To: Articles Team
From: [redacted]
Date: August 5, 2024
Re: S-22090 – Criminal Procedure as the Law of Cooperation

I.RECOMMENDATION

I tentatively do not recommend we move this piece to C-Read. It is on criminal procedure, which is a topic we are interested in, and is very easy to read. The content is interesting enough and I think it would be a lighter piece for internal workload. However, I am a little skeptical of how novel the thesis is. My main issue, though, is the structure and lack of synthesis. Most of the piece involves the author just running through some case law in different areas of criminal procedure without directly relating it to the thesis or tying subsections together. I also do have some preemption concerns. I know we are really looking for a criminal law piece, but if I'm honest about how I generally assess pieces for M-Read, I don't think this one meets the mark. I don't feel strongly, though, and could see those with a stronger criminal law background being more excited.

II.SYNOPSIS

Would highly recommend you check out [redacted] fantastic Rotopool for a more thorough summary! This Article is about how criminal procedure doctrine can be understood under a "law of cooperation" approach by the Supreme Court. The piece argues that SCOTUS decisions under the Fourth, Fifth, and Sixth Amendments are much more cohesive than they first appear once one considers this new framework. The idea is that SCOTUS caselaw is always about encouraging cooperation under an idea that this helps all parties involved (and society more broadly).

Part I lays out the doctrine in a variety of different areas of criminal procedure under the thesis and categorization of the law of cooperation. The first subpart considers various ways the law encourages voluntary cooperation (ie. through a right to cooperate, by discouraging evasion). Next, the article turns to how the Supreme Court has created an expansive definition of voluntariness so that officials can use deceptive, aggressive tactics into making people think they have no choice but to comply. This subpart also flags how the Supreme Court acts as though all of these dynamics are colorblind instead of considering how race may affect the voluntariness of compliance. Subsequently, this Part turns to how the criminal procedure doctrine legally authorizes compelled cooperation by lowering barriers to arrests, search warrants, and sanctions. This is accomplished through the laws of evidence due to low evidentiary thresholds for these actions and by obligations to testify, along with the structure of plea bargains. Part I then turns to how the Supreme Court ignores contexts where cooperation has no value (ie. when an official has improper motives) and instead still encourage cooperation in these areas (ie. through objective tests). Finally, Part I concludes by describing how the Supreme Court punishes fake cooperation or those who interfere with others' attempts to cooperate.

In the much shorter Part II, the Article considers the implications for this law of cooperation. First, it acknowledges exceptions to the law of cooperation, primarily through *Miranda* warnings and through obstacles to certain efforts by officials to compel cooperation. This latter category appears to be one-off, extreme cases involving bodily intrusion in order to obtain evidence. Part II.B then considers non-judicial forums like state legislatures, police departments, etc. could be better places to push back against SCOTUS cooperation doctrine.

III.ANALYSIS

a. POSITIVES

Writing Style: I found the writing style to be extremely accessible. Despite not taking Criminal Procedure, I feel as though I was able to follow the entire argument. The sentence structure and word choice is some of the most straightforward I've seen in any law review piece. But it never felt as though this was done at the expense of the complexity of the issues. It felt as though the author was very precise throughout. I will flag though that there is an excessive use of quotations throughout the piece, though.

Bluebooking: This piece appeared to be in great technical shape. There was a lot of support for the statements given (primarily from case law rather than journal articles, although there were some journal pieces). And from a quick skim, I wasn't seeing an abundance of Bluebook errors. I think from an internal workload side, this piece would be one of the easier pieces to work on. There is a strangely high amount of quotes in the piece, but that also makes me less worried about whether the sources support these sentences (unless the author is just wildly making things up).

Underrepresented Topic: While it is procedural, this is criminal law! We have yet to accept a criminal law piece and that has been a priority for us. Due to the procedural nature, it is a lot of constitutional law. But still exciting that this somewhat fits a criteria we have.

b. NEGATIVES

Novel/Impact: I am a little skeptical that this thesis is particularly novel or impactful. I have not taken Criminal Procedure so I do not know the ins and outs of this doctrine or how it is taught. But reading the piece, I wasn't sure what this Article contributed beyond a minor framing device. The actual substance of the doctrine seemed unsurprising and has likely been synthesized in other places. I will say though that the piece also fizzled out at the end in terms of impact. It doesn't have much to say beyond the doctrine being pretty hopeless, at which point it is unclear what the value is of putting this all together.

Our Goals: I also want to flag that this piece doesn't meet many of our Articles team's goals for this last piece. This piece is on procedural criminal law, not substantive criminal law. It is not an essay length. Nor does it cite state law pieces – instead many of these citations are to well established professors. Lastly, this author is not from an underrepresented background. He is from a non-T14 school but his resume includes many articles in top-tier journals.

Structure: I personally did not love the structure of the piece within the sections. From my understanding, the author would just raise multiple cases within some category of the law, explain the framing of how they bolster his theory of the law of cooperation, and then move onto a new section. Not necessarily a bad approach but at times felt more like a syllabus where there were just lists of quotations from cases. It also did make me wonder again about the novelty of the piece since it almost seemed to just be listing some doctrine from different areas of case law, which is not particularly interesting. And it felt like there was some missing synthesis. Rather than tying things together, providing summaries at the end of sections, and just generally turning it into a cohesive set of conclusions, this piece felt more like a list at times.

IV.PREEMPTION CHECK

I do not believe this thesis is preempted. The author's other pieces appear to not be on particularly similar topics. His other criminal procedure pieces are all much more specific and do not appear to have substantial overlap with this one. In terms of the cooperation angle, this appears to be mostly unique. There is one piece that considers criminal procedure and cooperation, but it exclusively focuses on corporate contexts and how there is less protection under the Fifth Amendment for compelled cooperation here. *See* Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 NYU L. Rev. 311 (2007).

However, due to the lack of synthesis, the piece is largely just a listing of doctrine, which would certainly be preempted by a criminal procedure textbook. And bits and pieces of the argument have been considered by other articles. One piece in particular is on the idea of voluntariness and how it is embodied in criminal procedure, before considering how voluntariness should not be sacrificed under the guise of helping communities. *See* Sheri Lynn Johnson, *Confessions, Criminals, and Community*, 26 Harv. C.R.-C.L. L. Rev. 327 (1991). There is also a piece on coercion and how criminal procedure judges coercion differently based on what it sees as beneficial for society. *See* David S. Kaplan & Lisa Dixon, *Coerced Waiver and Coerced Consent*, 74 Denv. U. L. Rev 941 (1997); *see also* Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 Yale L. J. 1792 (2019). And another piece is on the low evidentiary thresholds for arrests and how arrests and guilt have become too synonymous. *See* Anna Roberts, *Arrests as Guilt*, 70 Ala. L. Rev. (2019).

I could keep going but already through a preliminary search, it is clear that many of the subparts of this argument have been considered by other journal articles. I think that if someone spent a few hours looking into discussions of each subpart, they would find multiple arguments. Which really comes back to the main point, that the novelty of this piece rests on the synthesis and overall thesis as that seems to be the main novel part.