Constitutional Regulation, Exception and Anomie: How states of exception inspire functional and moral anomie within the American constitutional system

By Colin Christensen – Emory & Henry College

[Cchristensen10@ehc.edu](mailto:Cchristensen10@ehc.edu)

(540)-729-2752

The recent ruling in *Floyd v. City of New York* striking down provisions of New York City’s stop-and-frisk policy raises serious questions about the legitimacy of American policing practices. Much of the language used in this decision also implicates our prevailing socio-political norms with respect to legalizing extraordinary police actions before meaningful deliberation. I argue that NYC’s stop-and-frisk procedure may be best understood in terms of Giorgio Agamben’s theory of  “the state of exception,” and suggests that many common practices of American policing actually exist *outside* of the American juridical order. Pragmatically, NYC’s stop-and-frisk policy intersects New York’s urban social facts and crime statistics as a method of precautionary crime-prevention; but the stop-and-frisk procedure has far reaching theoretical implications for American constitutionalism. Here, I explore recent national crises and mundane public interactions, namely the Boston Bombing and sobriety checkpoints, respectively, to illustrate how modern constitutional developments embrace extra-juridical techniques of governance, not unlike stop-and-frisk, in the name of public safety. I critically engage the works of Agamben, John Locke, and Emile Durkheim to explain (a) how practices like stop-and-frisk undermine the theoretical foundation of civil society, namely the rule of law, and thus how (b) these practices deregulate the political and social expectations contained within the constitutional order, therefore engendering an anomic conception of justice.

**I. Introduction**

Within the American constitutional system, it is axiomatic that a “constitutional right implies the ability to have and effectuate that right.”[[1]](#endnote-1) However, it is also an accepted principle of constitutional interpretation that the ability to enjoy and effectuate any right guaranteed by the Constitution is neither absolute nor immune from limitation. In other words, if civil rights codified within constitutional doctrine are not absolute then the logical contrapositive suggests that these rights are open to certain exceptions. What remains true of both constitutional protections and their exceptions is their supreme character as foundational legal and theoretical principles to which all other laws and regulatory schemes are subservient. While the U.S. Constitution stands as the doctrinal manifestation of constituent organization and power, it also functions to inform the collective American psyche of the most basic functional and moral expectations held tantamount within our system of governance. In so doing, our Constitution can be understood as a codification of the underlying social facts and norms held generally in common within American society. The Constitution understood as such becomes not only a positivist contract created by constituent power, but so too, implicitly establishes certain patterns of political behavior and social interaction that are capable of exerting coercive power over both the government and the individual citizen alike.

The purpose of this paper is to elucidate the ways in which constitutional provisions function as both social facts and social norms, thus rendering the American scheme of ordered liberties susceptible to anomie when exceptions to constitutional provisions are applied in such a way that defies and potentially undermines the foundations of American law. This anomic susceptibility refers, generally, to the propensity for constitutional exceptions to obfuscate the broad patterns of mutual expectations within political and social interactions.[[2]](#endnote-2) While the process of applying exceptions to constitutional provisions leads some scholars to assert that arguments about exceptions are essentially arguments about the meaning of the rule itself,[[3]](#endnote-3) others contend that this same process has become an extra-juridical technique of governance, essentially functioning as the legal manifestation of what, according to constitutional doctrine, cannot have legal form.[[4]](#endnote-4)

At a fundamental level, arguments about exceptions often hinge on a divergence between pragmatism and principle. On the one hand, constitutional exceptions are purported to be rooted in the practical implications of unrestricted rights, often presupposing that exceptions prevent otherwise negative consequences associated with effectuating civil rights under a determined pattern of facts. On the other hand, constitutional exceptions erode the basic principles for which our scheme of order liberties exists. To be sure, constitutional exceptions are marked throughout our individual civil rights and liberties. Accordingly, the standard of review for determining the constitutional permissibility of measures exceptional to one of these rights varies according to the purported constitutional purpose of each right. Certainly, the intended purpose of the protections afforded to us by the First Amendment are different than those afforded to us by the Fourth or Fifth Amendments, and so on. Yet despite these differences, the scheme of ordered liberties afforded to us by the Constitution as an aggregate whole functions in a symbiotic way to provide a more expansive legal shelter under which we may find protection from intrusion by both private citizens and government action alike.

Here, I consider the ways in which many contemporary American policing practices may be best understood in terms of Giorgio Agamben’s theory of  “the state of exception,” and suggest that many common practices of American policing actually exist *outside* of the American juridical order. The aim of this paper is to examine the anomic implications of contemporary American policing practices through the lens of Giorgio Agamben’s theory of  “the state of exception.” Viewed through his aperture, many common practices of American policing actually exist *outside* of the American juridical order. Although often embraced in the name of public safety, these extra-juridical techniques of governance undermine the constituent power that the Constitution is designed to defend. By undermining this power, constitutional exceptions create a zone of anomie within the broader American conception of justice. I seek to demonstrate that exceptions to widely promulgated and historically understood constitutional principles engender an anomic conception of justice by obscuring the mutual expectations for political and social actions that are broadly defined by and operative under the Constitution.

In doing so, this paper proceeds in five parts. Part II examines John Locke’s *Second Treatise* in order to illustrate an understanding of justice broadly defined by the expectations of constituent powers. While this section does not suggest that there is a univocally shared conception of what is just, it argues a more general claim that a fundamental tenant of justice within the social contractarian theory that informs the U.S. Constitution relies on the predictability of the Rule of Law.

Part III engages Giorgio Agamben’s theory of the “state of exception” in order to demonstrate the constitutional and theoretical implications of exceptions to established constitutional provisions. Using Agamben’s theoretical framework, Part III considers the ways in which contemporary policing practices, namely, sobriety checkpoints, stop and frisk, and the public safety exception, may be best understood in Agamben’s terms. The part distinguishes between exceptions that are extra-juridical and those that manifest incidentally as the process of judicial review clarifies linguistic deficiencies within constitutional language and modifies constitutional doctrine as our collective understanding of rules develops. With particular scrutiny to the constitutional justifications for these practices, Part IV considers the ways in which extra-juridical exceptions are particularly problematic for the Rule of Law within the American scheme of ordered liberty. Focusing on a limited set of constitutional issues is intended only to be illustrative, not exhaustive.

Part V situates the problems presented in Part IV within the social theory of Emile Durkheim in order to demonstrate the interconnectedness between extra-juridical exceptions and anomie. In so doing, Part V illuminates the social implications of the constitutional phenomenon associated with extra-juridical techniques of governance. Traditionally defined, laws have been categorically partitioned within the theoretical framework of social mores. However, constitutional doctrine differs from ordinary statutory laws insofar as the supremacy of constitutional provisions establishes are larger scheme of regulation, both politically *and* socially. With this difference in mind, constitutional provisions are shown to function as both social facts as well as strictly enforced social norms. Understanding constitutional provisions as such suggests that extra-juridical exceptions disrupt the functionally and morally regulative functions of constitutional systems, thus fomenting anomie. Accordingly, Part V considers critically the role of constitutional doctrine as a larger scheme of regulation in the context of the elements of the Rule of Law discussed in Part II. In so integrating these theoretical structures, Part V argues that extra-juridical exceptions abrogate the predictive and action guiding purpose of the rule of law, therefore distorting the historically understood expectations for political and social interactions and producing an anomic conception of justice. Part VI concludes.

**II. Locke’s *Second Treatise* and the Rule of Law**

In order to understand the implications of suspending the juridical order through the use of exceptions to well-established and commonly recognized constitutional principles, we must first consider the purpose for which the constitutional system exists. Perhaps more fundamentally, we must also consider the qualities that differentiate the constitutional system from the lawless state of human affairs for which it is constructed to cabin.

John Locke offers us a way in which to address these considerations that is most congruent with the American scheme of ordered liberty.[[5]](#endnote-5) Under Locke’s rationale, the state of human affairs that precedes the establishment of civil society is one of “perfect freedom” and “equality.”[[6]](#endnote-6) Unlike Hobbes’ rather amorphous, and substantially more disorderly and uncivilized natural state, Locke conceives the state of nature as “men living together according to reason, without a common superior on earth with authority to judge between them…”[[7]](#endnote-7) As such, Locke’s state of nature can be described generally as a form of human interaction in which men are guided by the law of nature, yet lack the guidance of a common authority to resolve disputes that inevitably arise.[[8]](#endnote-8)

More specifically, for Locke the state of nature is not an adequate condition of human affairs for three reasons. First, this state of affairs lacks “an established, settled, known law, received and allowed by common consent to be the standard of right and wrong and the common measure to decide all controversies between them…”[[9]](#endnote-9) Second, this state of affairs lacks “a known and indifferent judge, with authority to determine all differences according to the established law…”[[10]](#endnote-10) Finally, this state of affairs lacks a “power to back and support the sentence when right, and to give it due execution…”[[11]](#endnote-11) Together, the lack of an established and known law, a common judge to settle disputes, and an executive power are the qualities which Locke seeks to fulfill within his conception of human affairs organized within a civil society.

To be sure, Locke maintains that the catalyst that causes men to enter into civil society is the preservation of individual property: “the great and chief end… of men’s uniting into commonwealths and putting themselves under government is the preservation of their property.”[[12]](#endnote-12) However, unlike the theory of property used by Rousseau in his *Discourse on the Origins of Inequality*,[[13]](#endnote-13) Locke understands property in a comprehensive sense.[[14]](#endnote-14) This comprehensive understanding is observed within Locke’s famous trifecta of “life, liberty, and estate,”[[15]](#endnote-15) the pursuit of any of which being both unsafe and uncertain within the state of nature. Thus, for Locke the remedy for the insecurity of life, liberty, and estate is effectuated by transitioning into civil society and collectively creating laws, the protection of which all civil members enjoy, and the exercise of which all members control.[[16]](#endnote-16)

For Locke, the most salient natural right to which all men are entitled is freedom. Broadly realized, the contrast between the state of nature and civil society is seen insofar as without established laws and a common judge there is no freedom.[[17]](#endnote-17) To this point, the purpose of filling the voids present in the state of nature is to guide and protect the interests of the members of the civil society: “law in its true notion is not so much the limitation, as the direction, of a free and intelligent agent to his proper interest.”[[18]](#endnote-18) Such laws, however, are only legitimately established on the basis of the consent of the governed.[[19]](#endnote-19) The social contract thus becomes the constituent power of the governed, providing restraint for wrongdoings while simultaneously preserving man’s freedom more securely than the state of nature.[[20]](#endnote-20) Locke suggests that constituent power of the governed vests three functions within the government. These are legislative, judicial, and executive. Recalling the three primary deficiencies within the state of nature that render man’s freedom unsafe, Locke requires that government exercise each of these powers in such a way that affords all members of the civil society the knowledge of how, where, and to what extent each of these powers reside.[[21]](#endnote-21) More specifically, the government must publicize and clearly communicate to all citizens the laws and their respective penalties, as well as the agents responsible for enforcing the same.[[22]](#endnote-22) For Locke, the aim of this is to ameliorate the uncertainty of the course of human interaction within the state of nature. If members of the civil society lack the public access to and understanding of law and punishment “their peace, quiet, and property will still be at the same uncertainty as it was in the state of nature.”[[23]](#endnote-23) Because Locke maintains, “no rational creature can be supposed to change his condition within an intention to be worse,”[[24]](#endnote-24) together government of constituent powers and public understanding of and access to the law and agents thereof are considered the chief benefits of civil society.

To be certain, Locke’s prescription of the characteristics of civil society necessary to compensate for and improve upon the defects present in the state nature fall neatly within the conceptual framework of the Rule of Law. Not unlike Locke’s conception of civil society, the rule of law is a “regulative ideal, not a mirror of what is done.”[[25]](#endnote-25) As a human ideal, the rule of law functions as a type of equilibrium over which civil society inevitably disagrees. In Lockean terms, this equilibrium point requires publicly promulgated rules that incorporate the law of nature.[[26]](#endnote-26) But more generally, the rule of law should fulfill at least three purposes.[[27]](#endnote-27) First, the rule of law should defend against the danger and uncertainty of the state of nature.[[28]](#endnote-28) Second, the rule of law must serve a predictive function, allowing members of civil society to reasonably and confidently predict in advance the legal ramifications of their actions.[[29]](#endnote-29) Finally, the rule of law should defend against certain types of arbitrary government action.[[30]](#endnote-30) These purposes implicate the rule of law in such a way that requires of the rule of law: the capacity to be action guiding for members of civil society; the ability to actually guide civil actions; reasonable stability; equal applicability to government agents and common citizens alike; and fair and equal enforcement of law.[[31]](#endnote-31)

Due deference for the rule of law is fundamental to the American scheme of political accountability, and in many ways, at least in the extent to which American political philosophy is generally Lockean,[[32]](#endnote-32) perhaps fundamental to the American political and social identity.[[33]](#endnote-33) Indeed, the Supreme Court has structured much of our constitutional understanding around “our historic commitment to the rule of law.”[[34]](#endnote-34) The central role of the rule of law within our constitutional tradition has further been held to be “the great mucilage that holds society together.”[[35]](#endnote-35) However idealistic the rule of law may be, it is a regulative ideal to which the American juridical order is historically committed.[[36]](#endnote-36)

Unraveling Locke’s *Second Treatise* in the context of the rule of law, the gulf that separates the state of nature from organized political society becomes clearer. For Locke, the state of nature lacks an established and publicly articulated law, a common judge to adjudicate disputes amongst men, and an executive power for legal enforcement. As such, the goal of civil society is to reduce the uncertainty of the state of nature by providing for each of these. To this point, Locke’s general reasons for which men enter political society manifest within the rule of law,[[37]](#endnote-37) and thus insofar as it is effectuated by the consent of the governed, the rule of law should be understood as the chief underlying principle of our constitutional system. Without adhering to this principle, we are reduced back to the lawless state of nature. Without laws designed by the people for the purposes of defending the same, there is no secure freedom and therefore no guiding conception of justice. The rule of law is not justice *itself*, but rather the gate that leads to it. Broadly understood, then, the rule of law is thus the bedrock of the social contractarian conception of justice upon which American constitutional democracy is founded.

**III. Agamben’s “State of Exception”**

Within the framework of the rule of law, no rights are absolute. On balance, systems that are most firmly rooted within and base their legitimacy upon the rule of law must under extreme circumstances resort to extra-juridical maneuvers to preserve the juridical order itself.[[38]](#endnote-38) Even Locke acknowledges this fact in his discussion of the necessity of executive prerogative during times in which the constitutional order is threatened from without.[[39]](#endnote-39) This notion is captured within the Latin maxim *necessitas legem non habet* – “necessity has no law.” Necessity, as such, allows violations of the law to be justified by absolute necessity.[[40]](#endnote-40) However, in Lockean terms, such extra-legal violations of the established legal order are to be only temporal – that is, only in force until the political order is restored.

The problematic dimension of this accepted fact of human action arises when extra-legal measures are not dissolved upon the restoration of political order. As extra-legal measures lose their temporality they begin to obtain to the status, duration, and terminology of law.[[41]](#endnote-41) Giorgio Agamben offers a way of understanding this problem in the context of the “State of Exception.”[[42]](#endnote-42) According to Agamben, these extenuated extra-legal measures are necessarily exceptions to established juridical protections that undermine the very purpose for which such protections exist. In the context of the American constitutional system, such exceptions effectively suspend the constitutional provisions designed to protect individual civil liberties.[[43]](#endnote-43) In so doing, the modern state of exception embodies the rationale of *necessita legem non habet* by establishing extra-juridical practices in the name of “public safety.”[[44]](#endnote-44) The result of such exceptions “appears as the legal form of what cannot have legal form.”[[45]](#endnote-45) In other words, the Constitution exists as a series of political guarantees, the abrogation of which cannot legitimately occur without adhering to a constituently prescribed formal procedure. In a strict legal sense, the supreme character of the protections buttressed within the Constitution render undue exclusions to such protections illegitimate *prima facie*.

As problematic as constitutional illegitimacy may be, perhaps more concerning is the transmogrification of *neccessitas legem non habet* as an action reserved for extreme circumstances to a commonplace method of governance. One of the essential features of the state of exception, for Agamben, is the provisional dissolution of the distinctions between the legislative, executive, and judicial powers of government.[[46]](#endnote-46) According to Agamben, the idea of necessity has evolved in contemporary political interaction to be “a theory of exception by virtue of which a particular case is released from the obligation to observe the law.”[[47]](#endnote-47) In so evolving, *neccessitas legem non habet* has become a constant state, allowing the emergency, whether real or manufactured, to become the rule and the distinction between non-emergency and emergency impossible to discern.[[48]](#endnote-48) As emergency exceptions and the necessity from which they arise become increasingly impossible to define as either spatial or temporal, the exception transforms into the rule and the emergency provision transforms into a “paradigm of government.”[[49]](#endnote-49) Understood in these terms, the state of exception exists neither inside nor outside of the juridical order.[[50]](#endnote-50) Rather, the state of exception, insofar as it allows the exception to become the rule, attempts to intertwine the exception within the juridical order itself by carving out a “zone of in distinction” in which fact gains the force of law and juridical provisions deteriorate into mere patterns of fact.[[51]](#endnote-51)

In what has become a normative political phenomenon, the state of exception is anchored to the constitutional order through undermining constituent power vis-à-vis constituted power.[[52]](#endnote-52) A peculiar dichotomy ensues. On the one hand, within the state of exception the law is in force but is not applied; on the other, it is applied but not in force.[[53]](#endnote-53) In other words, the state of exception carves out patterns of fact in which specific constitutional provisions do not apply, despite the very provision to which it is an exception standing as good law. Likewise, the state of exception gives force and effect to laws that, in a strict constitutional sense, cannot have either force or effect. Consequently, as the state of exception has become entrenched within the prevailing norm of emergency powers, constitutional provisions that are designed to engender deliberation are circumvented for the sake of expediency,[[54]](#endnote-54) therefore absolving the government of its obligation to observe the law.

Within the context of the Lockean distinctions between the state of nature and organized civil society, the state of exception jeopardizes the framework considered here as the rule of law. The essential elements of the rule of law aim to reduce the uncertainty of the state of nature by establishing and widely promulgating laws that guide citizens’ actions and allow them to predict the legal consequences of the same. The aim of the state of exception stands in diametric opposition to these elements of the rule of law. By suspending provisions contained within the constitutional order, the state of exception abrogates the law’s predictive and action guiding functions. Actions that are constitutionally protected under normative conditions, such as walking down the street free from arbitrary police interference, no longer enjoy a constitutional shelter under the state of exception. Yet as the exception transforms into the rule, so too, the exception becomes the norm.[[55]](#endnote-55) Thus while the Constitution defines the expectations for normative political interaction, the state of exception takes on the character of the norm in the shadow of such constitutional definitions. The result is a dissonance between constitutional expectations and what over time become normative practices under the state of exception. Consequently, this legal dissonance destabilizes the constitutional order by undermining the rule of law and obfuscating the action guiding and predictive functions of the promulgated legal establishment.

**IV. The State of Exception in Practice**

With Agamben’s theoretical framework of the “state of exception” in mind, many contemporary American policing practices that have become essentially commonplace can be understood to actually compromise the integrity of the rule of law within the American juridical order. Here, I illustrate how Agamben’s theoretical framework manifests operationally within regular police activities throughout the United States. These police activities range from mundane practices such as field sobriety checkpoints and stop and frisk, to national headline stories such as the use of the public safety exception in the wake of the 2013 Boston Bombing. While many of these practices enjoy Supreme Court rulings that provide for their constitutional justification, in a broader theoretical sense, together these rulings and the practices that they justify compromise the rule of law and thus delegitimize the American constitutional order.

A. Sobriety Checkpoints

Consider, for example, the ordinary sobriety checkpoint. The Fourth Amendment provides the individual right to travel securely along public roadways free from unwarranted search and seizure. Though a driver may be pulled over if a law enforcement officer observes or has probable cause to suspect a traffic violation, it is emphatically the officer’s duty to demonstrate that such a violation has occurred in order to enforce a legal traffic stop. However, sobriety checkpoints do not uphold this legal obligation. Rather, sobriety checkpoints require that drivers temporarily stop so that law enforcement officers may determine if they are driving under the influence of alcohol or other substances.

To this ubiquitous police practice, the Court has held:

“…the balance of the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program.”[[56]](#endnote-56)

The language used in the Courts’ reasoning suggests that the “degree of intrusion” is justified under the Fourth Amendment because it is not overly egregious. In so reasoning, the Court doesn’t explicitly justify *why* the Fourth Amendment doesn’t offer the individual a protection from sobriety checkpoints stops, but rather, it assumes that such checkpoints are a reasonable departure from the rule insofar as they advance the “State’s interest.” Based on this reasoning, the temporary stop required by sobriety checkpoints effectively suspends the normative protections of the Fourth Amendment under the auspice of public safety. Understood properly, this suspension necessarily carves out an exception to the Fourth Amendment’s protection against unwarranted search and seizure.[[57]](#endnote-57)

The exception that the Court creates within Fourth Amendment jurisprudence for sobriety checkpoints is particularly problematic. The line of reasoning provided by the Court suspends the traditional understanding of the doctrine of probable cause in order to advance the paradigm of public safety. While it is a fundamental principle of our scheme of ordered liberties that the state has the burden of proving an individual has violated the law, sobriety checkpoints reverse this burden. In other words, under normative circumstances, a law enforcement officer must demonstrate that an individual has violated the law in order to seize them via traffic stop.[[58]](#endnote-58) However, sobriety checkpoints allow for the state to stop and question motorists without any probable cause or reasonable suspicion that they have violated any law – thus abridging one’s right to travel freely along public roadways. As Justice Stevens rightly observed in his dissent, the state’s obligation to demonstrate that an individual is driving impaired now becomes the motorist’s “burden of demonstrating to the officer that her driving ability was not impaired.”[[59]](#endnote-59)

By dissolving the state’s obligation and reversing this burden, sobriety checkpoints fundamentally undermine the prescribed protection of the Fourth Amendment in at least two ways. First, the Fourth Amendments provides a protection from unwarranted search and seizure. To be sure, a seizure occurs “when there is a governmental termination of freedom of movement through means intentionally applied.”[[60]](#endnote-60) Recalling that one of the primary functions of the rule of law is to prevent arbitrary government action,[[61]](#endnote-61) it follows from logical necessity that for such seizures to fulfill this function they must be reasoned, informed, and *warranted*. By virtue of this function the state must meet a burden of proof that demonstrates the cause for which government intrusion upon and termination of free movement is warranted. As Justice Stevens makes clear, sobriety checkpoints remove the state’s obligation to demonstrate this cause, thus forcing individual motorists to demonstrate that their ability to travel freely along public roads is warranted, turning the rule of law on its head.

Second, sobriety checkpoints undermine the predictive function of the Fourth Amendment. Under normative constitutional conditions, the Fourth Amendment’s protection allows citizens to travel freely, with confidence that they will only be stopped – in this case pulled over for a traffic stop – if they commit a moving violation while operating a vehicle. Thus, in addition to reversing the burden of proof, sobriety checkpoints also restrict the ability to reasonably predict the course of one’s travels. In other words, under normative circumstances, an individual citizen should have the ability to predict that they will not be stopped via traffic stop so long as they do not commit a traffic violation. Regardless of whether a citizen is actually committing a vehicular violation, sobriety checkpoints authorize police agents to stop and seize motorists, therefore obscuring the circumstances under which one’s freedom of movement may be predictably subject to governmental intrusion. Accordingly, it is clear that sobriety checkpoints suspend the normative protections of the Fourth Amendment and function as an extra-juridical technique of governance. As a legal measure, they exist outside of the juridical order as the legal form of what, according to the strict language of the Fourth Amendment, should not, and more importantly, constitutionally cannot, have legal form.

B. Stop and Frisk

In August of 2013, a judge for the Federal District Court of the Second District of New York struck down as unconstitutional New York City’s policing practice known as stop and frisk. This police practice allows New York City officers to stop, interrogate, and frisk individuals on New York City streets if there is reasonable suspicion that an individual poses a threat to the safety of the community. The ruling in *Floyd v. City of New York* held this practice to be unconstitutional as a violation of the Fourth Amendment and the Equal Protection Clause of the Fourteenth Amendment.

In many regards, stop and frisk functions to suspend Fourth Amendment protections similarly to that of sobriety checkpoints. Though logically the two may be akin to one another, the extent to which stop and frisk jeopardizes the predictive capacity of the rule of law is particularly acute. For better or for worse, it is a well-established precedent within Fourth Amendment jurisprudence that where there is reasonable suspicion of criminal activity, “it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.”[[62]](#endnote-62) Even if an officer lack’s probable cause, the Fourth Amendment is understood to allow brief stops if articulable facts suggest criminal activity “may be afoot.”[[63]](#endnote-63) But there is a significant distinction between what warrants a stop escalating to a frisk. In order for a frisk to occur, an officer must believe that there is a fear of the stop escalating into violence: “‘[T]o proceed from a stop to a frisk, the police officer must reasonably suspect that the person stopped is armed and dangerous.’”[[64]](#endnote-64) As such, “The purpose of [a frisk for weapons] is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence.”[[65]](#endnote-65)

In a strict legal sense, each of these precedents offers preemptive exigencies that allow an officer to conduct a search or seizure without a crime actually taking place beforehand. The conclusion in *Floyd* followed largely from the Federal District Court’s empirical understanding of stop and frisk in New York City. Among many statistics cited, the court noted that “52% of all stops were followed by a protective frisk for weapons. A weapon was found after 1.5% of these frisks. In other words, in 98.5% of the 2.3 million frisks, no weapon was found.”[[66]](#endnote-66) Therefore, New York City police either overzealously or grossly misinterpret the articulable queues which suggest an individual is engaging in armed criminal activity or they go well beyond the extent of the prescribed procedures for individual stops by way of abusing their position of authority. If nothing else, New York City’s stop and frisk policy is not exactly efficacious.

The broader constitutionally problematic phenomenon that occurs in stop and frisk as well as the precedents providing the underlying foundation for its implementation is the substitution of law with fact. One of the chief characteristics of the state of exception manifests when “fact and law become undecidable.”[[67]](#endnote-67) Under the rule of law, facts are secondary to law. Laws are intended to be constants. In normal situations, the law is applied to the facts in order to determine if an individual’s actions are in violation of the law. Stop and frisk confuses this relationship between law and fact. In so confusing, facts take on the force of law. Under the normative legal establishment, law gains its force only when a violation has occurred. Indeed, it would be patently absurd to think that laws may be held against and sanctioned upon individuals if they have not actually committed any legal violation. To be sure, laws are in effect at all times. The important distinction is that though they may be in effect, they cannot be enforced until deviance has occurred. Certainly, the normative constitutional expectations under the Fourth Amendment barring unwarranted search and seizure are not overcome by an individual’s mere appearance, which is essentially the only meaningful factor in stop and frisk. Outward appearances, whether physical or of dress, do not constitute a violation of law unless such appearance is deemed to be publicly indecent.[[68]](#endnote-68) Surely, the aim of stop and frisk isn’t to control public indecency.

The language and reasoning of the *Floyd* decision also implicate the Fourteenth Amendment’s Equal Protection Clause. The Equal Protection Clause articulates a fundamental characteristic of the rule of law which requires that the law be applied equally to all members of civil society. The ruling in *Floyd* noted:

“Throughout this litigation the City has acknowledged and defended the NYPD’s policy of conducting stops based in part on criminal suspect data, of which race is a primary factor. The NYPD implements this policy by emphasizing to officers the importance of stopping ‘the right people.’ In practice, officers are directed, sometimes expressly, to target certain racially defined groups for stops.”[[69]](#endnote-69)

By targeting racially defined groups, the NYPD’s stop and frisk policy carves out a specific class of citizens that are not afforded the same Fourth Amendment protections. What’s more, in allowing the facts of physical characteristics to take the force of law, the indirect racial profiling that ensues relies upon facts that are entirely outside the control of the individual. Certainly one does not choose their race. So, too, the law does not distinguish between races for its application. Thus, stop and frisk is problematic for at least two reasons. First, the practice is preemptive and allows fact to take the force of law, therefore reversing the relationship between law and fact within the legal establishment. Second, race functions as its primary underlying rationale, therefore allowing stop and frisk to be disproportionately applied between races. Theoretically and practically, stop and frisk suspends the normative constitutional expectations of the Fourth and Fourteenth Amendments and therefore compromises the foundation of the rule of law.

C. The Public Safety Exception

The doctrine of the public safety exception within Fifth Amendment jurisprudence stands as another illustration of Agamben’s state of exception. The public safety exception and questions regarding its constitutional legitimacy garnered widespread national attention in the days following the apprehension of Dozhohkar Tsarnaev, the primary suspect in the April 15, 2013, Boston Marathon Bombing. After regaining consciousness after nearly 48 hours in a hospital critical care unit, the FBI interrogated Tsarnaev for 16 hours over a period of two days without Mirandizing him.[[70]](#endnote-70) In the pending criminal litigation implicating Tsarnaev, the Department of Justice publicly indicated that it intends invoke the public safety exception in order to allow Tsarnaev’s un-Mirandized statements to be admitted as evidence during his trial.[[71]](#endnote-71)

The Fifth Amendment provides, among others, protection against self-incrimination.[[72]](#endnote-72) Perhaps one of the most salient evolutions of Fifth Amendment jurisprudence is the doctrine of Miranda Rights, which establishes that a law enforcement officer must alert an arrestee of their constitutional right to “remain silent” in order to prevent self-incrimination, and bars un-Mirandized statements to be admitted as evidence against a defendant.[[73]](#endnote-73) However, according to the Court’s ruling in *New York v. Quarles*, this understanding of the protections provided by the Fifth Amendment is abandoned when an arresting officer perceives that there is a threat to public safety:

“The need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination…. The public safety exception will not be difficult for police officers to apply because in each case it will be circumscribed by the exigency which justifies it. Police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect.”[[74]](#endnote-74)

The exception created here within Fifth Amendment jurisprudence is illustrative of a particularly problematic trend within the state of exception: the subjective discretion of law enforcement officers to refuse arrestees of their constitutional rights. Perhaps the most cursory reading of this excerpt from the *Quarles* majority opinion illuminates this subjectivity. That is, “in each case it will be circumscribed by the exigency which justifies it.” In so holding, the public safety exception provides no objective standard with which to determine whether its use is appropriate. As Justice O’Connor argues in her dissent, the public safety exception has the propensity to create "a finespun new doctrine on public safety exigencies incident to custodial interrogation, complete with the hair-splitting distinctions.”[[75]](#endnote-75)

To a degree perhaps more acute than sobriety checkpoints, the public safety exception abrogates one’s ability to predict the application of law. In the tradition of the rule of law, the American legal establishment posits laws intended to guide citizens’ actions and stipulates the potential outcome for failing to adhere to these expectations. In this regard, the law has a certain degree of calculability. Should one individual choose to murder another without any mitigating provocation, the law makes clear the possible penalties for such actions. Likewise, if one chooses to disobey the promulgated speed limit on public motorways, the law makes clear the fines and additional penalties. The ability for each citizen to be aware of the consequences of their actions is a fundamental element of the rule of law, and thus of the American scheme of ordered liberty. As such, predictability functions systemically to prevent the arbitrary abuse of state authority.

Yet, it is clear from the language in *Quarles* that the public safety exception strips away the expectation that one may be readily made aware of their constitutional rights while being placed under arrest. *Quarles* effectively establishes that the right may be excluded under certain circumstances without making explicitly clear what these constitutes such circumstances. As such, the constitutional guarantee established by *Miranda* is now subject to the individual discretion of the arresting officer. Under this exception there is no way for one to be sure that they will enjoy the Fifth Amendment’s *Miranda* rights if they are placed under arrest. Consequently, the public safety exception erodes one of the most fundamental principles of the American justice system and the very purpose of the Fifth Amendment within our scheme of ordered liberty.

D. Incidental Adaptations

The meaning of most constitutional provisions adapts over time. At first glance, many of the provisions found within the Constitution employ relatively inelastic language. In a strict sense, the inelasticity of much of this language ostensibly suggests that these are infallible principles upheld by and buttressed within the highest law of the land. However, even the strictest language posited as law is subject to linguistic interpretation and evolution. At a basic level, this is how the American system of judicial review works. As such, constitutional protections posited within the Constitution are substantially more nuanced than much of language might suggest at first sight.

Marked throughout our jurisprudential history are moments when the Court excludes and includes actions that are afforded constitutional protection.

However, constitutional evolution, insofar as it changes our understanding of constitutional protections, must be distinguished from the states of exception discussed above. Professor Frederic Schauer offers a way in which to better understand this concept in terms of logical antecedents. Schauer suggests, “Many terms existing antecedent to their legal manifestations fail to draw the distinctions or create the exceptions that track the goal of some regulatory scheme.”[[76]](#endnote-76) According to this line of reasoning, exceptions are often applied to any given rule out of linguistic circumstance.[[77]](#endnote-77) In other words, many, if not all, constitutional protections are written prior to any legal scheme within which they are operationalized. Furthermore, they are written to communicate central principles and do not necessarily provide detailed stipulations for the ways in which to effectuate them in legal practice. As a result, some exceptions arise as a means to provide further clarification as to how and to what extent these core principles shall be operationalized. Some scholars consider these to be incidental exceptions that although as a matter of technicality are an exception, are perhaps better understood as a modified form of the previous rule, thus changing or altering the meaning of the rule on its face.[[78]](#endnote-78)

To be sure, incidental exceptions function in two forms. Insofar as incidental exceptions are a product of linguistic circumstance, they should be understood as modifications or alterations to the general rule. Accordingly, these modifications can be both restrictive and inclusive. The incidental ratchet turns in two meaningful directions; on the one hand it functions to operationalize the antecedent terms in such a way that provides greater freedoms, while on the other it functions to operationalize the same terms to exclude certain actions from the rule’s shelter. These progressive developments should perhaps be more accurately termed incidental adaptations inasmuch as these adaptations are both inclusive and exclusive, permissive and restrictive.

Consider, for example, the way in which this duality is demonstrated within the jurisprudence of the Fourth Amendment’s protection against unreasonable search and seizure. This protection was first incorporated to include protection from state infringement in 1949, when the Court held in *Wolf v. Colorado* that the security of one’s privacy is “implicit in the concept of ordered liberty, and as such enforceable against the states.”[[79]](#endnote-79) Initially, the expectation of secure privacy was limited to the walls of the home or office. This conception later changed in the Court’s ruling in *Hoffa v. U.S.*, which held, “what the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally protected area, be it his home or his office, his hotel room or his automobile.”[[80]](#endnote-80) The Court’s ruling in *Hoffa* not only extended the areas in which the Fourth Amendment is applicable, but also widened the Amendment’s scope to include “oral statements,” creating a protection for things which are “not tangibles.”[[81]](#endnote-81) Most recently, the Fourth Amendment has been held to bar the unwarranted recording of oral statements,[[82]](#endnote-82) the unwarranted search of a traveler’s personal luggage,[[83]](#endnote-83) and evidence obtained by “sense-enhancing technology.”[[84]](#endnote-84)

As this ratchet has spun in the opposite direction the Court has also embraced exclusions to the Fourth Amendment’s protection against unreasonable search and seizure. For instance, the Court has maintained a long tradition of rescinding the requirement of a formal warrant for search and seizure so long as government agents meet a “probable cause” standard.[[85]](#endnote-85) The Court has also modified this standard to embrace the “totality of the circumstances.”[[86]](#endnote-86) Furthermore, Fourth Amendment jurisprudence has evolved to include the plain view doctrine, an exception that allows law enforcement to carry out a search and seizure without a warrant so long as evidence of a crime is in plain sight.[[87]](#endnote-87) In the same vein, the Court has restricted Fourth Amendment protections to exclude “open fields,”[[88]](#endnote-88) thus defining the extent to which certain areas are reasonably expected to be venues of emphatic privacy. Ultimately, the Fourth Amendment has evolved to include exclusions for “exigent circumstances,” a doctrine, which has been under constant re-examination by the modern Supreme Court, restricting Fourth Amendment protections in situations involving imminent danger to persons or evidence.[[89]](#endnote-89)

To be sure, this cursory survey of Fourth Amendment jurisprudence illustrates that our scheme of judicial review is one characterized by incidental adaptations. Recalling that constitutional terms that exist antecedent to any form of legal regiment within which to be operationalized fail to create nuanced distinctions regarding what the rule may or may not protect, the process of incidental adaptation should be understood as the process of clarifying and defining abstract principles. In some instances, this process clarifies these abstract principles in such a way that expands the protection of the right, while in others this process restricts the same protection. Such adaptations are, on balance, more a product of linguistic circumstance than they are a suspension of the rule of law.

**V. Durkheim, the State of Exception and Anomie**

As the state of exception suspends the constitutional order, both in theory and in practice, it implicates the regulative ability of the rule of law. The rule of law manifests as a normative understanding of constitutional provisions – in this context the Fourth and Fifth Amendments – insofar as constitutional provisions allow citizens to predict the outcome of their actions and the patterns of political interaction with respect to government policing activities. However, as illustrated in the previous sections, it is clear that exceptions to these constitutional provisions obfuscate these patterns of interaction and therefore compromise the predictability of the rule of law. Certainly, constitutional provisions each aim to defend distinct civil liberties. Despite their distinctions, each constitutional provision is obliged to fulfill some degree of predictability as required by the rule of law. Therefore, the normative function of each constitutional provision may be distinct but the broader norm of justice that underpins them equally is that of the predictability of the rule of law.

A. The Constitution as the Codification of Social Facts

If the constitutional order outlines a pattern of expected political interactions vis-à-vis the constituents whom consent to such interactions, then the same constitutional order also outlines a pattern of expected social interactions by virtue of political interactions functioning as a representative manifestation of the constituents themselves. In other words, “the people” consent to be governed and thus the government is “of the people.” The analogue of political life is social life. If this is true, then the constitutional order is properly understood as functioning to define the limitations and expectations of political interactions, while symbiotically acknowledging that these same limitations and expectations are to held in common with a broader understanding of social interaction.

In conceiving of the Constitution as functioning both politically and socially, the social dimension of the state of exception warrants further attention. Generally, the elements comprising the legal establishment – constitutional provisions, statutory laws, and the theoretical claims that inform and underpin both – are understood as social mores. As mores, the elements of the legal establishment are characteristics and conventions that are essential to collective solidarity. Yet, insofar as constitutional provisions maintain a legal and political supremacy, so too, the understanding and interpretation of such provisions establishes a social hegemony.

In any organized civil society there are generally agreed upon broad principles and procedures that establish shared expectations within social interactions.[[90]](#endnote-90) The collective consciousness of a given society thus defines the normative order for social relationships.[[91]](#endnote-91)

Emile Durkheim’s discussion of “social facts” within *The Rules of the Sociological Method* provides a frame of reference with which to understand the social hegemony created by constitutional provisions. According to Durkheim, social facts are “ways of acting, thinking, and feeling, external to the individual, and endowed with a power of coercion, by reason of which they control him.”[[92]](#endnote-92) Social facts are not created by the individual, but are inherited through birth and cultural assimilation.[[93]](#endnote-93) What’s more, Durkheim suggests that “The system of signs I use to express my thought, the system of currency I employ to pay my debts, the instruments of credit I utilize in my commercial relations, the practices followed by my profession, ect., function independently of my own use of them.”[[94]](#endnote-94) Social facts, as such, manifest as patterns of behavior and human action that are capable of exerting coercive power over the individual, while existing outside of the individual.

Here, I suggest that constitutional provisions should be considered as the codification of social facts. Despite the fact that in Lockean terms the American constitutional order is understood as a social contract, no American in the last 200 years has actually *agreed* to the terms of the contract. Simply maintaining citizenship does not imply agreement to the terms the contract. Yet, most Americans generally agree with many of the terms of the constitutional contract created by those that preceded them. Ways of acting, thinking, and feeling are all contained within constitutional doctrine. And to be sure, a Lockean understanding suggests that these ways of acting, thinking, and feeling each existed prior to those who gave the Constitution its first breath of life by reason of the law of nature. In constituting social facts, the constitutional understanding into which we are born shapes our view of the proper powers and divisions of government, rights retained by the individual, and the proper means by which such rights may be effectuated.

Thus, the social hegemony of the constitutional order manifests in two ways. First, as the supreme law of the land that all other laws must strive to uphold, the constitutional order is the preeminent code establishing the properly understood relationship between the people – collectively and individually – and the government. Moreover, all Americans inherit this constitutional order equally, whether Virginian or Californian. Second, the constitutional order imposes itself upon us by virtue of us merely existing within the American republic, thus causing the supremacy of this order to exist wholly within and without of us as individuals. The fact that the constitutional order has been seldom amended since its inception speaks to the extent to which the social facts contained within it have imposed their value and acceptance upon the social fabric of the American system.

In addition to understanding constitutional provisions as the codification of the broader social facts that underpin the whole of American society, so too, constitutional provisions should be understood as social norms. While social facts exist outside and before the individual, social norms are rules of behavior that develop out of a group’s values. In Lockean terms, social facts can be understood as the law of nature to which all men are aware, while social norms can be understood as the terms of the law of nature more clearly articulated and promulgated by the legislature. Because the laws of nature inform the understanding of and are imposed upon the constitutional order within civil society, the socially normative role of constitutional provisions is never without the social facts that underpin the order itself.

B. Anomie

The American constitutional order promulgates expectations pertaining to the extent to which the government may intrude upon the actions of individual citizens. Recall, for example, the Fourth Amendment’s prohibition against unwarranted search and seizures. Judicial progeny notwithstanding, the language of the Fourth Amendment communicates clearly to the citizenry of the social contract that the government must fulfill the burden of establishing that a search and seizure is warranted prior to conducting either. To be sure, although statutory laws further clarify the circumstances that warrant a search or seizure, the Fourth Amendment functions as a broader legal compass by virtue of its clear premise that the government may not interfere arbitrarily with civil actions so long as they do not violate the law.

Because the constitutional order functions as both a codification of social facts as well as a pattern of social and political norms that establish expectations of human action in both dimensions, respectively, the interruption of such patterns of expected interaction are acutely anomic. According to Agamben, as exceptions abrogate the constitutional norm the result is “a zone of absolute indeterminacy between anomie and law.”[[95]](#endnote-95) Furthermore, his argument insists, “law seems to subsist only by capturing anomie, just as language can subsist only by grasping the nonlinguistic.”[[96]](#endnote-96) In order to understand more clearly what this “zone of absolute indeterminacy” means it is beneficial to connect Agamben’s argument to Emile Durkheim’s discussion on the theoretical construct that is anomie.

Durkheim addresses the concept of anomie in two distinct texts, *The Division of Labor in Society* and *Suicide*. In each context, anomie takes on a different meaning. Although commonly translated in English as “normlessness,” *Division of Labor* considers anomie as “inadequate procedural rules for interaction,” while *Suicide* considers anomie as “inadequate moral norms for social control.”[[97]](#endnote-97) Despite first glances that suggest that anomie is a state of normlessness,[[98]](#endnote-98) this proposition is highly debated within the sociological literature. Instead, anomie should be understood as a state of deregulation that renders norms unable to control social interactions.[[99]](#endnote-99) Interpreted this way, anomie is subsequent to some form of regulation. Indeed, if there is a state of deregulation there must be a state of regulation from which it diverges.[[100]](#endnote-100) As a deviation from the antecedent regulation, “anomie represents a loss of pattern in the mutual expectations for social action.”[[101]](#endnote-101) Thus, for Durkheim, anomie suggests a lack of regulation, functional and moral, political and social, in such a way that disturbs normative interactions inasmuch as such norms can be understood as expected patterns of human action.

From each text, we gain an understanding of anomie as deregulation that has a functional and moral dimension. Broadly, then, anomie is a “state of deregulation, in which social norms – mutually agreed upon goals and means – do not control man’s actions.”[[102]](#endnote-102) Keeping in mind that constitutional provisions establish a normative agreement of expected human interaction as well as serving to codify social facts, the duality of anomie, insofar as it can be both functional and moral, is particularly acute within the state of exception. Recall the anomic dichotomy. On the one hand, it manifests functionally as inadequate procedural rules for interaction, while on the other hand it manifests morally as inadequate moral norms for social control.[[103]](#endnote-103) The former implicates the expectations for political interaction outlined within the constitutional order, whereas the latter implicates the social facts and social norms inherent within order itself and imposed upon the whole of society. Functionally, Durkheim suggests, anomie is engendered by conflicting and inconsistent rules, rules poorly stipulated or understood, or failures within the mechanisms in place to enforce and uphold rules.[[104]](#endnote-104) Functional anomie is the direct result of the state of exception. To be sure, exceptions to constitutional provisions – inasmuch as they are procedural rules for interaction – remove the predictability and action guiding function of the rule of law. As such, exceptions should be viewed as standing in direct conflict with normative constitutional expectations. Consider, for example, the normative constitutional understanding of Fourth Amendment protections and the exceptions to this understanding as manifest within sobriety checkpoints and stop and frisk. The result of such exceptions obfuscates normative constitutional expectations by establishing a zone of functional anomie by means of inconsistent and contradictory rules. The inconsistent and contradictory application of these constitutional norms therefore abrogates the predictive and action guiding function of the rule of law. Consequently, the result of such exceptions introduces a zone of anomie within the rule of law itself.

Functional anomie gives rise to moral and socially normative anomie.[[105]](#endnote-105) Understanding constitutional provisions as the codification of certain social facts that impose equally upon the whole of American society, inconsistency and contradiction within such facts engenders moral anomie. Recall that, for Durkheim, social facts are ways of “acting, thinking, and feeling,” that exist outside of the individual while simultaneously imposing themselves upon him. These facts create a social morality. By imposing upon each individual from without a way of acting, thinking, and feeling, social facts signal a sense of moral “oughtness.” In other words, by virtue of their coercive power to control individual and collective behavior, social facts signal how one *ought* to act, think, and feel. Though the constitutional order may impose itself upon us from without, it is wholly visible from within. The peculiarity of the constitutional order as the codification of social facts is revealed by the very codification itself. Constitutional provisions as social facts, insofar as they establish a collective understanding of moral “oughtness,” when under the state of exception directly contradict the codified understanding of this “oughtness.” As the government is “of the people” in the Lockean sense, the ways of acting, thinking, and feeling about political life that are contained within the constitutional order also inform the ways we act, think, and feel about social life in a broad context. Whereas the deregulation of political rules and procedures enables functional anomie, these political rules and procedures are analogues of expectations of social interaction, and of moral “oughtness,” thus subsequently engendering social deregulation and moral anomie.

The constitutional order regarded as a larger scheme of political *and* social regulation is grounded in the elements of the Rule of Law discussed in Part II. In the Lockean framework, social facts exist prior to civil society as the law of nature. Yet the uncertainty of the state of nature and the lack of a common judge to settle disputes between individuals causes man to enter into civil society in order to ameliorate these defects. In so doing, the organization of civil society establishes political structures for the social facts of the law of nature through widely promulgated and settled laws. Though explicitly political, these structures retain an underlying social character because they of “of the people.” By encompassing a predictive function, which allows members of civil society to reasonably and confidently predict in advance the legal ramifications of their actions, the rule of law upholds expected patterns of political and social interaction. Thus, as the state of nature is devoid of this predictive certainty, the rule of law underlies the social contractarian conception of justice by providing this predictive certainty between individuals and the government; and consequently, between individuals and other individuals. Exceptions to the established legal order that compromise the elements of the rule of law degrade the regulative purpose of the rule of law, deregulating what is intended to regulate politically and socially – functionally and morally. With Durkheim’s anomie as the connective tissue between Locke and Agamben, exceptions that suspend and undermine the constitutional order replace normative constitutional expectations with a zone of anomie. In so doing, such exceptions also transform the rule of law into its antithesis, anomie. Recognizing the rule of law as entangled within an intricate socio-political web and as fundamental to the social contractarian conception of justice generally, extra-juridical exceptions therefore engender an anomic conception of justice that lacks an adequate political or social regulative capacity.

**VI. Conclusion**

To this point, I have attempted to bring Locke, Agamben, and Durkheim into a dialogue that better illustrates the theoretical implications of extra-juridical American policing practices. Understanding Locke’s distinctions between the state of nature and organized civil society illuminates the underlying characteristics required of civil society better known as the Rule of Law. Though this is not Locke’s nomenclature, there is a philosophical congruence between the two. As many contemporary American policing practices carve out exceptions to constitutional protections, the undermining affect that ensues jeopardizes the foundation of the rule of law. Although there may not be one univocal conception of justice within the American constitutional democracy, the rule of law should be understood as one core feature of our constitutional order. As a general claim, the rule of law should be understood as a basis for the American conception of justice, regardless of how derivative conceptions of justice manifest. What’s more, inasmuch as the rule of law informs the American constitutional order, the provisions contained within the Constitution should be understood as patterns of expected political and social interaction. Not only do constitutional provisions regulate political interaction between individual citizens the government, they also establish a broad pattern of moral “oughtness” for social interactions as well.

Taken together, exceptions to the normative understanding of these constitutional provisions deregulate the expected patterns of political and social interaction outlined within the constitutional order. In so doing, exceptions undermine the constitutional order and thus jeopardize the rule of law by abrogating its predictive and action guiding functions. Ultimately, this lack of predictive and action guiding regulation – both politically and socially – engenders an overarching conception of justice that is anomic. To be sure, anomie is a relatively intangible concept and it is unclear how the consequences of this argument manifest empirically within the context taken here. Regardless, the state of exception raises serious questions concerning the theoretical and constitutional legitimacy of many American policing practices. If nothing else, future legal analysis would do well to warrant acute deference to the rule of law when engaging these controversial issues of law and order.

1. David I. Caplan & Sue Wimmershoff-Caplan, *Armed Standoff: The Impasse in gun Legislation and Litigation: Postmodernism and the Model Penal Code v. the Fourth, Fifth, and Fourteenth Amendments – and the Castle Privacy Doctrine in the Twenty-First Century*, 73 UMKC L. Rev. 1073, 1105 (2005). [↑](#endnote-ref-1)
2. J. Milton Yinger, “On Anomie,” *Journal for the Scientific Study of Religion* 3.2 (1964): 158. [↑](#endnote-ref-2)
3. Frederic Schauer, *Exceptions*, 58 U. Chi. L. Rev. 871 (1991). [↑](#endnote-ref-3)
4. Giorgio Agamben, *The State of Exception*, trans. Keven Attell (Chicago: University of Chicago Press 2005). [↑](#endnote-ref-4)
5. As one scholar notes, this congruence is largely the result of American political philosophy maintaining a generally Lockean orientation. See, for instance, William T. Bluhm, *Theories of the Political System: Classics of Political Though & Modern Political Analysis* (NJ: Prentice Hall, 1965), 300. [↑](#endnote-ref-5)
6. John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988). I will cite the *Second Treatise* as 2T, and give the paragraph number rather than the page; the present citation, for example, is Locke 2T, §4. [↑](#endnote-ref-6)
7. Locke 2T, §19. [↑](#endnote-ref-7)
8. Vicente Medina, “Locke’s Militant Liberalism: A Reply to Carl Schmitt’s State of Exception,” *History of Philosophy Quarterly* 19.4 (2002): 351. [↑](#endnote-ref-8)
9. Locke 2T, §124. [↑](#endnote-ref-9)
10. Locke 2T, §125. [↑](#endnote-ref-10)
11. Locke 2T, §126. [↑](#endnote-ref-11)
12. Locke 2T, §124. [↑](#endnote-ref-12)
13. As Anna Marie Smith points out, Rousseau’s theory of property is rooted in an individual sense of narcissism and paranoia. “For Rousseau, the invention of private property historically coincides with the triumph of jealousy and discord. Each person evaluates the positional goods of the other, and every intended injury is taken not only as a deduction from one’s holdings but also as hostile act against the self, an aggressive demonstration of profound disrespect.” See, Anna Marie Smith, “Deadly Force and Public Reason,” *Theory and Event* 15.3 (2012): 21. [↑](#endnote-ref-13)
14. Robert A. Goldwin, “John Locke,” in *History of Political Philosophy*, ed. Leo Strauss and Joseph Cropsey (Chicago: University of Chicago Press, 1987), 495. [↑](#endnote-ref-14)
15. Locke 2T, §87. [↑](#endnote-ref-15)
16. Goldwin, “John Locke,” 497. [↑](#endnote-ref-16)
17. Goldwin, “John Locke,” 509. [↑](#endnote-ref-17)
18. Locke 2T, §57. [↑](#endnote-ref-18)
19. Sterling P. Lamprecht, *Moral & Political Philosophy of John Locke* (New York: Russell & Russell, 1962), 137; Locke 2T, §73-76 [↑](#endnote-ref-19)
20. Lamprecht, *Moral & Political Philosophy of John Locke*, 136. [↑](#endnote-ref-20)
21. Lamprecht, *Moral & Political Philosophy of John Locke*, 134. [↑](#endnote-ref-21)
22. Lamprecht, *Moral & Political Philosophy of John Locke*, 134. [↑](#endnote-ref-22)
23. Locke 2T, §136. [↑](#endnote-ref-23)
24. Locke 2T, §131. [↑](#endnote-ref-24)
25. Richard H. Fallon, *“The Rule of Law” as a Concept in Constitutional Discourse*, 97 Columbia Law Review 1, 4 (1997). [↑](#endnote-ref-25)
26. Lon. L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969), 42-44. [↑](#endnote-ref-26)
27. Fallon, “The Rule of Law,” 7. [↑](#endnote-ref-27)
28. John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), 235-243. Here, Rawls understands this state of nature in Hobbesian terms: “the war of all against all.” [↑](#endnote-ref-28)
29. Friedrich Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 2007), 54. See also, Rawls, *A Theory of Justice*, 235. [↑](#endnote-ref-29)
30. A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund: 1982), 193-194. See also, Friedrich Hayek, *The Political Ideal of the Rule of Law* (University of Michigan Press, 1955), 41. [↑](#endnote-ref-30)
31. Fallon, “The Rule of Law,” 8. [↑](#endnote-ref-31)
32. See *supra* note 5. [↑](#endnote-ref-32)
33. Frank I. Michelman, *Law’s Republic*, 97 Yale L.J. 1493, 1499-1503. [↑](#endnote-ref-33)
34. *U.S. v Nixon* 418 US 683 (1974), at 703. [↑](#endnote-ref-34)
35. *Papachristou v City of Jacksonville* 405 US 156 (1972), at 171. [↑](#endnote-ref-35)
36. Recent literature regarding the rule of law has identified at least four primary ways in which the rule of law is ideally construed. Among these orientations include an historical, formalistic, legal process, and substantive ideal types. See, for example, Fallon, *supra* note 25. Though the distinctions between these ideal types are certainly valuable for a more nuanced understanding of the particular constructions of rule of law’s role within our constitutional democracy, these do not guide my argument. Rather, the point is here is a more general claim outlining the elements that constitute the rule of law and their recognized place within the American juridical order. [↑](#endnote-ref-36)
37. This manifestation exists only insofar as the general reasons for which man transitions from the state of nature into civil society, and makes no claim about the ideal political structure Locke advances. [↑](#endnote-ref-37)
38. Kirk Wetters, “The Rule of the Norm and the Political Theology of ‘Real Life' in Carl Schmitt and Giorgio Agamben,” *Diacritics* 36.1 (2006): 32. [↑](#endnote-ref-38)
39. Locke 2T, §160-161. [↑](#endnote-ref-39)
40. "Necessitas non habet legem.” http://www.oxfordreference.com/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-1429 (accessed March 20, 2014). [↑](#endnote-ref-40)
41. Wetters, “The Rule of the Norm,” 32. [↑](#endnote-ref-41)
42. Agamben, *supra* note 4. [↑](#endnote-ref-42)
43. Agamben, *State of Exception*, 5. [↑](#endnote-ref-43)
44. Consider, for example, Agamben’s polemical analysis of unitary executive action during the George W. Bush administration, in Agamben, *supra*, 3, 22. [↑](#endnote-ref-44)
45. Agamben, *State of Exception*, 1. [↑](#endnote-ref-45)
46. Agamben, *State of Exception*, 7. [↑](#endnote-ref-46)
47. Agamben, *State of Exception*, 25. [↑](#endnote-ref-47)
48. Agamben, *State of Exception*, 22. [↑](#endnote-ref-48)
49. Marc de Wilde, “Safeguarding the Constitution with and against Carl Schmitt,” *Political Theory* 34. 4 (2006): 513. See also, Agamben, *supra*, 1-31. [↑](#endnote-ref-49)
50. de Wilde, “Safeguarding the Constitution,” 513-514. [↑](#endnote-ref-50)
51. de Wilde, “Safeguarding the Constitution,” 513-514; Agamben, *supra*, 26. [↑](#endnote-ref-51)
52. Agamben, *State of Exception*, 33. [↑](#endnote-ref-52)
53. Agamben, *State of Exception*, 63. [↑](#endnote-ref-53)
54. Elaine Scarry, *Thinking in an Emergency* (New York: W.W. Norton & Co., 2012). [↑](#endnote-ref-54)
55. Wetters, “Rule of the Norm,” 41. [↑](#endnote-ref-55)
56. *Michigan Department of State Police v Sitz* 496 U.S. 444 (1989), at 455. [↑](#endnote-ref-56)
57. “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. Constitution, Amendment IV. [↑](#endnote-ref-57)
58. To be sure, even the majority in *Sitz* acknowledges that a traffic stop is properly understood as a “seizure”: “In our view… a Fourth Amendment "seizure" occurs when a vehicle is stopped at a checkpoint.” *Sitz*, At 450. [↑](#endnote-ref-58)
59. *Sitz*, at 465. (Stevens, J., dissenting). [↑](#endnote-ref-59)
60. *Sitz*, at 450. See also, *Brower v County of Inyo* 489 U.S. 593 (1989). [↑](#endnote-ref-60)
61. See *supra* note 30. [↑](#endnote-ref-61)
62. *Terry v Ohio* 392 U.S. 1 (1968), at 24. [↑](#endnote-ref-62)
63. *United States v Sokolow* 490 U.S. 1, 7 (1989). [↑](#endnote-ref-63)
64. *Arizona v Johnson* 555 U.S. 323, 326–27 (2009). [↑](#endnote-ref-64)
65. *Adams v Williams* 407 U.S. 103 (1972), at 146. [↑](#endnote-ref-65)
66. *Floyd v City of New York* 813 F.Supp.2d 457 (2013), at 463. [↑](#endnote-ref-66)
67. Agamben, *State of Exception*, 29. [↑](#endnote-ref-67)
68. Barnes v Glenn Theatre 501 U.S. 506 (1991). [↑](#endnote-ref-68)
69. *Floyd*, at 638. [↑](#endnote-ref-69)
70. Ethan Bronner & Michael S. Schmidt, “In Questions At First, No Miranda for Suspect,” *The New York Times* (Apr. 22, 2013), http://www.nytimes.com/2013/04/23/us/miranda-rights-withheld-for-marathon-suspect-official-says.html [↑](#endnote-ref-70)
71. As per a report from the DOJ, “…we plan to invoke the public safety exception to Miranda in order to question the suspect extensively about other potential explosive devices or accomplices and to gain critical intelligence.” Brian Beutler, DOJ Official: No Miranda Rights for Boston Bombing Suspect Yet, Talking Points Memo (Apr. 19, 2013, 10:18 PM) (internal quotation marks omitted), http://livewire.talkingpointsmemo.com/entry/doj-official-no-miranda-rights-for-boston-bombing [↑](#endnote-ref-71)
72. “…nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law…” U.S. Constitution, Amendment V. [↑](#endnote-ref-72)
73. *Miranda v Arizona* 384 U.S. 436 (1966). [↑](#endnote-ref-73)
74. *New York v Quarles* 467 U.S 649 (1984), at 657-659. [↑](#endnote-ref-74)
75. *Quarles*, at 663-664. (O’Connor, J., dissenting). [↑](#endnote-ref-75)
76. Schauer, “Exceptions.” [↑](#endnote-ref-76)
77. Schauer, “Exceptions,” 875. [↑](#endnote-ref-77)
78. Schauer, “Exceptions,” 898. [↑](#endnote-ref-78)
79. *Wolf v Colorado* 338 U.S. 25 (1949), at 27. [↑](#endnote-ref-79)
80. *Hoffa v United States* 385 U.S. 293 (1966), at 301. See also, *United States v Jeffers* 342 U.S. 48 (1951); *Silverman v United States* 365 U.S. 505 (1961). [↑](#endnote-ref-80)
81. Id. [↑](#endnote-ref-81)
82. *Katz v United States* 389 U.S. 347 (1967). [↑](#endnote-ref-82)
83. *Bond v United States* 529 U.S. 334 (2000); see also, *United States v Place* 462 U.S. 696 (1983). [↑](#endnote-ref-83)
84. *Kyllo v United States* 533 U.S. 27 (2001), at 34. [↑](#endnote-ref-84)
85. *Carroll v U.S.* 267 U.S. 132 (1925); *Dumbra v U.S.* 268 U.S. 435 (1925); *Delaware v Prouse* 440 U.S. 648 (1979). [↑](#endnote-ref-85)
86. *Illinois v Gates* 462 U.S. 213 (1983). [↑](#endnote-ref-86)
87. See, for example, *Coolidge v New Hampshire* 403 U.S. 443 (1971); *Arizona v Hicks* 480 U.S. 321 (1987); *Horton v California* 496 U.S. 128 (1990). [↑](#endnote-ref-87)
88. *Hester v U.S.* 265 U.S. 57 (1924). [↑](#endnote-ref-88)
89. *Ker v California* 374 U.S. 23 (1963); *Brigham City v Stuart* 547 U.S. 398 (2006). [↑](#endnote-ref-89)
90. Yinger, “On Anomie,” 159-160. [↑](#endnote-ref-90)
91. Marvin E. Olsen, “Durkheim’s Two Concept of Anomie,” *The Sociological Quarterly* 6.1 (1965), 44. [↑](#endnote-ref-91)
92. Emile Durkheim, “The Rules of the Sociological Method,” in *Classical and Contemporary Sociological Theory*, ed. Scott A. Appelrouth and Laura Desfor Edles (London: Sage Press, 2012), 87. [↑](#endnote-ref-92)
93. Durkheim, “Sociological Method,” 86. [↑](#endnote-ref-93)
94. Id. [↑](#endnote-ref-94)
95. Agamben, *State of Exception*, 57. [↑](#endnote-ref-95)
96. Agamben, *State of Exception*, 60. [↑](#endnote-ref-96)
97. Olsen, “Durkheim’s Two Concept of Anomie,” 41. [↑](#endnote-ref-97)
98. Phillippe Besnard, “The True Nature of Anomie,” *Sociological Theory* 6.1 (1988), 92. [↑](#endnote-ref-98)
99. Stjepan G. Meštrović and Hélène M. Brown, “Durkheim's Concept of Anomie as Dérèglement,” *Social Problems* 33.2 (1985), 158. [↑](#endnote-ref-99)
100. Consider, also, that anomie’s Greek origin translates closely as “broken limits” or “no laws,” suggesting that there were some form of limits existing antecedent to be broken, see Olsen, “Durkheim’s Two Concepts of Anomie,” 37. [↑](#endnote-ref-100)
101. Meštrović and Brown, “Dérèglement,”158. [↑](#endnote-ref-101)
102. Yinger, “On Anomie,” 158. [↑](#endnote-ref-102)
103. Olsen, “Durkheim’s Two Concepts of Anomie,” 44. [↑](#endnote-ref-103)
104. Olsen, “Durkheim’s Two Concept of Anomie,” 40. [↑](#endnote-ref-104)
105. To be sure, Durkheim’s analysis of normative or moral anomie in Suicide identifies the social pressures that give rise to such deregulation. For the purposes of this paper, however, I put those aside and instead address the possibility of how functional anomie vis-à-vis the state of exception engenders moral anomie. [↑](#endnote-ref-105)