein v. Pugh, 420 U.S. 103, 124–25 (1975).

315. 500 U.S. 44, 55–56 (1991).

316. *Id.* at 55.

317. *Id.* at 56.

limit.[318] Unlike the joinder rules endorsed by the Court in *Shady Grove*, it does not leave "the parties' legal rights and duties intact."[319] Instead it imposes a substantive limitation on the interaction between law enforcement and criminal suspects.

Professor Beale makes a similar point in challenging the *McNabb* rule as an illegitimate exercise of the Supreme Court's inherent power over procedure.[320] She argues that *McNabb* is substantive in that "it regulates extrajudicial conduct, not judicial procedure[; therefore,] [s]uch a rule limits the means the government may employ to investigate criminal conduct and creates a right on the part of the suspect."[321] In her view, though, such a rule would be legitimate as part of the federal rules themselves if promulgated under the REA.[322] It is hard to see how, though, given the plurality opinion in *Shady Grove*.

The case law on Rule 5(a) provides two primary justifications for the time bar, both of which are substantive in nature.[323] The first argument in favor of the time bar is the most straightforward and comes from the constitutional case law. Detention itself is extremely costly for defendants and the longer the period of detention, the more serious the burden. As the Court noted in *Gerstein*, "pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships."[324] These impositions on the defendant's life cannot be justified as purely procedural costs; ensuring that the government does not unreasonably interfere with citizens' life and welfare are classically substantive concerns.

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318. *See, e.g.*, Mallory v. United States, 354 U.S. 449, 450–51 (1957) (finding a violation where the defendant was arrested between 2:00 and 2:30 p.m. and presented the following morning); Upshaw v. United States, 335 U.S. 410, 411–12, 414 (1948) (finding a violation where there was a thirty-hour delay).

319. *See* Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. ___, ___, 130 S. Ct. 1431, 1443 (2010).

320. *See* Beale, *supra* note 301, at 1475–76. Notably, Professor Beale's article was written prior to the 1988 merger of the Civil and Criminal Rules Enabling Acts.

321. *Id.* at 1475.

322. *Id.* at 1477.

323. Professor Inbau argued for other justifications for the time bar; they have not received much attention in the case law, but they are equally substantive. Returning to a key statute cited by the Court in *McNabb* as justification, Inbau argues that the central concern regarding the time bar was law enforcement corruption rather than harsh interrogation. *See* Inbau, *supra* note 306, at 456 (noting that Congress was concerned that federal officers were delaying presentment to earn higher mileage fees).

324. Gerstein v. Pugh, 420 U.S. 103, 114 (1975); *see also* Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 52 (1991).

The *McNabb* line of cases produces a more powerful, but also more substantive, argument in favor of prompt presentment. *McNabb* emphasizes not just the costs of detention itself but also the need to restrict harsh interrogation techniques during that detention. Prompt presentment is needed "to avoid all the evil implications of secret interrogation of persons accused of crime."[325] This concern with the possibility of federal law enforcement interrogation abuses during periods of undisclosed detention persists in *Corley v. United States*, the Court's most recent decision on the subject.[326] Like the concern over the costs of detention itself, this anti-torture, anti-third degree rationale relates to a defendant's rights with respect to the government, not merely to the fairness or accuracy of the litigation process.

The Civil Rules also suggest that rules regulating arrest are substantive within the meaning of the REA. While seldom used, the Civil Rules also recognize the possibility of arrest.[327] Rule 64, though, expressly declines to regulate the scope and availability of arrest, attachment, and other preliminary remedies. Those remedies are a matter of state law under the rules.[328] This decision to expressly incorporate state law is extremely unusual under the federal rules, which reflect a strong preference for federal uniformity.[329] Professor Burbank's research on the legislative history of the rules demonstrates that Rule 64 incorporated state law in part out of REA concerns.[330]

While the Supreme Court has not explicitly held that the REA restricts the scope of civil preliminary remedies, it has strongly suggested as much. In *Grupo Mexicano de Desarrollo, S. A. v. Al-*

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325. McNabb v. United States, 318 U.S. 332, 344 (1943).

326. *See* Corley v. United States, 556 U.S. 303, 320 (2009).

327. *See* FED. R. CIV. P. 64.

328. *Id.*

329. The only comparable rule is Rule 69, which also relates to remedies. *See* FED. R. CIV. P. 69.

330. Rules 64 and 69

> took that form because, notwithstanding the desire of some members of the Advisory Committee to subject those matters, or some of them, to uniform federal law, the Committee as a whole recognized that to do so would be controversial and would perhaps exceed the limits of the Court's power. The legitimacy of the latter concern is confirmed by the Act's long legislative history and by contemporary scholarly literature.

Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291, 1331 (2000); *see also Rules Enabling Act of 1934*, *supra* note 12, at 1085–86.

liance Bond Fund, Inc., the Supreme Court reviewed an injunction under Rule 65 which barred the defendant from dissipating assets even though the plaintiff had not yet obtained a judgment.[331] The Court pointed out that permitting such an injunction under Rule 65's preliminary injunction provisions would make Rule 64 moot.[332] More importantly, the Court indicated that the rules could not authorize such a result:

> [W]e would not be inclined to believe that it is merely a question of procedure whether a person's unencumbered assets can be frozen by general-creditor claimants before their claims have been vindicated by judgment. It seems to us that question goes to the substantive rights of all property owners.[333]

If a plaintiff's ability to interfere with defendant's interest in property prior to judgment is too substantive to regulate under the REA, there is a strong argument that the government's right to interfere with a liberty interest is equally over the line.

The strongest argument in favor of Rule 5 under the Court's current jurisprudence, including *Grupo Mexicano*, is that it does not authorize or prohibit detention, but instead simply imposes a time limit. The rule limits the duration of the arrest, not its existence. Under this theory, the time it takes to get a defendant before a magistrate is procedural under the REA, even if the right to arrest is substantive. From this standpoint, Rule 5 sets a limitations period on the defendant's right to object to detention. Complaints before an "unnecessary delay" has occurred are untimely.

However, it is difficult to see the Rule 5 constraint as a time limit. It has far more in common with a substantive element of a claim for false imprisonment or malicious prosecution. When an arrest is initially privileged, a false imprisonment claim may arise when the period of privilege has elapsed and the detention has become unreasonable.[334] In that context, the time delay operates as an element of the substantive claim. The Advisory Committee notes accompanying the 1944 version of the rule supports

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331. 527 U.S. 308, 318–20 (1999).

332. *Id.* at 330.

333. *Id.* at 322–23.

334. RESTATEMENT (SECOND) OF TORTS § 136 cmt. e (1965); *see also* Van Schaick v. United States, 586 F. Supp. 1023, 1033 (D.S.C. 1983) (finding the United States liable for false imprisonment for unnecessarily delaying presentment).

this interpretation.[335] Only one of the cases cited in the notes involves a criminal defendant objecting to the period of detention as part of his criminal case. The remainder of these cases examines the question in the context of false arrest claims against the arresting officer.[336]

Even if the time bar acts more like a statute of limitation than an element, such a provision is likely substantive for REA purposes. Statutes of limitations are notoriously difficult to categorize as substantive or procedural but are one of the few areas where the Supreme Court has repeatedly spoken. In *Guaranty Trust Co. v. York* the Court held that, for purposes of the unguided *Erie* analysis where the federal rules are silent, federal courts must apply state statutes of limitations to determine whether a claim is time-barred.[337] More to the point, the Court has held that state law determines when the limitations period starts and stops running, even if the federal rules would do so in a federal question case.[338] Rule 3 states that lawsuits commence in federal court when the complaint is filed, which in turn determines whether the lawsuit is within the statute of limitations.[339] However, in diversity cases, state law determines when the statute of limitations starts and stops running.[340] Even if Rule 5 just sets a limita-

335. *See* FED. R. CRIM. P. 5 advisory committee's note (1944).

336. In *Commonwealth v. Di Stasio*, the defendant sought to suppress his confession based on the claim that his presentment to a magistrate was delayed unnecessarily. 1 N.E.2d 189, 192, 196 (Mass. 1936). The remainder of the cases cited by the Advisory Committee involve actions where the alleged delay was a basis for liability for the police officers in a false imprisonment action. *See* Janus v. United States, 38 F.2d 431, 436 (9th Cir. 1930); Carroll v. Parry, 48 App. D.C. 453, 458 (1919) (malicious prosecution action by arrestee); Peloquin v. Hibner, 285 N.W. 380, 383 (Wis. 1939) (civil false imprisonment against arresting officers based on unnecessary delay in presentment); State v. Freeman, 86 N.C. 683, 683 (1882) (criminal false imprisonment charges against arresting officer).

337. 326 U.S. 99, 109 (1945).

338. West v. Conrail, 481 U.S. 35, 39 (1987).

339. *Id.* at 38–40.

340. *See* Ragan v. Merch. Trans. & Warehouse Co., 337 U.S. 530, 532–33 (1949). If Rule 5 is a limitations provision, it measures when the period starts rather than stops. *Ragan*, *Walker*, and *York* all only deal with the end of the statute of limitations, rather than the beginning. *See* Walker v. Armco Steel Corp., 446 U.S. 740, 741 (1980); *Ragan*, 337 U.S. at 531; *Guaranty Trust*, 326 U.S. at 107 (1945). However, *Ragan* makes clear that state law applies to both. *Ragan*, 337 U.S. at 533 (citing *York*, 326 U.S. at 110; West v. Am. Tel. & Tel. Co., 311 U.S. 223, 238 (1940)) (noting a claim "accrues and comes to an end when local law so declares"). The courts of appeals have also consistently applied state law to determine when a cause of action accrues for statute of limitations purposes. *See, e.g.*, Dixon Ticonderoga Co. v. O'Connor, 248 F.3d 151, 160–61 (3d Cir. 2001); Larsen v. Mayo Med. Ctr., 218 F.3d 863, 866 (8th Cir. 2000); Matsumoto v. Republic Ins. Co., 792 F.2d 869, 871 (9th Cir. 1986).

tion period on law enforcement detention, such a provision may well lie beyond the scope of the REA.[341]

B. *Rule 48(a) and Nonpreclusive Dismissals*

Rule 48(a) inserts the trial judge into the resolution of the criminal case. The rule permits the government to dismiss an indictment "with leave of court," that is, the rule requires court approval before dismissal can occur.[342] While not phrased in these terms, Rule 48(a) is deeply influenced by questions of preclusion. For the government, the central preclusion doctrine arises out of the Double Jeopardy Clause.[343] The clause bars the government from trying a defendant twice for the same crime, but the mere fact of an indictment does not implicate the clause. Jeopardy only attaches once a jury is sworn.[344] Moreover, this timing is no "arbitrary exercise of linedrawing . . . . [T]he time when jeopardy attaches in a jury trial serves as the lynchpin for all double jeopardy jurisprudence."[345] As a result, the preclusion rules are straightforward. When an indictment is dismissed prior to the start of trial, the government can reindict the defendant for the same crime.

Before the adoption of the rules, the government had an absolute right to this type of nonpreclusive dismissal.[346] Under the version of Rule 48 initially recommended to the Supreme Court

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341. While Rule 5 regulates the speed with which arrested defendants must be presented to a magistrate, the Speedy Trial Act determines how quickly trials must occur. *See generally* Speedy Trial Act, 18 U.S.C. § 3161 (2006). Two circuits have indicated that the requirements of the Speedy Trial Act are "substantive" for REA purposes. *See In re* Grand Jury Proceedings, 616 F.3d 1186, 1197 (10th Cir. 2010) ("Substantive rights are the bundle of rights such as due process, the right to a speedy trial, or, under the facts of this case, the Government's right to obtain evidence to pursue a grand jury investigation and Appellee's right to exclude irrelevant evidence from that investigation."); United States v. Daychild, 357 F.3d 1082, 1092 n.13 (9th Cir. 2004) ("Because applying [Rule] 45 to the speedy trial calculation would alter the substantive meaning that Congress gave to the Speedy Trial Act, [Rule] 45 cannot properly be interpreted to supersede or contradict the Speedy Trial Act.").

342. FED R. CRIM. P. 48(a) (requiring defendant's approval if dismissal occurs during trial).

343. U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.").

344. Downum v. United States, 372 U.S. 734, 736–38 (1963).

345. Crist v. Bretz, 437 U.S. 28, 37–38 (1978) (citation omitted) (internal quotation marks omitted) (incorporating the Double Jeopardy Clause against the states).

346. *See* Confiscation Cases, 74 U.S. (7 Wall.) 454, 457 (1868); 3B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 812 (3d ed. 2004).

by the Advisory Committee, the government would have retained this discretion.[347] However, the Supreme Court, on its own initiative, amended the rule and consciously abandoned the common law practice and gave the district court the discretion to deny the motion to dismiss.[348] Rule 48, then, takes the ability to dismiss nonpreclusively out of the hands of the government and gives it to the trial judge.

The relationship between these rules and preclusion is important because preclusion, and its connection to dismissals, is an area where the Supreme Court has applied the REA with some bite. In *Semtek International Inc. v. Lockheed Martin*, the Court confronted the civil equivalent of Criminal Rule 48, Civil Rule 41.[349] In *Semtek*, a California federal court dismissed a diversity action on statute of limitations grounds, indicating that the dismissal was "on the merits."[350] Semtek then refiled the action in a Maryland state court in order to take advantage of the longer statute of limitations.[351] Lockheed successfully defended in state court on federal preemption grounds, arguing that Rule 41(b) controlled and required dismissal.[352]

This argument raised REA problems. If the rule extinguished the right to sue when state law would have permitted the plaintiff to proceed, the claim-preclusive effect of the rule would arguably violate the REA.[353] Justice Scalia, writing for a unanimous Court, avoided this problem with a creative interpretation of Rule 41. Even though Rule 41(b) described the dismissal as "on the merits," the Court interpreted that language to mean something different than its usual, claim-preclusive definition.[354] Rather, the references in Rule 41 to dismissals "on the merits" and their opposite, dismissals "without prejudice," are not efforts to define the

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347. 3B WRIGHT, *supra* note 346, § 812.

348. FED. R. CRIM. P. 48 advisory committee's note (1944) (citing *Confiscation Cases*, 74 U.S. (7 Wall.) at 457; United States v. Woody, 2 F.2d 262, 262 (D. Mont. 1924); CODE OF CRIMINAL PROCEDURE ch. 15, 895–97 (1948)) ("The first sentence of this rule will change existing law. The common-law rule that the public prosecutor may enter a *nolle prosequi* in his discretion, without any action by the court prevails in the federal courts. . . . This provision will permit the filing of a *nolle prosequi* only by leave of court. This is similar to the rule now prevailing in many States."); 3B WRIGHT, *supra* note 346, § 812.

349. 531 U.S. 497, 501 (2001).

350. *Id.* at 499.

351. *Id.*

352. *Id.* at 500–01.

353. *Id.* at 503.

354. *Id.* at 505.

preclusive consequences of actions of federal courts. Instead, they simply define local rules regarding when cases may be refiled.[355] A dismissal "on the merits" only bars the same action from being filed again in that same court, not any other jurisdiction.[356] The Court recognized that the initiating court's preclusive treatment of the decision is not binding on any other court; it is neither necessary nor sufficient for preclusion in a second jurisdiction.[357]

Semtek does not directly control the interpretation of Rule 48. There is a difference between these rules and the version of Rule 41 that *Semtek* suggested would be invalid. Rule 48 does not explicitly purport to determine the preclusive consequences of a preindictment dismissal. It does not deem a particular resolution "on the merits." Instead, the rule gives the district court the authority to choose between a preclusive and nonpreclusive resolution.[358] From this standpoint, the rule is arguably valid because it simply controls a procedural choice and puts the substantive effect of that choice out of the hands of the court.

This argument cuts too finely. Assuming Rule 48 simply barred the government from dismissing an indictment, jeopardy would effectively attach once the United States indicted a defendant. The rule would have "moved up" the relevant preclusive choice; indictments, rather than trials, would bind the government. It is difficult to see how those approaches would not "abridge" or "enlarge" a substantive right, assuming that the *Semtek* interpretation of Rule 41(b) is correct. *Semtek* itself even suggests this result, noting that the REA might constrain the district court to follow state court approaches in deciding how to designate a dismissal.[359]

C. *Reading Rules Narrowly*

Despite these potential REA challenges, both Rule 5 and Rule 48 can be read narrowly to avoid any conflict. The Supreme Court

355. *Id.* at 506.

356. *Id.*

357. *See id.*

358. FED. R. CRIM. P. 48(b).

359. *Semtek*, 531 U.S. at 506 n.2 ("We do not decide whether, in a diversity case, a federal court's 'dismissal upon the merits' (in the sense we have described), under circumstances where a state court would decree only a 'dismissal without prejudice,' abridges a 'substantive right' and thus exceeds the authorization of the Rules Enabling Act.").

has been careful to read the Civil Rules in a limited fashion in order to retain their validity. For instance, in *Gasperini v. Center for Humanities, Inc.*, the Supreme Court considered the appropriate standard for a motion for new trial on the grounds of excessive damages.[360] The Court concluded that the state standard applied instead of the federal approach, even though Rule 59 arguably served as the source of the federal doctrine.[361] The Court suggested that the Rules Enabling Act compelled this interpretation of Rule 59.[362] Similarly, as described above, in *Semtek*, the Court narrowly interpreted the meaning of "on the merits" to avoid allowing Rule 41 to establish a potentially invalid standard for preclusion.[363]

Rules 5(a) and 48(a) are both rules where one component of the rule is well-defined but another component is left open-ended. Rule 5(a) clearly imposes a burden on the government to present the defendant to magistrate without "unnecessary delay" but does not specify the remedy for failing to do so.[364] Rule 48(a) authorizes the court to deny the government the right to dismiss and thus force it to suffer the preclusive consequences of impanelling a jury, but it does not provide much in the way of a standard for the court to apply.[365]

For both rules, the proper course is to read the open-ended component of the rule to limit the substantive nature of the rule and to bring it in compliance with the REA. For Rule 5(a), such an approach would mean that the only remedy for delay in presentment is exclusionary. Any statements made by the defendant should be inadmissible. In fact, this is essentially the current state of the law under Rule 5, although courts have never grounded the interpretation in the requirements of the REA. Defendants held past the Rule 5(a) deadline are not entitled to have the indictment dismissed, and the only remedy is exclusion of any statements.[366] In contrast, presentment delay that extends fur-

360. 518 U.S. 415 (1996).
361. *See id.* at 436–37 & n.22.
362. *Id.* at 437 n.22.
363. *Semtek*, 531 U.S. at 503.
364. FED. R. CRIM. P. 5(a).
365. FED. R. CRIM. P. 48(a).
366. *See, e.g.*, United States v. Cardenas, 410 F.3d 287, 293 (5th Cir. 2005); United States v. Garcia-Echaverria, 374 F.3d 440, 452 (6th Cir. 2004).

ther, so that presentment occurs beyond the limits of the Constitution, can give rise to a damages claim.[367]

For Rule 48(a), the REA limits the reasons for which the district court could deny a motion to dismiss. Rule 48 should be seen as a sanctions provision allowing the court to deny the government the ability to dismiss nonpreclusively as a punishment for procedural abuses. If the government appears to be seeking dismissal as part of an effort to harass the defendant by abandoning the case without allowing jeopardy to attach, the court can deny the motion. The Civil Rules make a similar choice, permitting the district court to impose a substantive sanction for procedural misconduct. Rule 37(b)(2)(C) identifies the entry of a default judgment against a party as one of the sanctions available for discovery violations,[368] and Rule 41 treats a second or successive dismissal by a plaintiff as a dismissal "on the merits."[369]

The Supreme Court has already recognized this procedural goal as the primary purpose of Rule 48. In *Rinaldi v. United States*, the Court noted that: "The principal object of the 'leave of court' requirement is apparently to protect a defendant against prosecutorial harassment, *e.g.*, charging, dismissing, and recharging, when the Government moves to dismiss an indictment over the defendant's objection."[370]

Rinaldi, though, leaves open the question of whether the district court can ever deny a motion to dismiss by the government when the defendant consents to the motion.[371] If the goal of the rule is to protect the defendant from procedural abuses, there is little reason to deny such a motion.

Despite this logic, district courts have denied joint motions on grounds that are certainly substantive under the REA. For example, the district courts have denied motions to dismiss because the court disapproved of the government's decision to abandon a

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367. *See, e.g.*, Hayes v. Faulkner Cnty., 388 F.3d 669, 675–76 (8th Cir. 2004); Garcia Rodriguez v. Andreu Garcia, 403 F. Supp. 2d 174, 176–77 (D.P.R. 2005).

368. *See* FED. R. CRIM. P. 37.

369. Some have argued that this type of substantive consequence for procedural misconduct may still be too substantive to comply with the REA. *See, e.g.*, Redish & Murashko, *supra* note 12, at 56; *Rules Enabling Act of 1934*, *supra* note 12, at 1155. If this stronger position is correct, Rule 48(a) needs to be constrained even further.

370. 434 U.S. 22, 29 n.15 (1977) (per curiam).

371. *Id.*

case against one defendant in exchange for another defendant pleading guilty[372] and where the district court simply believed that the government was treating the defendant too leniently and that more punishment was warranted.[373] Even though the government has not always appealed these decisions, these denials of motions to dismiss have limited support in the appellate case law. As the Seventh Circuit has noted, there are "speculations in some judicial opinions that a district judge could properly deny a motion to dismiss a criminal charge even though the defendant had agreed to it;" they were "unaware, however, of any appellate decision that actually upholds [such] a denial of a motion to dismiss."[374] When the courts of appeals have reversed, they have generally focused on separation of powers concerns, especially when the district judge attempted to appoint private prosecutors to proceed when the government declined to do so.[375] Even setting aside the separation of powers issue, the REA requires the same result. The Criminal Rules cannot give the district court authority to increase the substantive punishment faced by the defendant.

Rinaldi also highlights a second important consequence of reading Rule 48 narrowly. The Court has largely ignored the difference between dismissing an indictment prior to the verdict and doing so after the jury has convicted the defendant or a guilty plea has been entered. The defendant in *Rinaldi* was convicted on federal robbery charges after he had previously been convicted on state charges arising out of the same facts.[376] The government sought dismissal on the grounds that the dual prosecutions violated Department of Justice *Petite* policy,[377] which bars successive

372. *See* United States v. Freedberg, 724 F. Supp. 851, 853–54 (D. Utah 1989) (refusing to dismiss indictment of individual defendant where corporate defendant agreed to plead guilty); United States v. N.V. Nederlandsche Combinatie Voor Chemische Industrie, 428 F. Supp. 114, 117 (S.D.N.Y. 1977) (same).

373. *See In re:* United States, 345 F.3d 450, 453–54 (7th Cir. 2003) (reversing the district court's denial of motion to dismiss); United States v. Cowan, 381 F. Supp. 214, 222 (N.D. Tex. 1974) ("[T]his court is unable to perceive how the best interest of justice could be served by dismissing serious charges with a potential penalty of 35 years imprisonment and a $70,000 fine in exchange for a guilty plea in an unrelated case carrying a maximum penalty of 2 years and a $10,000 fine."), *rev'd* 524 F.2d 504 (5th Cir. 1975); United States v. Bettinger Corp., 54 F.R.D. 40, 41 (D. Mass. 1971) (holding that post-indictment compliance with the law is an insufficient ground to grant the government's motion to dismiss).

374. In re: *United States*, 345 F.3d at 453.

375. *See id.*; *Cowan*, 524 F.2d at 513.

376. Rinaldi v. United States, 434 U.S. 22, 24 (1977) (per curiam).

377. *See* Petite v. United States, 361 U.S. 529, 530 (1960) (per curiam) ("[I]t is the general policy of the Federal Government that several offenses arising out of a single transac-

prosecutions arising out of the same facts.[378] Because the motion to dismiss the indictment was consistent with the *Petite* policy, the Court concluded that it was in the public interest.[379] As Justice Rehnquist noted in his dissent, *Rinaldi* was the latest in a series of cases where the Justice Department enlisted the assistance of the Court in vacating a conviction obtained in violation of the *Petite* policy.[380]

Whether or not the government and the defendant have the right to vacate a conviction obtained in violation of the government's *Petite* policy is hard to see as a purely procedural question. Joint motions to dismiss the indictment that come after sentencing are different in kind from motions that come before a jury verdict or guilty plea, or between the verdict or plea but prior to sentencing. The courts of appeals have generally treated these questions as equivalent, applying the same relaxed scrutiny to the motion and not drawing significant distinctions between cases based on when the joint request for a dismissal occurs.[381]

In contrast, on the civil side, the Supreme Court has made clear that the agreement of the parties to vacate a judgment is very different in kind from an agreement to dismiss prior to judgment. When parties agree that the plaintiff will voluntarily dismiss an action prior to judgment, the district court has no role to play. The plaintiff may dismiss an action without a court order as long as all parties consent.[382] After a judgment is entered, the district court has a decision to make. District courts have the equitable power to vacate judgments in response to a settlement agreement but are not obliged to do so.[383] In analyzing the related

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tion should be alleged and tried together and should not be made the basis of multiple prosecutions . . . .") (internal quotation marks omitted).

378. *Rinaldi*, 434 U.S. at 24–25. The *Petite* policy is a discretionary policy declining to purse federal cases when a state conviction has already succeeded even though such prosecutions face no double jeopardy bar. *See, e.g.*, Bartkus v. Illinois, 359 U.S. 121, 136–37 (1959).

379. *Rinaldi*, 434 U.S. at 31–32.

380. *Id.* at 32 (Rehnquist, J., dissenting) (citing Ackerson v. United States, 419 U.S. 1099 (1975); Hayles v. United States, 419 U.S. 892 (1974)).

381. *See, e.g.*, United States v. Gonzalez, 58 F.3d 459, 460 (9th Cir. 1995) (motion made between guilty plea and sentencing); United States v. Smith, 55 F.3d 157, 158 (4th Cir. 1995) (same); United States v. Weber, 721 F.2d 266, 267 (9th Cir. 1983) (post-sentencing motion).

382. FED. R. CIV. P. 41.

383. The standard to be applied by the district court is in dispute. In *U.S. BanCorp Mortgage Co. v. Bonner Mall*, the Supreme Court noted that only extraordinary circum-

question of whether appellate opinions should be vacated on settlement, the Supreme Court has emphasized the value of precedent to the public at large, almost certainly a substantive consideration.[384]

This argument does not suggest that the government and a defendant are unable to vacate a conviction for a violation of the *Petite* policy or for other reasons, but rather that the standard for doing so needs to come from somewhere other than a procedural rule designed to sanction government procedural abuses. As described above, the Supreme Court held in *Gasperini* that state law provided the relevant standard for Rule 59 remittitur motions for a new trial in diversity cases.[385] Similarly, Civil Rule 60(b) allows parties to file motions for relief from final judgments but the Advisory Committee notes to Rule 60 are careful to make clear that Rule 60(b) just provides the mechanism, not the standard, to be applied.[386] If the standard for new trials or vacatur is too substantive for REA purposes in civil cases, a similar result should hold in criminal cases.

V. CONCLUSION: RECONSIDERING *SHADY GROVE* AND THE CIVIL RULES

The restrictions of the REA on the Criminal Rules outlined in this article are not only significant in their own right, they also have important implications for the Civil Rules. As discussed above, the *Shady Grove* opinions left open two major questions about the REA: the importance of § 2072(b), and the relative role

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stances would justify vacating an opinion of the court of appeals when the case is moot by reason of settlement. 513 U.S. 18, 29 (1994). When the settlement occurs earlier in the process and the district court is considering a motion to vacate under Rule 60(b), the circuits are split on whether the same extraordinary circumstances test applies. *Compare* Vlareo Terrestrial Corp. v. Paige, 211 F.3d 112, 117–18, 121 (4th Cir. 2000) (holding that district courts may only vacate in extraordinary circumstances), *with* Am. Games Inc. v. Trade Prods., Inc., 142 F.3d 1164, 1167 (9th Cir. 1998) (holding that district courts may vacate simply upon a balancing of the equities).

384. *Bonner Mall*, 513 U.S. at 26–27 (quoting Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27, 40 (1993) (Stevens, J., dissenting)) ("'Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.'").

385. *See supra* notes 360–62 and accompanying text.

386. FED. R. CIV. P. 60(b) advisory committee's note (1946) ("It should be noted that Rule 60(b) does not assume to define the substantive law as to the grounds for vacating judgments, but merely prescribes the practice in proceedings to obtain relief.").

of federalism and separation of powers in interpreting the statute.[387] The Criminal Rules serve as an important testing ground for both sides of both questions. For instance, Justice Stevens (and Professor John Hart Ely) argue that the § 2072(b) "abridge, enlarge or modify" language imposes a restriction separate and apart from the limit in § 2072(a).[388] For those taking this position, the 1988 recodification bringing the Criminal Rules into § 2072(b) should be a matter of concern. When Congress folded the Criminal Rules into the framework of the Civil Rules Enabling Act, that change imposed whatever limit previously existed on the Civil Rules to the Criminal Rules. If § 2072(b) has independent weight, the restraints on the Criminal Rules changed in 1988. The silence in the legislative history, though, at least provides some reason to doubt that Congress intended this change. Moreover, the more significant one believes the § 2072(b) language to be, the more puzzling the lack of legislative history.[389] It would suggest that Congress inadvertently imposed a major restriction on the Criminal Rules.

On the other side, those persuaded by Justice Scalia's rejection of § 2072(b) for the Civil Rules need to grapple with the Criminal Rules. Justice Scalia concedes that the statutory text of § 2072(b) is clear, and his *Shady Grove* arguments in favor of disregarding it are much weaker on the criminal side.[390] The plurality puts forth two arguments in support of its disregard of § 2072(b): the danger of interstate disuniformity and the strength of statutory stare decisis.[391] Neither carries much weight in the criminal context. While Justice Stevens's approach might require divergent state-by-state application on the civil side, federal criminal law is inherently uniform nationwide. Furthermore, the arguments for *stare decisis* are weaker when the statute is newer. While "*Sibbach* has been settled law . . . for nearly seven decades,"[392] § 2072(b) has applied to the Criminal Rules for just over twenty

387. *See supra* Section I.B.

388. *See supra* notes 43–54, 90–95 and accompanying text.

389. *See supra* Section I.A.

390. *See supra* Section I.A

391. *See supra* Section I.A

392. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. ___, ___, 130 S. Ct. 1431, 1446 (2010).

years. Of course, Congress is often assumed to retain the preexisting meaning of statutory language,[393] so perhaps Congress intended to incorporate *Sibbach* on the criminal side as well. However, the legislative history criticizes *Sibbach* rather than endorses it.[394]

Second, if the REA is mostly about separation of powers, as seems to be the scholarly consensus, those concerns are even greater with the Criminal Rules. In criminal cases, the substantive rights being altered frequently will enhance or restrict the power of the executive branch. On the civil side, the separation of powers problem only involves the relative authority of the judiciary and the legislature to define the rights of private parties. Only two branches of government are involved. On the other hand, if the judiciary expands or contracts substantive rights in criminal cases, it not only steps on the authority of Congress to make those choices, but it does so to the benefit or the detriment of the executive branch.

Even for those scholars and judges identifying federalism as the central focus of the REA limitations, the limitations on the Criminal Rules are still important. In the criminal context the REA applies without the constitutional concerns of *Erie* or the statutory overlap of the RDA. The Criminal Rules provide a clean baseline uncluttered by these other issues. The REA limitations on the Criminal Rules can thus provide a starting point for determining the impact of the statute on the Civil Rules. Similarly looking the Criminal Rules can help answer an important question left open by the Court's federalism orientation: Does the REA apply differently in cases arising under federal law than it does in diversity cases? The Supreme Court has not yet directly confronted the scope of the REA in a non-diversity case.[395] However, the Court's interpretations of Rule 3 in *Walker v. Armco Steel Corp.* and *West v. Conrail* at least raise the possibility that the substantive law providing the cause of action matters in interpreting the rules.[396] The conflict between *West* and *Walker* has been widely

393. *See, e.g.*, Smith v. City of Jackson, 544 U.S. 228, 233 (2005) (plurality opinion).

394. *See* H.R. REP. NO. 99-422, at 20–21 (1985) (criticizing *Sibbach*).

395. *Cf.* Marek v. Chesny, 473 U.S. 1, 36 (1985) (Brennan, J., dissenting) (arguing that the Court's interpretation of Rule 68 ran afoul of the REA).

396. *Walker* held that state law determined when the limitations period was tolled. 446 U.S. 740, 752–53 (1980). In *West*, the Court found that Rule 3 provided the appropriate marker for statute of limitations purposes, explicitly distinguishing *Walker* on the grounds

criticized.[397] Considering the REA in the context of the Criminal Rules can help answer the question of whether we have one REA in diversity cases and another elsewhere.

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that it was a diversity case. 481 U.S. 39, 39 n.4 (citation omitted) (quoting *Walker* 446 U.S. 752–53) ("Respect for the State's substantive decision that actual service is a component of the policies underlying the statute of limitations requires that the service rule in a diversity suit 'be considered part and parcel of the statute of limitations.' This requirement, naturally, does not apply to federal-question cases.").

397. *See, e.g.*, Burbank, *supra* note 288, at 702 n.69 ("[N]either in *Walker* nor in *West* did the Court explain how a Federal Rule can have two 'plain meanings.'").

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