Supreme Irrelevance: The Court's Abdication in Criminal Procedure Jurisprudence

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Criminal procedure is one of the Supreme Court's most active areas of jurisprudence, but the Court's rulings are largely irrelevant to the actual workings of the criminal justice system. The Court's irrelevance takes two forms: objectively, on the numbers, its jurisprudence fails to protect the vast majority of people affected by the criminal justice system; and in terms of salience, the Court has sidestepped the major challenges in the United States today relating to the criminal justice system. These challenges include discrimination in stops and frisks, fatal police shootings, unconscionable plea deals, mass incarceration, and disproportionate execution of racial minorities. For each major stage of a person's interactions with the criminal justice system — search and seizure, plea-bargaining, and sentencing — the Court develops doctrines that protect only a tiny percentage of people. This is because the Court focuses nearly all of its attention on the small fraction of cases implicating the exclusionary rule, trial rights, and the death penalty, and it ignores the bulk of real-world criminal procedure — searches and seizures that turn up no evidence of crime, plea bargains that occur outside of the courtroom, and the sentencing of convicts for terms of years — leaving constitutional rights unrecognized and constitutional violations unremedied. Consistently, each issue the Supreme Court neglects has a disparate impact on traditionally disadvantaged racial minorities. Together, this constitutes an abdication of the Court's responsibility.

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TABLE OF CONTENTS

INTRODUCTION

Since the 1970s, incarceration in state and federal United States jurisdictions has grown exponentially,[1] making the U.S. a global anomaly in its rate of imprisonment.[2] New approaches taken by the police, courts, prosecutors, and defense attorneys to efficiently process this rapid escalation have both responded to and contributed to the problem. Police have conducted an unprecedented number of "stop and frisk" encounters with minimal suspicion,[3] trials have become exceedingly rare as nearly every criminal case is disposed of via plea-bargaining,[4] and the Supreme Court has more than doubled the proportion of criminal procedure cases it hears each Term,[5] even as it has halved its overall caseload.[6] Each of these responses is associated with major social cleavages, particularly relating to traditionally disadvantaged minorities. Young black and Latino men are stopped by police at disproportionate rates,[7] leading to cycles of distrust between police and minorities.[8] Racial minorities are incarcerated at disparate rates and face longer sentences that are inexplicable on non-racial terms,[9] including being disproportionately subject to the death

[1] There were 2.3 million people in the justice system in 2017. Press Release, Peter Wagner & Bernadette Rabuy, Prison Policy Initiative, Mass Incarceration: The Whole Pie 2017 (Mar. 14, 2017), https://www.prisonpolicy.org/reports/pie2017.html. The prison population has increased 500% in the last forty years. *Criminal Justice Facts*, SENT'G PROJECT, http://www.sentencingproject.org/criminal-justice-facts (last visited Mar. 20, 2018).

[2] The United States has the highest rate of incarceration in the world — 30% higher than the second-highest nation, China, and over three times the third-highest, Brazil — despite having a significantly lower overall population than China, and only a slightly higher overall population than Brazil. *See Highest to Lowest — Prison Population Total*, WORLD PRISON BRIEF, http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All (last visited Mar. 20, 2018); *U.S. and World Population Clock*, U.S. CENSUS BUREAU, https://www.census.gov/popclock/world (last visited Mar. 20, 2018).

[3] *See infra* Part I.

[4] *See infra* Part II.

[5] *See infra* Figure 1.

[6] *See infra* Figure 2; *see also* Tonja Jacobi & Matthew Sag, *The New Oral Argument: Justices as Advocates*, 94 NOTRE DAME L. REV. (forthcoming 2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3125357 (illustrating and discussing this trend).

[7] *See* Floyd v. City of New York, 959 F. Supp. 2d 540, 556 (S.D.N.Y. 2013) (finding that many of the 4.4 million police stops conducted in New York between January 2004 and June 2012 unconstitutionally targeted racial minorities).

[8] L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2638 (2013).

[9] *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-90-57, DEATH PENALTY

penalty.[10] And recent Supreme Court opinions, in the words of one Supreme Court Justice, "risk treating members of our communities as second-class citizens" by enabling police to arbitrarily and routinely target them.[11]

Despite doubling its criminal procedure caseload, the United States Supreme Court has failed to address the most significant issues that have accompanied the rise of the modern criminal justice system. Since the 1970s, the Supreme Court has confined a disproportionate amount of its criminal-justice jurisprudence to three major areas: (1) the Fourth Amendment rights of criminal defendants who are found with contraband or evidence of criminality; (2) a defendant's rights at trial; and (3) the constitutionality of capital sentencing practices. Furthermore, within its death-penalty jurisprudence, the Court has focused exclusively on (4) protecting from the death penalty only those already least likely to receive it. But today, most people whose Fourth Amendment rights are violated are not found with incriminating evidence and are never charged with a crime, trials make up less than 1% of activity in the criminal justice system, and within that small percentage, death sentences constitute a very minor fraction of criminal dispositions. The Supreme Court has largely abdicated any role in regulating police stops that do not produce evidence of criminality, plea bargains, non-capital criminal sentences, and the massive differentials between black and white capital defendants. This Article shows that the Court has failed to devote its attention to the most significant contemporary issues implicating our constitutional system of criminal justice. As a result, the Supreme Court has become increasingly irrelevant to the operations of the criminal justice system in the United States.

The Supreme Court has made itself irrelevant in two important ways. First, it is objectively irrelevant on the numbers: its jurisprudence ignores the vast majority of citizens affected by the criminal justice system. Citizens' most common interaction with police is in the form of *Terry* stops — seizures that are brief in time

SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 5 (1990) (examining twenty-eight studies of capital sentencing procedures and finding that 82% show that victim race influenced outcomes and legally relevant variables could not explain the differences); Traci Burch, *Skin Color and the Criminal Justice System: Beyond Black-White Disparities in Sentencing*, 12 J. EMPIRICAL LEGAL STUD. 395 (2015) (establishing that being black increases the average sentence by 4.25%, and the effect is even higher for dark-skinned blacks).

[10] *See infra* text accompanying notes 16–17.

[11] Utah v. Strieff, 136 S. Ct. 2056, 2069 (2016) (Sotomayor, J., dissenting).

and limited in scope,[12] but nonconsensual and potentially degrading.[13] Studies in numerous major cities have shown that between 88 and 98% of these stops uncover no evidence and so are mostly of actually innocent people, and the stops are frequently based on minimal suspicion and so are unconstitutional.[14] Yet the Supreme Court has provided practically no remedy for these violations. When evidence is found against a person and the person is charged, about 97% of the time the defendant will plead to a deal offered by the prosecutor.[15] The Supreme Court has offered minimal regulation of the plea-negotiation process, leaving prosecutors with huge leverage and minimal oversight. Once convicted, 99.95% of convicts face non-capital sentences, yet the Supreme Court has largely given up on any requirement of proportionality between the crime and the sentence in the non-death penalty context. And even within capital sentences, the Court has refused to focus on those most likely to be put to death: more than 42% of the country's current death-row inmates are black, 13% Latino, and only 42% white.[16] Seventy-six percent of those executed were defendants who murdered whites, while only 15% of those executed murdered blacks, and only 7% murdered Latinos.[17] Yet the Court has refused to address whether such frequency of application of the death penalty raises constitutional problems, instead explicitly focusing its jurisprudence on rarity of death sentences against other groups. Together, these four elements constitute a jurisprudential "cone of shame,"[18] in which the Supreme Court has narrowed its focus in each stage of the criminal justice system, turning away from the rules that apply to the vast majority of criminal suspects, and focusing instead on the minutiae of the processes that have become the least relevant in most people's lives.

Second, beyond the numbers, the Supreme Court has refused to address the most salient issues that are dividing the country. The racial bias in police stops and frisks constitutes the modern version of

[12] *See* Terry v. Ohio, 392 U.S. 1, 28-30 (1968).

[13] *See id.* at 24-25 ("Even a limited search . . . must surely be an annoying, frightening, and perhaps humiliating experience.").

[14] *See infra* Part I.

[15] William T. Pizzi, *The Effects of the "Vanishing Trial" on Our Incarceration Rate*, 28 FED. SENT'G. REP. 330, 331 (2016).

[16] DEBORAH FINS, NAACP LEGAL DEF. & EDUC. FUND, INC., CRIMINAL JUSTICE PROJECT, DEATH ROW U.S.A.: SUMMER 2017, at 1 (2017), http://www.naacpldf.org/files/case_issue/DRUSASummer2017.pdf.

[17] *Id.* at 4.

[18] In another context, see Cyernide, *Up-Cone of Shame*, YOUTUBE (Mar. 13, 2010), https://www.youtube.com/watch?v=R58kSuIhURI.

the stamp of inferiority that the Warren Court described as being created for African-American children in segregated schools.[19] Not only is being stopped and frisked by police degrading, it is often the first step preceding a police shooting, frequently of unarmed citizens.[20] Exonerations of actually innocent people have skyrocketed in recent years; many of those eventually vindicated were imprisoned under plea deals.[21] The problem of mass incarceration disproportionately affects African-Americans, and the unequally lengthy sentences that African-Americans face contribute to this directly.[22] And the racial disparities in capital punishment raise questions about the legitimacy of that means of punishment.

Each of these issues lies within the domain of the Supreme Court, but not only have they been sidelined by its jurisprudence, the Court has actually structured many of its doctrines so as to be incapable of addressing these problems. For instance, by limiting the remedy for Fourth Amendment violations to the exclusion of evidence, the Supreme Court has disabled itself from directly regulating police stops that do not result in evidence production, as well as police stops that are designed for non-evidence producing goals, such as "aggressive policing."[23] Similarly, the Court only recognizes a capital-punishment application as unconstitutional when so many states have ceased to apply it that the Court can discern an "evolving consensus" against the

[19] Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

[20] The Court was recently criticized by Justice Sotomayor for ignoring this problem. Salazar-Limon v. City of Houston, 826 F.3d 272 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 1277, 1282 (2017) (No. 16-515) (Sotomayor, J., dissenting from denial of certiorari) (describing "a disturbing trend regarding the use of this Court's resources" in regularly reversing denials of qualified immunity, but failing to take cases where courts have wrongfully given the benefit of the doubt to police officers).

[21] As of March 20, 2018, of the 2,187 exonerations detailed in the National Registry of Exonerations, 401 involved plea deals. NAT'L REGISTRY EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/browse.aspx (last visited Mar. 20, 2018).

[22] *See, e.g.*, David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285 (2001) (finding that black offenders receive significantly longer sentences, largely due to departures from the sentencing guidelines); Darrell Steffensmeier et al., *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male*, 36 CRIMINOLOGY 763 (1998) (finding that age, gender, and race are all significant determinants of sentencing, and young black males are more harshly sentenced than any other group).

[23] Even when establishing the lower standard of suspicion for police stops, the Warren Court recognized, "Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime." Terry v. Ohio, 392 U.S. 1, 13-14 (1968).

practice.[24] That is, the Court will only step in once its protection has become largely unnecessary.[25]

Consequently, the major issues emphasized by the Court — and the literature — tend to miss the big picture. For instance, the multi-decade battle between the liberal and conservative justices over whether the exclusionary rule should be further restricted or fully expanded[26] is irrelevant to the overwhelming majority of people affected by illegal police encounters, who are typically not prosecuted. Similarly, the battle in recent cases has been over the proper standard to apply to those stops — such as when the police can be wrong on the law yet still arrest a person for evidence found in the stop,[27] and whether anonymous tips can justify such stops;[28] but these disputes all concern suspects against whom evidence was found and disregard the vast majority of real-world applications of *Terry*. And in just the last decade, the Supreme Court has taken eight cases on the Confrontation Clause and seventeen cases on ineffective assistance of counsel at trial, yet it has had little to say on the process by which prosecutors garner plea deals. In the few cases where the Court has addressed the plea-negotiation process, it has placed more duties on defense counsel, even though some public defenders have essentially declared bankruptcy due to their inability to deal with their existing responsibilities.[29] The vitriol expressed by the justices in these cases[30]

[24] *See* Stanford v. Kentucky, 492 U.S. 361, 370-73 (1989); Coker v. Georgia, 433 U.S. 584, 593-96 (1977); Gregg v. Georgia, 428 U.S. 153, 186-87 (1976).

[25] *See infra* Parts III, IV.

[26] *See infra* Part I.

[27] *E.g.*, Heien v. North Carolina, 135 S. Ct. 530, 536 (2014) ("Reasonable suspicion arises from the combination of an officer's understanding of the facts and his understanding of the relevant law. The officer may be reasonably mistaken on either ground."); *see also infra* Part I.

[28] *E.g.*, Navarette v. California, 134 S. Ct. 1683, 1688-89 (2014) ("[b]y reporting that she had been run off the road by a specific vehicle," an anonymous tip was made reliable enough to support reasonable suspicion). *See generally infra* Part I.

[29] *See* Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES (Nov. 8, 2008), http://www.nytimes.com/2008/11/09/us/09defender.html (reporting that public defenders offices in at least seven states refused to take on new cases, saying that their "overwhelming workloads . . . undermine the constitutional right to counsel for the poor").

[30] *See, e.g.*, Utah v. Strieff, 136 S. Ct. 2056, 2071 (2016) (Sotomayor, J., dissenting) (criticizing the majority for enabling arbitrary stops of racial minorities, which will "corrode all our civil liberties and threaten all our lives"); *Navarette*, 134 S. Ct. at 1697 (Scalia, J., dissenting) (criticizing the "freedom-destroying cocktail" of the majority); Miller v. Alabama, 567 U.S. 460, 500 (2012) (Roberts, C.J., dissenting) (criticizing the jurisprudence for making "false promises of restraint").

and the complexity of the jurisprudence belie a fundamental truth: that the Supreme Court's jurisprudence is largely irrelevant.

This Article describes the three key stages of the criminal justice process[31] in the chronology experienced by the ordinary citizen: *Terry* stops, plea-bargaining, and sentencing. We venture through the cone of shame, witnessing how the rights and interests of the overwhelming number of citizens in the criminal justice system are largely disregarded by the Court, and analyzing the failure of the Supreme Court to provide guidance on the most salient issues of the day. Along the way, we recommend ways in which the Court could provide more robust guidance. But our goal is not to promote any particular policy; rather, our recommendation is that the Court meaningfully investigate each of these issues and provide some form of constitutional protection to those in the criminal justice system.

Part I describes how the Supreme Court has developed the meaning of the Fourth Amendment almost entirely in the context of the unrepresentative minority of cases in which people stopped and searched by the police are found with evidence of a crime. The Court has refused to provide a remedy to those illegally searched who possess no evidence of a crime, focusing all its remedial attention instead on the exclusionary rule — a remedy incapable of providing direct protection to innocent victims of constitutional violations. Part II examines how the Supreme Court has openly embraced the plea-bargaining-as-criminal-justice regime without assuming any meaningful role as the final arbiter of fundamental fairness in that process. Even though almost all criminal cases are resolved via pleas, the Supreme Court continues to devote the overwhelming bulk of its contemporary criminal-justice jurisprudence to trial rights. Part III explores how the Supreme Court has devoted almost all of its jurisprudence concerning the constitutionality of sentencing practices to the death penalty, a practice which has no measurable effect on the United States' anomalous mass-incarceration problem. Although the central sentencing doctrines developed in regard to the death penalty — such as the requirement of proportionality — were borrowed from non-death-penalty cases, the Court has since disregarded them outside of the capital context. Part IV shows that, even within its death-

[31] Note that there are other areas of the criminal justice system that we do not have space to explore, but they too have been shown to display the same neglect by the Court. *See, e.g.*, Tonja Jacobi et al., *The Attrition of Rights Under Parole*, 87 S. CAL. L. REV. 887 (2014) (describing parole rules and how the failure to recognize the rights of parolees leads to greater recidivism and attrition of rights of the broader community, particularly that of minorities).

penalty jurisprudence, the Supreme Court has embraced the principle of rarity (i.e., the infrequency of a criminal-justice practice) as a barometer of Supreme Court action. Only when a sentencing practice is virtually non-existent will the Supreme Court comment on its constitutionality. Despite the Court's potentially groundbreaking decision in *Miller v. Alabama*,[32] the Court continues to employ an evolving standards of decency doctrine based on the infrequency of particular practices to restrict its jurisprudence to issues that are by definition irrelevant.

Throughout, we consider the significance of the Court's jurisprudential myopia for racial minorities: we submit that the overarching theme of the Court's jurisprudence has been an abnegation of its responsibility on the very doctrines that most drive the substantial and significant differential impact experienced by minorities, particularly African-Americans. We do not comment on whether this is by design, but there is no doubt that the most pressing modern criminal-justice issues center around the treatment of African-Americans by police, prosecutors, and judges. This failure by the Supreme Court is not simply unfair and jurisprudentially sloppy, it is contributing to some of the major contemporary schisms in U.S. society.

I. THE FOURTH AMENDMENT IN THE SHADOW OF EXCLUSION

After the turn of the century, the practice of "stop and frisk" in New York City rose dramatically, from 97,296 people stopped in 2002, to 685,724 in 2011.[33] The New York Civil Liberties Union revealed the extreme racial disparities engendered by this practice, finding that 89.7% of stops conducted from 2003 until 2013 were of non-whites.[34] The report also noted a less heralded fact: of the nearly five million stops recorded between 2003 and 2013, 88.1% did not result in the discovery of incriminating evidence, a citation, or an arrest.[35] Temporary detentions in other major cities mirror the New York pattern.[36]

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[32] *Miller*, 567 U.S. at 465 (holding that mandatory sentences of life without parole for juvenile offenders are unconstitutional).

[33] CHRISTOPHER DUNN, N.Y. CIVIL LIBERTIES UNION, STOP AND FRISK DURING THE BLOOMBERG ADMINISTRATION 2002–2013, at 2 (2014), https://www.nyclu.org/sites/default/files/publications/stopandfrisk_briefer_2002-2013_final.pdf.

[34] *Id.* at 4. Non-whites were 66.7% of the New York City population. Jacobi et al., *supra* note 31, at 960.

[35] *Id.* at 14.

[36] In Boston, from 2007 to 2010, police disproportionately targeted minorities in the

These reports suggest that the majority of people subjected to stops — a disproportionate number of whom are minorities — are innocent of any crime. The likelihood that a person temporarily detained by police will be innocent stands in stark contrast with the factual situations at issue in the Supreme Court's decisions interpreting and applying the Fourth Amendment to the *Terry* doctrine of reasonable suspicion,[37] which it develops and applies almost exclusively in cases where incriminating evidence has been found on the person asserting his or her rights. The Supreme Court is consistently addressing exceptional Fourth Amendment situations, while ignoring the most common scenario.

Not only does the Supreme Court almost exclusively consider cases in which evidence is found, it provides little remedy for those who experience violations but against whom evidence is not found. Since 1961, the principal remedy for a Fourth Amendment violation has been the exclusion at trial of incriminating evidence discovered as a result of police violations.[38] While the Supreme Court has considered civil-rights claims based upon Fourth Amendment violations, it has not developed rules governing police conduct in situations that do not result in the discovery of evidence. In fact, the Court has created a major obstacle to such development: public officials are immune from civil constitutional claims unless they have violated a constitutional right that was already clearly established at the time of the conduct.[39] Consequently, no new law has been established with regard to violations of an innocent person's Fourth Amendment rights.

Instead, the Court develops the Fourth Amendment exclusively in the context of cases in which criminal evidence is discovered. The

vast majority of stops, and 97.5% were reported to have not uncovered incriminating evidence. AM. CIVIL LIBERTIES UNION, BLACK, BROWN AND TARGETED 12 (2014), https://aclum.org/wp-content/uploads/2015/06/reports-black-brown-and-targeted.pdf [hereinafter BLACK, BROWN AND TARGETED]. In Los Angeles, from July 2003 to June 2004, blacks were stopped at a rate 3,400 times higher than whites, but frisked blacks were 42.3% less likely to be found with a weapon than frisked whites, and blacks were 21.0% more likely than whites to be stopped without being either cited or arrested. IAN AYRES & JONATHAN BOROWSKY, AM. CIVIL LIBERTIES UNION OF S. CAL., A STUDY OF RACIALLY DISPARATE OUTCOMES IN THE LOS ANGELES POLICE DEPARTMENT i, 7 (2008), https://www.aclusocal.org/sites/default/files/wp-content/uploads/2015/09/11837125-LAPD-Racial-Profiling-Report-ACLU.pdf.

[37] *See* Terry v. Ohio, 392 U.S. 1, 30 (1968) (permitting limited stops where police have reasonable suspicion of criminality).

[38] *E.g.*, Mapp v. Ohio, 367 U.S. 643, 655 (1961) ("[A]ll evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court.").

[39] Plumhoff v. Rickard, 134 S. Ct. 2012, 2023 (2014).

Supreme Court has repeatedly asserted, but never established, the empirical assumption that the most effective deterrent against unlawful police conduct is the suppression of incriminating evidence.[40] While in recent years the Court has repeatedly called into question the desirability of the exclusionary rule and limited its applicability in an expanding list of situations,[41] it has not accordingly developed alternative remedies for Fourth Amendment violations.

Exclusion provides no comfort to the vast majority of people who are detained despite actual innocence. The number of cases in which there is no real remedy for a Fourth Amendment violation is only increasing, as the practice of stopping and frisking has broadened with the sustained popularity of the "broken windows" theory of policing.[42] The Court itself has recognized that the exclusionary rule cannot deter such methods of policing, which deemphasize the detection and arrest of perpetrators in favor of maintaining order through constant police-civilian interactions.[43] The Court has left police departments around the country free to stop and frisk thousands of people with little regard for their extremely low rate of success, and so the vast majority of potentially unlawful stops are practically beyond remediation.

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[40] *See* Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 595 (2011) (describing how the Supreme Court has acknowledged that the impact of the exclusionary rule is unknown, and further showing why this assumption is often incorrect).

[41] *See, e.g.*, Utah v. Strieff, 136 S. Ct. 2056, 2061 (2016) ("Suppression of evidence . . . has always been our last resort, not our first impulse."); Davis v. United States, 564 U.S. 229, 236 (2011) (describing the exclusionary rule as a mere "prudential" doctrine); Herring v. United States, 555 U.S. 135, 140 (2009) ("[O]ur precedents establish important principles that constrain application of the exclusionary rule."); Hudson v. Michigan, 547 U.S. 586, 591 (2006) ("Suppression of evidence, however, has always been our last resort, not our first impulse."); United States v. Leon, 468 U.S. 897, 907 (1984) (describing the "substantial social costs exacted by the exclusionary rule").

[42] *See* Renee Klahr et al., *How a Theory of Crime and Policing Was Born, and Went Terribly Wrong*, NPR (Nov. 1, 2016, 12:00 AM), http://www.npr.org/2016/11/01/500104506/broken-windows-policing-and-the-origins-of-stop-and-frisk-and-how-it-went-wrong; *infra* Subpart I.C; *see also* George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982), https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/?single_page=true.

[43] *See* Kelling & Wilson, *supra* note 42; Klahr et al., *supra* note 42; *see also* Terry v. Ohio, 392 U.S. 1, 13-14 (1968) (acknowledging that the exclusionary rule does nothing to discourage searches undertaken for non-prosecution purposes, such as creating an aggressive police presence in order to deter crime).

A. Terry *Stops and the Problem of Racialized Policing*

At approximately 9:40 pm on December 18, 2011, Jimmy Warren, a young black man, was walking near a park in Boston when Officer Luis Anjos was driving nearby in a marked car.[44] Twenty-five minutes earlier, Anjos had responded to a call of a robbery, and the victim had told him that he had seen a black male wearing a red hoodie jump out of his bedroom window. The victim then saw two other black males outside, one wearing dark clothing, before noticing that his backpack, a computer, and five baseball hats were missing from his room.[45] When Anjos later spotted Warren and another black male, both wearing dark clothing, neither was carrying a backpack. But Anjos had a "hunch" that these two men might have been involved in the breaking and entering, so he rolled down the window of his cruiser and yelled, "Hey guys, wait a minute."[46] Warren and his companion made eye contact with Anjos, turned around, and "jogged" down a path into the park away from Anjos.[47] Anjos radioed dispatch and Officer Carr soon arrived; Officer Carr addressed the men, at which point Warren turned and ran. Carr followed him and quickly drew his firearm, commanding Warren to "get down."[48] After a brief struggle, Carr arrested and searched Warren but found no contraband on his person. Police recovered a .22 caliber firearm nearby. Warren did not have a license to carry a firearm and was charged with unlawful possession.[49] Before trial, Warren moved to suppress the gun, arguing that the officers' attempt to detain him violated his Fourth Amendment right to be free of unreasonable searches and seizures.[50] The Trial Court denied the motion.[51]

The procedural posture of Warren's case is representative of most Fourth Amendment *Terry* cases, but the Supreme Judicial Court of Massachusetts handed down a groundbreaking decision. While conceding that evasive conduct is a relevant factor when analyzing reasonable suspicion, it stated that in the absence of any other information leading to an individualized suspicion, evasive conduct is insufficient to support reasonable suspicion. This was because the

[44] Commonwealth v. Warren, 58 N.E.3d 333, 336 (Mass. 2016).
[45] *Id.*
[46] *Id.* at 337.
[47] *Id.*
[48] *Id.*
[49] *Id.* at 337-38.
[50] *Id.* at 338.
[51] *Id.* at 336.

analysis of a black man's apparent flight from police could not be divorced from the findings of a Boston Police Department report documenting a pattern of racial profiling of black males in the city.[52] The court reasoned that the presumption that consciousness of guilt is the only motivating factor for evasiveness is belied by the fact that black males are "repeatedly targeted."[53] Black males suffer "the recurring indignity" of being racially profiled and so are just as likely to be motivated by the desire to avoid that indignity as to evade detection of criminal conduct.[54] The reasoning of the *Warren* decision is supported by the fact that most stops in Boston do not result in the discovery of criminal conduct.

The court's interpretation of the significance of Warren's evasive conduct was a bold response to the breakdown in police-minority relations. Yet even the *Warren* case, which resulted in the suppression of the gun police discovered, did not address the heart of the problem. The holding was designed to deter police officers from initiating stops on young black males on the grounds of evasive conduct alone. But in the overwhelming majority of law-enforcement stops, no evidence is uncovered that a victim of an unconstitutional stop could seek to suppress. Many *Terry* stops involve constitutionally dubious police conduct, but in nearly every case these stops will never be challenged by way of a plaintiff's civil claim that his or her Fourth Amendment rights were violated.[55]

The Boston study on which the Massachusetts court relied demonstrates patterns of police-citizen interactions similar to those conducted in other major cities, including New York, Chicago, and Los Angeles. These studies show that black males and other racial minorities are disproportionately targeted for police-civilian interactions.[56] From 2003 to 2004 in Los Angeles, for instance, blacks

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[52] *See id.* at 341-42.

[53] *Id.* at 342.

[54] *Id.*

[55] As discussed *infra*, many scholars consider civil litigation an impractical mechanism for the vindication of Fourth Amendment rights in large part due to the inadequacy of remedies and the doctrines of sovereign and qualified immunity. *See, e.g.*, Orin S. Kerr, *Fourth Amendment Remedies and Development of the Law: A Comment on* Camreta v. Greene *and* Davis v. United States, 2011 CATO SUP. CT. REV. 237, 242-43 (2011); L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule: A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule*, 83 IOWA L. REV. 669, 710, 737 (1998); Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 83 (1988).

[56] AM. CIVIL LIBERTIES UNION, BLACK, BROWN AND TARGETED, *supra* note 36, at 12-13;

were stopped at a rate 3,400 times higher than whites.[57] In addition to showing a disparate impact on racial minorities, these studies suggest that the vast majority of stops do not lead to the discovery of incriminating evidence. In the Boston study, police reported that an item or object was seized in only 2.5% of stops.[58] In the New York City study, only 2% of frisks revealed evidence of a weapon, even though police frisked suspects 50% of the time.[59] In Chicago in the summer of 2014, more than 250,000 people were subjected to stops that did not lead to an arrest.[60]

There is also evidence that the majority of stops, especially those of racial minorities, rest on inchoate and subjective descriptions of potentially innocent behavior in poor and minority neighborhoods.[61] When determinations of apparently criminal behavior are almost entirely subjective, implicit racial bias is likely to influence decision making.[62] In the New York study, the most cited reason for a stop was "furtive movements," which justified nearly 50% of all stops.[63] In its review of a random sample of Chicago Police Department explanations for stops, the ACLU of Illinois found that half of the stops were not supported by reasonable suspicion.[64] While a disproportionate number of those stopped were minorities,[65] stops of minorities were significantly *less* likely than stops of whites to turn up evidence of crime.[66] Young black and Latino males made up only 4.7% of New York City's population, yet they accounted for 40.5% of people stopped in the city from 2003 to 2013.[67] Yet, of those minorities

AM. CIVIL LIBERTIES UNION OF ILL., STOP AND FRISK IN CHICAGO 3 (2015), https://www.aclu-il.org/sites/default/files/wp-content/uploads/2015/03/ACLU_StopandFrisk_6.pdf [hereinafter STOP AND FRISK IN CHICAGO]; AYRES & BOROWSKY, *supra* note 36, at 5-6; DUNN, *supra* note 33, at 14.

57 AYRES & BOROWSKY, *supra* note 36, at i.

58 AM. CIVIL LIBERTIES UNION, BLACK, BROWN AND TARGETED, *supra* note 36, at 12.

59 DUNN, *supra* note 33, at 1.

60 AM. CIVIL LIBERTIES UNION OF ILL., STOP AND FRISK IN CHICAGO, *supra* note 56, at 3.

61 *See* DUNN, *supra* note 33, at 3-4.

62 *See, e.g.*, Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1030-31 (2006).

63 DUNN, *supra* note 33, at 3.

64 AM. CIVIL LIBERTIES UNION OF ILL., STOP AND FRISK IN CHICAGO, *supra* note 56, at 7.

65 AM. CIVIL LIBERTIES UNION, BLACK, BROWN AND TARGETED, *supra* note 36, at 4; AM. CIVIL LIBERTIES UNION OF ILL., STOP AND FRISK IN CHICAGO, *supra* note 56, at 9; DUNN, *supra* note 33, at 6.

66 AYRES & BOROWSKY, *supra* note 36, at 7-8.

67 DUNN, *supra* note 33, at 6.

stopped, 89.7% held no contraband.[68] While blacks and Latinos in New York City were frisked at a higher rate than whites, frisked whites were nearly twice as likely to be found with a weapon.[69] In Los Angeles, stops of blacks and Latinos "were systematically less productive than stops of whites."[70] Blacks were 42% less likely than frisked whites to be found with weapons, 25% less likely to be found with drugs, and 33% less likely to be found with other contraband.[71] "Hit-rate data" in Minnesota, Illinois, Rhode Island, Missouri, and West Virginia suggest that this pattern occurs nationwide.[72]

These figures present compelling evidence that the overwhelming majority of *Terry* stops are constitutionally questionable and typically unsuccessful, leading to the discovery of no incriminating evidence. Yet, courts almost exclusively consider the legality of stops in cases where contraband is discovered. The Supreme Court develops doctrine by considering an unrepresentative sample of cases and solving for a problem that occurs in a minor fraction of police-citizen encounters.

B. The Doctrine of Reasonable Suspicion in the Roberts Court

Instead of curbing the power of police to systematically stop citizens without evidence of criminality, the Supreme Court has further liberalized the reasonable-suspicion standard. This is despite the inability of scholarly research to determine whether stop-and-frisk programs reduce crime or increase the amount of contraband seized.[73] Simultaneously, the Court has refused to develop any jurisprudence unique to innocent victims of unconstitutional police conduct. Rather, by tethering remedies for the innocent to the steadily eroding protections for the apparently guilty, the Court has made it even more

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[68] *See id.*

[69] *See id.* at 9.

[70] AYRES & BOROWSKY, *supra* note 36, at 7.

[71] *Id.* at 8.

[72] L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2037-38 (2011).

[73] *Compare* Richard Rosenfeld & Robert Fornango, *The Impact of Police Stops on Precinct Robbery and Burglary Rates in New York City, 2003–2010*, 31 JUST. Q. 96, 116 (2014) (showing no significant effect), *with* Franklin E. Zimring, *How New York Beat Crime*, 305 SCI. AM. 74, 79 (2011) (showing a potentially large effect). For a moderate view, see David Weisburd et al., *Do Stop, Question, and Frisk Practices Deter Crime?*, 15 CRIMINOLOGY & PUB. POL'Y 31, 47 (2015) (finding a small effect once methodological errors in most studies are corrected).

difficult for innocent victims of unconstitutional police conduct to vindicate their Fourth Amendment rights.

In *Illinois v. Wardlow*, the Court held that a person's apparent flight from police in a high-crime neighborhood, without more, met the requirements for a finding of reasonable suspicion.[74] The Court was aware of the facts that made the Massachusetts court in *Warren* consider such a finding unsafe: the dissenting justices in *Wardlow* pointed out that there are "undeniably instances in which a person runs for entirely innocent reasons."[75] In fact, arguably there are *more* reasons for a person to run from police in a high crime neighborhood than in a low crime neighborhood, including being more likely to have had prior bad experiences with police, looking suspicious in failing to run if everybody else runs, a high probability of a subsequent battle occurring between actual criminals and police, and the possibility that officers are more likely to be aggressive out of fear or expectation of trouble. The same logic was available to the justices in *Wardlow* as in *Warren*, but the Supreme Court was unwilling to recognize or address the problem of police incentives to stop individuals, absent wrongdoing.

Wardlow is representative of the Court's apparent indifference to this problem, as manifested in two main lines of doctrine. First, the Court has continued to expand the scope of reasonable suspicion. Simultaneously, the Court has continued to qualify the exclusionary rule, lengthening the list of constitutional violations to which the Court will refuse to apply it.[76] While the Court finds fewer violations of the reasonable-suspicion standard, it also regularly finds constitutional violations that it is nevertheless unwilling to remedy.[77] These two developments are intrinsically intertwined.

In each of the three most recent *Terry* stop cases considered by the Roberts Court, incriminating evidence was found following constitutionally dubious police conduct.[78] In each case, the Court held

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[74] *See* Illinois v. Wardlow, 528 U.S. 119, 124-25 (2000).

[75] *Id.* at 129 (Stevens, J., dissenting).

[76] *See, e.g.*, Herring v. United States, 555 U.S. 135, 137 (2009) (holding that the exclusionary rule does not apply to situations of "isolated negligence attenuated from the arrest").

[77] *See, e.g.*, Utah v. Strieff, 136 S. Ct. 2056, 2059 (2016) (allowing admission of evidence obtained after an unlawful stop); *Herring*, 555 U.S. at 137-39 (allowing admission of evidence obtained incident to an officer's mistaken belief of an arrest warrant); Hudson v. Michigan, 547 U.S. 586, 603 (2006) (allowing admission of evidence obtained in violation of the knock-and-announce rule).

[78] *See Strieff*, 136 S. Ct. at 2059; Heien v. North Carolina, 135 S. Ct. 530, 534 (2014); Navarette v. California, 134 S. Ct. 1683, 1686-87 (2014).

the challenged evidence admissible despite questionable or even concededly unlawful police conduct.[79] When considered together, these three cases significantly expand the range of effectively permissible police conduct under the doctrine of reasonable suspicion and limit the set of circumstances where any remedy is available.

Most recently, in *Utah v. Strieff*, the Court excused a *Terry* violation that was concededly unlawful.[80] Narcotics detective Douglas Fackrell was surveilling a house after receiving an anonymous tip that narcotics were being sold from the residence.[81] After observing Edward Strieff exit the house, Fackrell detained him. During the stop, Fackrell relayed Strieff's identification information to a police dispatcher and discovered that Strieff had an outstanding arrest warrant for a traffic violation.[82] Fackrell then arrested Strieff and, incident to that arrest, searched him and uncovered small amounts of methamphetamine and drug paraphernalia.[83]

The Supreme Court found that the stop was unlawful, but the discovery of contraband was sufficiently attenuated to be admissible, even though the search that uncovered it was an automatic result of standard police procedure.[84] Justice Thomas, writing for the majority, recounted how the exclusionary rule had become the principal judicial remedy to deter Fourth Amendment violations in the twentieth century.[85] Justice Thomas stated that suppression of evidence was a last resort, not a first impulse, and harkened back to the days when officers could be subjected to tort suits from victims of Fourth Amendment violations.[86] But Justice Thomas did not examine the current state of the law of civil remedies, which is increasingly limited by the doctrines of qualified and sovereign immunity and the lack of availability of damages.[87]

Justice Sotomayor in dissent argued that since outstanding warrants are very common, the Court was wrong to consider the police misbehavior "isolated" and unlikely to recur: since tens of thousands of stops are made by police without cause and it is routine practice to

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[79] *See Strieff*, 136 S. Ct. at 2059; *Heien*, 135 S. Ct. at 534; *Navarette*, 134 S. Ct. at 1686-87.

[80] *See Strieff*, 136 S. Ct. at 2059-60.

[81] *Id.* at 2059.

[82] *Id.* at 2060.

[83] *Id.*

[84] *Id.* at 2063.

[85] *Id.* at 2061.

[86] *Id.*

[87] *See* Kerr, *supra* note 55, at 242-43.

check for outstanding warrants in such circumstances, it is unsafe to assume that such conduct will remain isolated.[88] Nevertheless, Justice Sotomayor embraced the deterrence rationale at the heart of the exclusionary rule.[89] But the "astounding" numbers that Justice Sotomayor cited of police stopping people without suspicion in order to check for a warrant[90] are but a small percentage of those stopped by police without suspicion for non-prosecutorial purposes, be it harassment or "aggressive policing," which are not deterred by the exclusionary rule.[91] As such, even the dissent misses the bigger picture: both sides focus on the issue of police stops of those found with incriminating evidence, and neither considers how to protect the majority of actually innocent individuals stopped.

In 2014, in *Heien v. North Carolina*, the Court demonstrated its willingness to excuse unlawful police conduct so long as that conduct flows from a police officer's "reasonable" mistake of law.[92] Sergeant Matt Darisse observed a vehicle whose driver looked "very stiff and nervous" pass by his stationary patrol car, so Darisse followed the car.[93] After several miles, Darisse saw the car brake but only the left brake light came on.[94] Darisse initiated a traffic stop and obtained consent to search the car, which uncovered a sandwich bag containing cocaine.[95] In fact, driving with only one working brake light was not a violation of North Carolina law;[96] nevertheless, the Supreme Court concluded that Darisse's apparent mistake of law was not unreasonable, and so there was reasonable suspicion justifying the stop, making the discovered evidence admissible.[97]

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[88] *See Strieff*, 136 S. Ct. at 2068-69 (Sotomayor, J., dissenting).

[89] *Id.* at 2065 ("This 'exclusionary rule' removes an incentive for officers to search us without proper justification.").

[90] *Id.* at 2068.

[91] *See* Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1041 (1987) (conducting a study of police officers, some of whom explicitly stated that some illegal searches were conducted to get weapons or drugs "off the street"); George C. Thomas III & Barry S. Pollack, *Balancing the Fourth Amendment Scales: The Bad-Faith "Exception" to Exclusionary Rule Limitations*, 45 HASTINGS L.J. 21, 58 (1993) (observing that police officers "have plenty of other incentives to violate the Fourth Amendment, such as preventing a suspect from fleeing, confiscating contraband, and making certain that no one in the vicinity is armed").

[92] Heien v. North Carolina, 135 S. Ct. 530, 540 (2014).

[93] *Id.* at 534.

[94] *Id.*

[95] *Id.*

[96] *Id.* at 535.

[97] *Id.* at 540.

The result of *Heien* is that even when a citizen is behaving lawfully, the police may mistakenly believe themselves to have reasonable suspicion, thus subjecting citizens to an even wider array of stops. But as Justice Sotomayor pointed out in her dissent, the majority failed to clarify what test of reasonableness applied in this context, and she predicted that its appropriate application "will prove murky" in subsequent cases.[98] As such, not only can officers be reasonably mistaken about the law, but officers could be reasonably confused about when their mistakes of law are reasonable, creating an incentive that when in doubt, they should stop the persons they have unspecified hunches about.

In *Navarette v. California*, the Court lowered the quantum of evidence necessary to constitute reasonable suspicion that can justify an investigatory stop.[99] Police received a 911 call reporting a truck that had allegedly run the caller off the road.[100] After the tip was relayed to highway patrol officers, an officer saw the truck matching the description and initiated a stop.[101] The officer did not personally observe any reckless driving that would have confirmed the caller's accusation before initiating the stop.[102] After making the stop, law enforcement smelled marijuana and searched the truck, uncovering thirty pounds of marijuana.[103]

Contrary to prior precedent,[104] the Court held that an unconfirmed tip describing criminal behavior from an eyewitness was sufficient to justify a finding of reasonable suspicion.[105] The Court differentiated the case, reasoning that the information relayed in the 911 call was sufficiently reliable to support a finding of reasonable suspicion because by reporting that she had been run off the road, the caller was claiming eyewitness knowledge.[106] It also argued that because, now or in the future, 911 systems may have some limited tracking capacity of at least the geographic location of a caller, the use of the 911 emergency system meant that an anonymous call is not necessarily

98 *Id.* at 547 (Sotomayor, J., dissenting).

99 Navarette v. California, 134 S. Ct. 1683, 1692 (2014).

100 *Id.* at 1686-87.

101 *Id.* at 1687.

102 *See id.*

103 *Id.*

104 *E.g.*, Alabama v. White, 496 U.S. 325, 329 (1990) ("[A]n anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity . . . .").

105 *See Navarette*, 134 S. Ct. at 1687.

106 *Id.* at 1689.

truly anonymous.[107] Justice Scalia in dissent systematically dismantled these and other technical distinctions,[108] and criticized the majority opinion as a "freedom-destroying cocktail," in part because anonymous tipsters can now "lie with impunity."[109] Nonetheless the evidence was admitted. As a result, police can rely not only on their own borderline or even incorrect assessments of suspicion, but also on the unsubstantiated suspicions of other citizens, at least for *Terry* stops in the vehicle context.

The holdings of *Strieff*, *Heien*, and *Navarette*, taken together, signify an overarching liberalization of the law governing police conduct in the administration of *Terry* stops. After *Strieff*, an element of standard police procedure, such as conducting a record check, may in and of itself create an attenuating circumstance that excuses law-enforcement violations. Logically, allowing the police to nullify their own violations in this way by following standard procedure will encourage police to conduct yet more constitutionally dubious stops. After *Heien*, courts may excuse a police officer for subjecting a person to a stop despite the fact that the officer did not have reasonable articulable suspicion that an actual crime was being committed, so long as the officer's misapprehension of the law was not "unreasonable." And after *Navarette*, police officers need not personally confirm any of the details in an anonymous tip that would give rise to reasonable suspicion before subjecting a person to a temporary detention. All three of these cases justified the admission of incriminating evidence against a defendant who had in fact violated the criminal law, but their holdings weaken protections for the innocent as well. As the next section shows, the larger problem for the augmentation of police incentives to stop citizens is less at the margins of reasonable suspicion as it is in the myopic insistence on exclusion as the only remedy for violation during a *Terry* stop, when in most *Terry* stops there is no evidence to exclude.

C. The Exclusionary Rule and the Rights of the Innocent

Civil damages suits brought by innocent victims of constitutional violations have played only a very modest role in the development of Fourth Amendment law. The robust protections for defendants

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[107] *See id.* at 1690.

[108] Tonja Jacobi, *The Future of* Terry *in the Car Context*, 15 OHIO ST. J. CRIM. L. 89, 90, 97 (2017) (arguing that the dissent won the argument on technical terms but lost the debate for practical reasons).

[109] *Navarette*, 134 S. Ct. at 1693, 1697 (Scalia, J., dissenting).

resulting from the doctrines of qualified and sovereign immunity and the lack of availability of civil damages contribute to this phenomenon.[110] Under the qualified immunity doctrine, police may be excused from concededly unlawful Fourth Amendment violations, so long as the rights violated are not "clearly established" by prior Supreme Court law.[111] Furthermore, civil claimants are charged with proving damages, such as economic loss or physical and emotional distress,[112] which, while undeniably present in wrongful stops,[113] are unlikely to be substantial enough to justify the time and effort required to prepare and litigate a lawsuit.[114] Consequently, the Supreme Court has developed stop-and-frisk doctrine primarily when police engage in constitutionally questionable conduct that leads to the discovery of evidence — a wholly unrepresentative sample of cases. By focusing on the exceptional cases in which incriminating evidence is discovered, the Court has failed to develop doctrinal remedies that are protective of the Fourth Amendment rights of the innocent. While the exclusionary rule in theory provides a deterrent effect that benefits the innocent as well as the guilty, in reality police violations are effectively nullified by prosecutors refraining from bringing charges,[115] a benefit only for the guilty, not the innocent.

From the 1960s through the 1980s, the Supreme Court insisted that exclusion operated as an automatic fix for any constitutional

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[110] *See* Denise Gilman, *Calling the United States' Bluff: How Sovereign Immunity Undermines the United States' Claim to an Effective Domestic Human Rights System*, 95 GEO. L.J. 591, 593 (2007) ("One of the most serious impediments to the enforcement of human rights in the United States is the broad application of sovereign immunity to prevent liability or even suit against federal, state, and local governments and their officials."); Kerr, *supra* note 55, at 242-43; James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1601 (2011) (explaining the range of limitations on civil-rights litigants imposed by qualified immunity).

[111] *See* Wilson v. Layne, 526 U.S. 603, 614 (1999) (noting that government officials are "shielded from civil liability insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

[112] *See* Carey v. Piphus, 435 U.S. 247, 262-64 (1978).

[113] *See generally* MATT TAIBBI, THE DIVIDE: AMERICAN INJUSTICE IN THE AGE OF THE WEALTH GAP 53-82 (2014) (describing black men attesting to being stopped and harassed on a daily basis).

[114] *See* Kerr, *supra* note 55, at 242.

[115] This is true also for Fifth Amendment violations. *See* Chavez v. Martinez, 538 U.S. 760, 766 (2003) (holding that even physical assaults undertaken by the police in order to compel a confession from a suspect do not constitute compulsion to be a witness against oneself unless and until charges are brought against the individual).

violation,[116] regardless of the probative value of the evidence or the cost in terms of lost prosecutions,[117] and applied it to all jurisdictions.[118] Initially, the rule was justified in part as an expressive commitment to judicial integrity, as unlawful seizures should "find no sanction" in the courts,[119] but it is now exclusively justified by an empirically questionable claim that it increases deterrence of police violations.[120] The theory is that excluding evidence in a current case will impose costs on the police that will deter them from committing violations in future cases, and the Court claims that no other response by the Court would have such deterrent effect.[121]

There are two main problems with this approach. First, for the innocent, not being charged with a crime that one did not commit is hardly a remedy. The Court provides a remedy only for defendants when incriminating evidence was actually found against them and simply assumes this will provide secondary protection to those against whom police conduct illegal searches but find no evidence, via a "jurisprudential trickle-down effect of protection."[122] But if police are otherwise motivated to commit unlawful searches, and there is no consequence for committing unlawful searches against those who are not ultimately prosecuted, then the rule will not deter the vast majority of violations. Second, many scholars argue that the exclusionary rule is an overly costly response to sometimes minor constitutional infringements.[123]

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[116] *But see* Aldermen v. United States, 394 U.S. 165, 172 (1969) (refusing to apply exclusion to those lacking standing).

[117] *See* Weeks v. United States, 232 U.S. 383, 392 (1914).

[118] *See* Mapp v. Ohio, 367 U.S. 643, 660 (1961) ("Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States . . . we can no longer permit that right to remain an empty promise.").

[119] *Id.* at 648; *see also* Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) ("If the Government becomes a lawbreaker, it breeds contempt for law.").

[120] *See* United States v. Leon, 468 U.S. 897, 921 n.22 (1984) (stating that the previously relied upon rationale of judicial integrity is actually subsumed within the deterrence rationale).

[121] *Mapp*, 367 U.S. at 655-56 (explaining that without the exclusionary rule, Fourth Amendment rights would be valueless words, with no incentive not to disregard them).

[122] Jacobi, *supra* note 40, at 588.

[123] *Compare* Raymond A. Atkins & Paul H. Rubin, *Effects of Criminal Procedure on Crime Rates: Mapping out the Consequences of the Exclusionary Rule*, 46 J.L. & ECON. 157, 174 (2003) (finding that crime rates went up substantially after *Mapp* and thus that the exclusionary rule imposes massive costs), *with* Bradley C. Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous*

The first problem is supported by the data described above, showing that tens of thousands of unconstitutional stops of innocent people continue to occur in numerous cities around the country.[124] The second problem is one of opinion, depending on the relative value of admitting evidence in the face of police wrongdoing. It is a question on which the empirical evidence is, by the Court's own admission, hopelessly and insolubly unclear.[125] Nevertheless, the Rehnquist and Roberts Courts have focused on the second problem, to the exclusion of the first problem.

Dissatisfied with broad application of the exclusionary rule, the Rehnquist and Roberts Courts gradually narrowed its application through a number of exceptions, including exempting knock-and-announce violations,[126] creating a good-faith exception for court administrators,[127] and extending that exception to police officers in certain circumstances.[128] Beginning in *Leon*, the Court introduced a general principle that the exclusionary rule should apply only where constitutional violations are "substantial and deliberate" and only when exclusion would result in "appreciable deterrence."[129] In *Leon*, the Rehnquist Court described the exclusionary rule as an "extreme sanction," and opined that the rule should not apply when the social costs of allowing the guilty to go free outweigh the importance of deterring a particular constitutional violation.[130] The Roberts Court

Conclusion, 62 KY. L.J. 681, 695, 704-05 (1974) (showing a significant number of lost arrests in some cities following the introduction of the exclusionary rule, but determining that evidence of the exclusionary rule's failure is too inconclusive to abandon it).

[124] *See supra* notes 56–72 and accompanying text.

[125] *E.g.*, Illinois v. Gates, 462 U.S. 213, 257 (1983) (White, J., concurring) ("We will never know how many guilty defendants go free as a result of the rule's operation."); United States v. Janis, 428 U.S. 433, 452 n.22 (1976) ("No empirical researcher, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect . . . ."); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting) ("[T]here is no empirical evidence to support the claim that the [exclusionary] rule actually deters illegal conduct of law enforcement officials.").

[126] *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 599 (2006) (finding that the "social costs of applying the exclusionary rule to knock-and-announce violations" made its application in appropriate).

[127] *See* United States v. Leon, 468 U.S. 897, 920-21 (1984) (finding that "when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope . . . there is no police illegality and thus nothing to deter").

[128] *See* Herring v. United States, 555 U.S. 135, 141-44 (2009).

[129] *Leon*, 468 U.S. at 909.

[130] *See id.* at 909, 916.

went beyond merely creating a list of exceptions to the rule by developing an alternative standard for its application.[131] In *Herring*, the Court rested exclusion on a showing of whether its value in deterring police from a constitutional violation outweighs the social costs to the justice system, in terms of lost arrests, inefficient prosecutions, and lost convictions.[132]

The modern Court's qualified approach to the exclusionary rule is at odds with its early jurisprudence. In *Mapp*, by requiring exclusion as the remedy to all unconstitutional searches and seizures,[133] the Court acknowledged that the cost of exclusion may be, in some cases, to set the guilty free.[134] The Court's aim was to impose deliberately severe costs on society, so as to create deterrence against police violations. The *Herring* approach is therefore incoherent: the costs imposed by the exclusionary rule are, in theory, the very means by which the police are deterred. But the central problem with the Roberts Court approach is not its inconsistence with precedent or its logical weaknesses, but rather what it fails to address.

Although the Court has limited the applicability of the exclusionary rule in various situations, in none of these cases has it provided an alternative remedy for innocent people whose Fourth Amendment rights are violated. Nor has it acknowledged that limiting exclusion as a remedy interacts with its qualified immunity jurisprudence to leave numerous violations practically without remedy. The exclusionary-rule debate has continued between the liberal and conservative justices, as well as between scholars acting as advocates for either side, but it has overwhelmingly explored the tension between deterring future misconduct and truth in criminal justice.[135] As such, the debate largely ignores the key constitutional problem of the innocent person

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131 *See* Frank Cross, Tonja Jacobi & Emerson H. Tiller, *A Positive Political Theory of Rules and Standards*, 2012 U. ILL. L. REV. 1, 31 (arguing that the Roberts Court established an "exclusionary standard").

132 *See Herring*, 555 U.S. at 147-48 (noting that "any marginal deterrence" of excluding an error made in good faith must "pay its way" (quoting *Leon*, 468 U.S. at 907 n.6)).

133 Mapp v. Ohio, 367 U.S. 643, 655 (1961) ("We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.").

134 *Id.* at 659 (acknowledging that the effect of the exclusionary rule is that "the criminal is to go free because the constable has blundered. In some cases this will undoubtedly be the result. But . . . [t]he criminal goes free, if he must, but it is the law that sets him free").

135 *See* David A. Harris, *How Accountability-Based Policing Can Reinforce — or Replace — the Fourth Amendment Exclusionary Rule*, 7 OHIO ST. J. CRIM. L. 149, 162-64 (2009) (summarizing both sides of the debate).

who is subjected to a Fourth Amendment violation without any remedy.

Despite its more defendant-friendly bent, the Warren Court was equally neglectful of the plight of innocent citizens. The *Mapp* Court based the exclusionary rule on the assumption that exclusion of unlawfully obtained evidence would deter police officers from acting in violation of the Constitution. This claim has been shown to be flawed in many respects. First, studies have shown that police frequently do not know the constitutional rules that they are meant to apply,[136] or the consequences of their breach,[137] making deterrence difficult. Second, those consequences are only tangentially related to police incentives, since police performance is measured in terms of arrests, not convictions.[138] Third, police may have an incentive to stop and search even when evidence will be inadmissible, either to baldly harass certain people or to protect the community through "aggressive policing." Fourth, illegally garnered evidence can nonetheless be used to prosecute third parties who lack standing, to impeach a defendant's credibility, to try non-criminal cases, to induce a subject to become a police informant, or to find other evidence.[139]

On a more general level, the exclusionary rule often fails to deter police conduct because police may simply substitute abidance with Fourth Amendment law with perjury in the courtroom or aggressive policing tactics that are designed to avoid bringing cases to court. When police officers see the law as a hindrance to their primary task of apprehending criminals, they usually attempt to construct the appearance of compliance, rather than allow offenders to go free.[140] A

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[136] *See* William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J.L. REFORM 311, 333 (1991) (showing that police perform only slightly better than chance in assessing the lawfulness of search scenarios).

[137] *See* Perrin et al., *supra* note 55, at 723-24 (finding that fewer than 30% of officers were ever formally informed by the prosecutor or from their supervisor of an evidentiary exclusion).

[138] Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 793 (1970) (finding that police departments "almost invariably measure their own efficiency in terms of 'clearances by arrest,' not by conviction").

[139] *See* Walder v. United States, 347 U.S. 62, 66 (1954) ("[T]here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility."); Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 720-22, 732 n.197, 734-35 (1970); David H. Taylor, *Should It Take a Thief?: Rethinking the Admission of Illegally Obtained Evidence in Civil Cases*, 22 REV. LITIG. 625, 626 (2003).

[140] *See, e.g.*, JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL 215-19 (1966) (discussing

study of narcotics arrests found that in the wake of *Mapp*, arrests in which drugs were found on the person decreased, while at the same time arrests for drugs that police claimed to have found in hand or dropped to the ground rose significantly.[141] The study's authors concluded this result could only be explained through police perjury, because there was no other reason why such a sudden increase in drugs arrests that do not require a search had occurred.[142] Police perjury is acknowledged as an inevitable reality by prosecutors, defenders, and judges alike.[143]

An equally significant impediment lies in the reality that bringing cases to prosecution is only one part of police strategy. The primary objective of policing is not simply the eventual conviction of criminals, but the suppression of crime.[144] Police often act in order to "make police presence felt" by generating a perception of police activity.[145] Actually obtaining convictions is a "secondary goal often conflicting with [policing's] primary objectives."[146] Consequently, when police, conscious of the exclusionary rule, shift their focus to patrols and confiscations, rather than apprehensions that might lead to unsuccessful prosecutions, the exclusionary rule may actually encourage illegal police activity.[147] This became a formal policing strategy in the decades following *Mapp*, as stop-and-frisk programs are largely based on the principles of aggressive policing. For instance, New York implemented "broken windows" policing to respond to the "public's fear of crime" by addressing "perceptions of disorder," rather than serious criminal conduct.[148]

In *Terry*, the Warren Court acknowledged that the exclusionary rule "is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other

police perceptions of the exclusionary rule).

141 *Effect of* Mapp v. Ohio *on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROBS. 87, 95 (1968).

142 *Id.* at 95-96.

143 *See* Myron W. Orfield, Jr., *Deterrence, Perjury and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 95-99 (1992).

144 *See id.* at 86.

145 *Id.*

146 *Id.*

147 Jacobi, *supra* note 40, at 610.

148 Udi Ofer, *Criminalizing the Classroom: The Rise of Aggressive Policing and Zero Tolerance Discipline in New York City Public Schools*, 56 N.Y.L. SCH. L. REV. 1373, 1380-81 (2011–2012).

goal."[149] Yet the overwhelming focus of the Court — through both its liberal and conservative phases — has not been on the costs to society of the narrowness of the exclusionary rule failing to protect the innocent, but rather on whether the application of exclusion is overly broad or not, and whether it imposes excessive costs on society in protecting the probably guilty.[150] Thus, for all of their differences, the *Mapp* Court, the *Leon* Court, and the *Herring* Court alike completely disregarded the issue of how the rights of innocent people should be protected.

The nature of the modern debate on the exclusionary rule is illustrated by Justice Ginsburg's dissent in *Herring*, which expressed concern for the rights of innocent persons to be free from unconstitutional searches and seizures, but proffered the wrong solution: "[I]f courts are to have any power to discourage [police] error . . . it must be through the application of the exclusionary rule."[151] She expressed particular concern for the serious impact of the Court's holding on innocent persons wrongfully arrested.[152] But Justice Ginsburg also defended the exclusionary rule because of the lack of alternative remedies, suggesting that neither civil liability, criminal liability, nor administrative sanctions are realistic options for the deterrence of unlawful government conduct.[153]

Thus, the majority and dissent in *Herring* rehashed many of the same conservative and liberal rationales that have occupied the Court since the introduction of the exclusionary rule.[154] This debate, however, is framed entirely around the question of whether evidence obtained from guilty defendants may be admitted in a criminal trial. It therefore misses an insuperable obstacle presented by the exclusionary rule that was first acknowledged in *Terry*, that exclusion cannot protect vulnerable groups from police harassment.[155]

The problem is not simply that the justices ignore the issue of police harassing innocent suspects, particularly racial minorities. In crafting the exclusionary rule, the *Weeks* and *Mapp* Courts stalled the development of alternative remedies for Fourth Amendment violations. By making exclusion of unlawfully obtained evidence the

149 Terry v. Ohio, 392 U.S. 1, 14 (1968).

150 *See* Herring v. United States, 555 U.S. 135, 147-48 (2009).

151 *Id.* at 148 (Ginsburg, J., dissenting) (quoting Arizona v. Evans, 514 U.S. 1, 22-23 (1995)).

152 *Id.*

153 *Id.* at 153.

154 *See id.* at 147-48, 151-53.

155 *See* Terry v. Ohio, 392 U.S. 1, 14-15 (1968).

automatic remedy for Fourth Amendment violations, the Court felt no need to develop any alternative that would apply when exclusion did not. The Rehnquist and Roberts Courts diverged from *Mapp* by defining numerous exceptions, but stayed faithful to it in refusing to provide any other remedy, even when the Court recognized constitutional violations but did not provide the remedy of exclusion.[156]

D. The Immunization of Racial Profiling

The power of the police to conduct stops and frisks even when lacking probable cause was developed in *Terry v. Ohio*, a case in which John Terry, a black man, was found with a concealed weapon after being stopped by a police officer who concededly did not have probable cause for a seizure or search.[157] Officer McFadden could not "say precisely what first drew his eye" to Terry and another man; he had only the sort of "inarticulate hunch[]" that cannot constitute even reasonable suspicion.[158] He described his initial reaction to observing the three suspects by saying "when I looked over they didn't look right to me."[159] Officer McFadden, however, did not seize or search the subjects based on this hunch; rather, he observed the men for an extended period of time, during which he saw them walk back and forth before a shop window, stopping at opposite corners of the street to confer roughly a dozen times.[160] The Court concluded that, while there was still no probable cause, these additional facts adequately suggested that the men were casing a store, thus justifying the brief and limited seizure that came to be known as the *Terry* stop.[161]

The *Terry* case has, however, since been relied on to justify stops on far more feeble suspicion. For instance, one of us has previously established that of the hundreds of thousands of stops in New York conducted in 2011, the average stop was justified by only 1.66 factors,

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156 *See, e.g.*, *Herring*, 555 U.S. at 147-48 (exempting "police mistakes [that] are the result of negligence . . . rather than systemic error or reckless disregard of constitutional requirements" from exclusion, and providing no other remedy); Hudson v. Michigan, 547 U.S. 586, 602 (2006) (exempting knock-and-announce violations from exclusion and providing no other remedy).

157 *See Terry*, 392 U.S. at 4-5.

158 *Id.* at 5, 22.

159 *Id.* at 5.

160 *Id.* at 6.

161 *See id.* at 23-24 ("It would have been poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further.").

the most common of which were "furtive movements" and that the individual was in a "high-crime neighborhood."[162] Not only were these two subjective characteristics the most commonly relied upon, but the correlation between them was extremely low, meaning that one of these two subjective assessments was used as justification in most of the stops, and only about half of stops had even one secondary factor of suspicion.[163]

As mentioned, the *Terry* Court acknowledged that the exclusionary rule would often be simply "ineffective as a deterrent," in part because "[e]ncounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime."[164] In particular, the *Terry* Court recognized that the "wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial."[165] The application of the exclusionary rule in such cases would thus be little more than a "futile protest against practices which [exclusion] can never be used effectively to control."[166]

The data concerning "hit rates" bear out this prophecy, as police continue to stop blacks much more frequently than they do whites, even though stops of whites are more likely to turn up evidence of crime.[167] Nevertheless, in the nearly fifty years since *Terry* was decided, the Supreme Court has created no meaningful jurisprudence to prevent the harassment of minorities in violation of the Fourth Amendment. In fact, in those intervening years, the Court has only made it more difficult for innocent victims of unlawful stops to vindicate their rights.

As discussed, the Court has steadily fortified the doctrines of qualified and sovereign immunity as effective defenses to constitutional violations in the wake of *Terry*.[168] Of note, in *Anderson v. Creighton*, the Court stated that officials are immune from liability "as long as their actions could reasonably have been thought

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[162] *See* Jacobi et al., *supra* note 31, at 943, 964.

[163] *See id.* at 964.

[164] *Terry*, 392 U.S. at 13.

[165] *Id.* at 14-15.

[166] *Id.* at 15.

[167] Richardson, *supra* note 72, at 2037-38.

[168] *See, e.g.*, Mitchell v. Forsyth, 472 U.S. 511 (1985) (holding that the defendant was immune from suit under the doctrine of qualified immunity, even though his actions violated the Fourth Amendment).

consistent with the rights they are alleged to have violated."[169] According to *Anderson*, these rights cannot be defined at any level of generality but must be "clearly established in a more particularized" sense.[170] Thus, *Anderson* makes official civil liability entirely dependent on what the Supreme Court has previously ruled in Fourth Amendment cases.[171] The Court has yet to decide a case in which it has found a "clearly established right" to be free from police harassment that is motivated by race under the doctrine of reasonable suspicion. In fact, the Court effectively did the opposite in *Whren v. United States*, foreclosing the availability of damages for defendants who might be targeted because of their race, so long as there exists some objectively reasonable basis that might have justified a seizure by law enforcement.[172]

In *Whren*, a unanimous Court ruled that the actual motivations of individual officers — even racial prejudice or some other invidious motive — were irrelevant to Fourth Amendment protections.[173] The Court rejected petitioners' argument that police violated their rights by targeting them in a pre-textual stop.[174] The facts in *Whren* were commonplace: plainclothes vice-squad officers of the District of Columbia Metropolitan Police Department were patrolling a "high drug area" of the city in an unmarked car.[175] They grew suspicious of the youthful occupants of a truck with temporary license plates waiting for an unusually long time at a stop sign, and saw the driver look down into the lap of the passenger.[176] When the police car executed a U-turn to head back toward the truck, the truck turned suddenly without signaling, and sped off at an "unreasonable" speed.[177] When the truck stopped at a traffic light, Officer Ephraim Soto approached the car and observed two plastic bags containing what appeared to be crack and then proceeded to arrest Whren and his passenger.[178]

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169 Anderson v. Creighton, 483 U.S. 635, 638 (1987).

170 *Id.* at 640.

171 This test has considerable overlap with the good-faith exception of *Davis v. United States*, 564 U.S. 229, 244 (2011).

172 *See* Whren v. United States, 517 U.S. 806, 813-14 (1996).

173 *Id.*

174 *Id.* at 812-13.

175 *Id.* at 808.

176 *Id.*

177 *Id.*

178 *Id.* at 808-09.

Whren argued that the stop was pre-textual but the Supreme Court held that "a traffic stop is permissible as long as a reasonable officer in the same circumstances *could have* stopped the car for the suspected traffic violation."[179] Despite the apparent innocence of the traffic violations at issue, the Court refused to assess whether the petitioners' race (both of the petitioners were black) contributed to impermissible factors motivating the stop.[180] Instead, the Court announced that the only inquiry the Court would entertain was whether objectively reasonable grounds existed for the stop.[181] The Court in *Whren* effectively retreated from the task of protecting minority victims of police harassment in Fourth Amendment cases, limiting its role to assessments of objective facts, even if those facts did not motivate the law-enforcement conduct at issue.

In so ruling, the Court effectively granted qualified immunity to law-enforcement officials involved in cases where a post-facto justification for a stop might vitiate a selective-enforcement claim. Officers are protected by qualified immunity when their allegedly unlawful action meets a standard of "objective legal reasonableness."[182] When combined with the *Heien* case, *Whren* creates enormous opportunity for police to target minorities and provides little recourse against that conduct.

Thus, civil litigation is hardly a practical remedy for addressing the constitutional problems of the stop-and-frisk era. The unprecedented growth in stop-and-frisk techniques in recent decades suggests that exclusion has done little to regulate police behavior in regards to the innocent. The Supreme Court's preoccupation with the unsatisfying remedy of exclusion in an unrepresentative sample of cases has only undermined the basic liberty enshrined in the Fourth Amendment.

E. Returning to Relevance: A Remedy for the Majority of Victims

Having recognized that police harassment of minorities cannot be effectively curtailed by the exclusionary rule, and without civil remedies adequate to deter constitutional violations,[183] the Court should recognize the "need to deter violations of constitutional

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[179] *Id.* at 809.

[180] *See id.* at 810-12.

[181] *Id.* at 810, 813.

[182] Anderson v. Creighton, 483 U.S. 635, 639 (1987) (citing Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982)).

[183] *See* Kerr, *supra* note 55, at 242-43; Perrin et al., *supra* note 55, at 710, 737-38; Wasserstrom & Seidman, *supra* note 55, at 83.

rights."[184] The Court must embrace its responsibility to prescribe mechanisms by which Fourth Amendment violations may be deterred if it is to be at all relevant in regulating the majority of *Terry* stops conducted throughout the nation. Although the Court has largely abdicated any role in proposing workable alternatives, others have proposed methods that do not present the same social costs as exclusion.

Central to the complaints regarding the inadequacy of civil litigation as a reliable deterrent against Fourth Amendment violations is the problem of damages. The costs of litigation often outweigh the benefits of even meritorious civil suits because damages are likely to be insignificant when "the harm suffered by individuals from the constitutional violation itself may be small, widely dispersed, and intangible . . . ."[185] The Supreme Court has hesitated to address the problems of proof inherent in defining intangible losses[186] that result from Fourth Amendment violations, such as invasions on one's personal liberty, freedom of movement, and bodily integrity. Compensatory damages almost always fail to compensate for these less tangible, but equally unconstitutional, deprivations of Fourth Amendment rights. For this reason, scholars have proposed "presumed general damages" as a remedial device in constitutional tort litigation because they would guarantee a meaningful level of compensation for the infringement of all constitutionally protected interests.[187]

Guaranteed compensation could serve as a replacement for exclusion because it would likely provide the automatic deterrence that exclusion was originally designed to provide. At the same time, presumed general damages would ameliorate the social costs of exclusion, as criminals would not be set free as a result of a constitutional violation. Instead, costs would be borne either by individual officers, police departments, or county, state, or federal governments. These costs would provide clearer incentives than exclusion for police departments to retain and promote officers who perform their duties in accordance with constitutional guarantees while deterring police departments from retaining officers who do not.

An associated solution is administrative remedies, which could provide for non-negotiable damages to all persons whose

[184] Carey v. Piphus, 435 U.S. 247, 254 (1978).

[185] Perrin et al., *supra* note 55, at 738.

[186] Jean C. Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CALIF. L. REV. 1242, 1268-69 (1979).

[187] *Id.* at 1282.

constitutional rights are violated by police in the course of investigative work, regardless of whether the alleged victim of the constitutional violation is charged with a crime.[188] An independent executive agency could conduct preliminary review of any aggrieved party's verified complaint and determine if the alleged facts in the complaint might be sufficient to constitute a constitutional violation.[189] If a constitutional violation were properly alleged, an evidentiary hearing would follow in which both sides would have the opportunity to prove and defend against the allegations in the verified complaint.[190] If a bad-faith violation were proven, the complainant would be entitled to recover compensatory and punitive damages from the respondent officer(s) or agency.[191] Statutorily-mandated liquidated damage recovery for any bad-faith constitutional violation would remove the chilling effect that unspecified compensatory damages now have on civil suits, while punitive damages would be available to provide greater deterrence against egregious violations.[192] At the same time, administrative processes could provide caps on available damages to prevent the abuse of administrative remedies.

The primary advantages of a doctrine of presumed or statutory liquidated damages would be to provide direct deterrence against police misconduct, as opposed to exclusion which provides at most only indirect deterrence.[193] Presumed or statutory liquidated damages would incentivize innocent victims to bring claims and could alter the legal landscape in which the most litigated Fourth Amendment cases concern apparent criminals.

Alternatively, to assuage concerns without subjecting police officers to monetary damages, administrative remedies could be entirely punishment-based. Police officers would suffer employment-based warnings and punishments, such as administrative leaves or demotions, if found to have committed constitutional violations. Either way, the burdens of police misconduct would no longer fall on the truth-seeking process of the criminal justice system through the exclusionary rule, but instead would fall on individual police officers or on police departments, providing direct incentives for departments to retain and promote police officers who do not violate the Constitution.

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188 *See* Perrin et al., *supra* note 55, at 744-45, 750.

189 *Id.* at 744-45.

190 *Id.* at 754.

191 *See id.* at 748-49.

192 *See id.* at 749.

193 *See id.* at 749-51.

In the context of the United States' federalist system, the Supreme Court's adoption of any of these remedies could serve to encourage states and localities to provide their own alternative remedies.[194] The Court could reasonably condition a remedy's application on the absence of an adequate alternative remedy at the federal or state level. The Court would thus encourage the federal government or the states to provide their own meaningful solutions, tempering the possibility of a flood of traditional courtroom litigation.

The point is not to promote one particular alternative remedy, but rather to demand that the Court either create or enable *some* alternative remedy, and not itself violate the most fundamental constitutional principle that constitutional violations require remedies.[195] The exclusionary rule has dogged the Court for years because of the clear benefit it provides to the guilty, while providing at best only a trickle-down protection for the innocent. The Court may be right to question the propriety of exclusion in cases where significant criminal activity is discovered, but the Court prejudices the rights of the innocent in providing no viable alternative remedy. Tellingly, the Court in *Terry* acknowledged that the suppression of evidence would never provide the protection from police harassment for which minority groups continue to strive fifty years after *Terry* was decided.[196] While the Court continues to reconsider the propriety of exclusion, it should also reconsider how it may assist in the promulgation of remedies available for innocent victims of unconstitutional police conduct, so as to make its decisions relevant to the vast majority of people impacted by police conduct.

II. PLEA-BARGAINING AND THE SUB-CONSTITUTIONAL CRIMINAL JUSTICE SYSTEM

Jury trial is considered by the Supreme Court to be "of surpassing importance" in the nation's constitutional system because it is the

[194] For an argument that litigation of constitutional tort remedies should be recentered to the state courts — where state sovereign immunity is more easily waived — as a means of providing effective enforcement mechanisms without major constitutional change, see James E. Pfander & Jessica Dwinell, *A Declaratory Theory of State Accountability*, 102 VA. L. REV. 153, 182 (2016). Pfander and Dwinnell argue for a division of labor between federal courts, which would declare states' compliance with federal law, and state courts, which would accept the declaration and fashion a money remedy in accordance with state law. *See id.*

[195] *See* Marbury v. Madison, 5 U.S. 137, 147 (1803) (stating that "every right, when withheld, must have a remedy, and every injury its proper redress").

[196] Terry v. Ohio, 392 U.S. 1, 14-15 (1968).

place where "the great bulwark of [our] civil and political liberties" reside.[197] That notion was embraced by the nation's founders. In describing the contentious debates that occupied much of the Constitutional Convention, Alexander Hamilton noted that at least one proposed feature of the nascent country's legal system had drawn mutual and unanimous support:

> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.[198]

Likewise, in a letter to Thomas Paine in 1789, Thomas Jefferson expressed his opinion that trial by jury is "the only anchor, ever yet imagined by man, by which a government can be held to the principles of [its] constitution."[199]

Today, however, millions of people in the United States are involved in a criminal justice system in which disposition by way of the sacred jury trial is the exception to the rule. From 1962 to 2002, the absolute number of federal criminal trials declined by 30%.[200] Over that same period, the total United States' prison population grew about tenfold.[201] In spite of greater contemporary judicial resources, the criminal justice system is now concerned primarily with the administration of pleas: in 1974, 80% of convictions nationally came from plea-bargaining; today, the figure is approximately 97%.[202] In Arizona, plea-bargaining has been reported to dispose of 99.3% of cases.[203]

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197 Apprendi v. New Jersey, 530 U.S. 466, 477 (2000).

198 THE FEDERALIST NO. 83 (Alexander Hamilton).

199 Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), https://founders.archives.gov/documents/Jefferson/01-15-02-0259 [hereinafter Letter from Jefferson].

200 Pizzi, *supra* note 15, at 331.

201 *See* PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2002, at 1 (2003) (showing the total number of U.S. prisoners to be 2,166,260 at yearend 2002); PATRICK A. LANGAN ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, HISTORICAL STATISTICS ON PRISONERS IN STATE AND FEDERAL INSTITUTIONS, YEAREND 1925–86, at 10 (1988) (showing the total number of U.S. prisoners to be 218,830 in 1962).

202 Pizzi, *supra* note 15, at 331.

203 *Id.*

Although only approximately 3% of criminal cases nationally are now disposed of via trial, the Supreme Court has offered little guidance as to how the "government can be held to the principles of [its] constitution" in the absence of that anchor.[204] Criminal-justice cases constitute a greater portion of the Supreme Court's docket than ever before,[205] but the Supreme Court largely limits the issues that it considers within that docket to the rules governing trials. The Court has acknowledged that criminal justice today is for the most part a system of pleas,[206] but it has not accordingly devoted its attention to the most basic issues raised by plea-bargaining.[207] Similarly, the Court has refused to consider how the plea-bargaining regime undermines the Bill of Rights' constitutional guarantees, given that they were designed in the expectation that defendants would take advantage of the protections offered by the jury trial.

Instead, the Court addresses issues pertaining to a defendant's rights at trial with much greater frequency than the myriad issues that accompany the plea-bargaining regime. The Court considers and reconsiders what evidence is properly admissible in a criminal trial,[208] whether certain evidence sought to be introduced at trial is obtained in violation of the Fourth Amendment,[209] whether a defendant's Fifth Amendment right against self-incrimination is properly observed at trial,[210] and whether the Sixth Amendment right to confront witnesses is properly enforced at trial.[211] By contrast, the Court touches on plea-bargaining with far less regularity, justifying its refusal to regulate the role of prosecutors by insisting that the exercise of prosecutorial discretion is "ill-suited to judicial review."[212] Nevertheless, plea-

[204] Letter from Jefferson, *supra* note 199.

[205] *See infra* Table 1.

[206] Lafler v. Cooper, 566 U.S. 156, 169-70 (2012).

[207] *See generally* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 43-60 (2007) (describing how the prosecutor has "the upper hand" during plea-bargaining).

[208] *See, e.g.*, Ohio v. Clark, 135 S. Ct. 2173, 2180-81 (2015); Kansas v. Cheever, 134 S. Ct. 596, 602 (2013); Williams v. Illinois, 567 U.S. 50, 58 (2012); Michigan v. Bryant, 562 U.S. 344, 354 (2011).

[209] *See, e.g.*, Birchfield v. North Dakota, 136 S. Ct. 2160, 2166-67 (2016); Utah v. Strieff, 136 S. Ct. 2056, 2061 (2016); Rodriguez v. United States, 135 S. Ct. 1609, 1612 (2015); Grady v. North Carolina, 135 S. Ct. 1368, 1371 (2015).

[210] *See, e.g.*, White v. Woodall, 134 S. Ct. 1697, 1701 (2014); Salinas v. Texas, 133 S. Ct. 2174, 2178 (2013); Howes v. Fields, 565 U.S. 499, 514 (2012).

[211] *See, e.g.*, Woods v. Etherton, 136 S. Ct. 1149, 1152-53 (2016); *Clark*, 135 S. Ct. at 2180-81; *Williams*, 567 U.S. at 58.

[212] Wayte v. United States, 470 U.S. 598, 607 (1985).

bargaining constitutes virtually all of the activity in the criminal justice system and raises significant concerns regarding that system.

A. The Problem with Plea-Bargaining

The increasingly popular "tough-on-crime" political strategy[213] employed across the country since the 1970s has led to a political readjustment in which governments seek legitimacy by promising to protect people from risk rather than providing citizens with benefits.[214] In times of preoccupation with crime, politicians benefit from making promises of longer sentences for more criminals.[215] Similarly, prosecutors are often rewarded for maximizing prison time with additional resources and reelection.[216]

The ways in which prosecutors accomplish that goal are largely unseen and almost entirely unregulated. Prosecutors enjoy virtually unchecked and unreviewable authority to decide whether to file charges,[217] and they have nearly unlimited authority in deciding which charges to file. The expansion of criminal laws on the books in recent decades has given prosecutors further leeway in mixing and matching offense elements so as to charge defendants with an ever-widening array of crimes.[218] Using this discretion, a prosecutor can wield formidable leverage in dealing with defendants.

Overcharging — specifically "charge stacking" — forces defendants to calculate the comparative risk between a jury trial and the lighter bargained-for sentence, even if they are innocent.[219] Stringent

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[213] Donald Trump employed such a strategy during his presidential run. Brandon Howard, *'Chicago Is out of Control': Trump in His Own Words on the Windy City*, CHI. TRIB. (Oct. 20, 2016, 7:51 PM), http://www.chicagotribune.com/news/ct-donald-trump-chicago-comments-20161020-story.html; Mike Lillis, *Trump's 'Law-and-Order' Gamble*, HILL (July 14, 2016, 6:00 AM), http://thehill.com/homenews/campaign/287635-trumps-law-and-order-gamble.

[214] John F. Pfaff, *The Empirics of Prison Growth: A Critical Review and Path Forward*, 98 J. CRIM. L. & CRIMINOLOGY 547, 560 (2008).

[215] MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA 180 (1995).

[216] Adam Gopnik, *How We Misunderstand Mass Incarceration*, NEW YORKER (Apr. 10, 2017), http://www.newyorker.com/magazine/2017/04/10/how-we-misunderstand-mass-incarceration.

[217] *See generally* JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION — AND HOW TO ACHIEVE REAL REFORM (2017).

[218] *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357, 359 (1978).

[219] Mark Hay, *Queens DA's Early Plea Deal System Is Built on Something Rare: Trust*, GOTHAMIST (Feb. 22, 2017, 12:25 PM), http://gothamist.com/2017/02/22/queens_early_plea_deals.php.

mandatory minimums add to prosecutorial leverage,[220] as do three-strikes rules.[221] The difference between a two-year drug charge and a minimum twenty-year drug charge can leave the defense with little option but to accept a plea.

Meanwhile, the imbalance between prosecutorial and defense power in bargaining varies between defendants, particularly between indigent defendants — many of whom are detained pre-trial — and defendants of means who await trial at home.[222] Each of these defendants faces vastly different prospects, and each may have wildly different motivations for pleading guilty. While the Supreme Court's limited reasoning concerning the constitutional acceptability of plea-bargaining, discussed in sections B and C below, may hold water for the defendant of means out on bail, the Court has overlooked fundamental differences in the potential motivations of a defendant who bargains with the prosecution while in detention.

For indigent defendants who are unable to afford bail, pleading guilty to minor crimes may serve the simple purpose of getting out of jail as soon as possible so that these defendants may meet their ongoing responsibilities in the outside world, such as childcare and employment.[223] Research has confirmed that being detained before trial significantly increases the probability of a conviction, primarily through an increase in guilty pleas.[224] Once an indigent defendant has pled guilty, however, the defendant's criminal record can then be used by the prosecution as leverage into plea bargains for more serious sentences in subsequent cases.[225] Minority groups bear the greatest

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[220] *See* Tina M. Olson, *Strike One, Ready for More?: The Consequences of Plea Bargaining "First Strike" Offenders Under California's "Three Strikes" Law*, 36 CAL. W. L. REV. 545, 545-46 (2000); Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty.

[221] *See* Olson, *supra* note 220, at 545-46.

[222] In addition to indigent defendants, a disparate impact has also been noted for noncitizens and legal permanent residents, who can also face deportation. *See* Rebecca Ibarra, *When Prosecuting Immigrants, Brooklyn District Attorney Aims to Shield Them from Deportation*, WYNC NEWS (Apr. 24, 2017), http://www.wnyc.org/story/when-prosecuting-immigrants-brooklyn-da-aims-shield-them-deportation.

[223] Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1346-47 (2012).

[224] Will Dobbie et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges* 12-13 (Nat'l Bureau of Econ. Research, Working Paper No. 22511, 2016), https://ssrn.com/abstract=2823319.

[225] *See* Adam Benforado, *Reasonable Doubts About the Jury System*, ATLANTIC (June 16, 2015), https://www.theatlantic.com/politics/archive/2015/06/how-bias-shapes-juries/395957 (explaining that defendants "can't stop losing, because every time [they] return from prison, [they] are in a worse position to gain the help [they] need").

burden in judging how to game the plea-bargaining system, as they are increasingly among those arrested and prosecuted for low-level offenses in state court, which constituted approximately 75% of all prosecutions in New York from 2010 to 2011.[226]

Even for non-minor crimes, plea-bargaining has led to instances in which actually innocent indigent defendants have pled guilty in order to avoid the threat of heavier sentences. A stark illustration is the guilty plea to manslaughter in lieu of capital murder by Victoria Banks for the death of a baby that never existed. She was sentenced to fifteen years, despite evidence that she had had her tubes tied prior to entering her guilty plea.[227]

Due to a lack of clear legal limits on plea-bargaining, defendants may waive their rights to exculpatory evidence under *Brady* in exchange for leniency. This has created a system where fundamental rights are used as bargaining chips.[228] This system has led defendants to surrender the right to assemble, to engage in certain occupations, to procreate, and to file lawsuits, among others.[229] Significantly, it is now standard practice in federal court to require a waiver of appeal rights before a plea is accepted, even while the government maintains its right to appeal an adverse sentence.[230] The Supreme Court has never addressed the question of whether this is constitutional.[231]

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[226] Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1776 (2013).

[227] *See* Bob Herbert, *An Imaginary Homicide*, N.Y. TIMES (Aug. 15, 2002), http://www.nytimes.com/2002/08/15/opinion/an-imaginary-homicide.html. For numerous examples of the preponderance of stereotypes about women that often lead to wrongful convictions, see generally Andrea L. Lewis & Sara L. Sommervold, *Death, but Is It Murder? The Role of Stereotypes and Cultural Perceptions in the Wrongful Convictions of Women*, 78 ALB. L. REV. 1035 (2014).

[228] *See* Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment, and Alienation*, 68 FORDHAM L. REV. 2011, 2013, 2015 (2000).

[229] Joseph A. Colquitt, *Ad Hoc Plea Bargaining*, 75 TUL. L. REV. 695, 722-23 (2001).

[230] *See* Offices of the U.S. Attorneys, *626. Plea Agreements and Sentencing Appeal Waivers — Discussion of the Law*, U.S. DEP'T JUST., https://www.justice.gov/usam/criminal-resource-manual-626-plea-agreements-and-sentencing-appeal-waivers-discussion-law (last visited Mar. 20, 2018).

[231] However, some Courts of Appeals have ruled specific rights non-waivable. *See* United States v. Attar, 38 F.3d 727, 732 (4th Cir. 1994) (holding that effective assistance of counsel is non-waivable); United States v. Jacobson, 15 F.3d 19, 22-23 (2d Cir. 1994) (ruling that appeal on the grounds that the sentence was based on naturalized status is non-waivable); United States v. Marin, 961 F.2d 493, 496 (4th Cir. 1992) (finding that appeal on the grounds that the sentence was based on race is non-waivable).

While unregulated plea-bargaining may lead to constitutionally questionable results in the cases of indigent defendants, that same system may provide a windfall to defendants with private counsel who defend themselves while out on bail. Patrick Keefe theorizes that the plea-bargaining system is self-reinforcing: because most cases plead out, prosecutors lack any significant courtroom experience, making them timid when faced with a well-funded private attorney on the other side of the table.[232] Defendants out on bail are better able to assist in their own defenses in various ways and thus enjoy superior bargaining positions to defendants in detention.

The lack of guidance from the Supreme Court with respect to plea-bargaining is especially concerning given that many of a defendant's core constitutional rights are not self-executing. To vindicate their rights, in all but a few sets of circumstances, defendants must proceed to trial.[233] Thus, nearly all of the Supreme Court's pronouncements regarding the meaning of these core constitutional amendments carry their true weight and effect only for those defendants who proceed to trial. For every other criminal defendant, these rights are merely negotiating chips in the system of plea-bargaining.

The Court has failed to recognize that the disappearance of the jury trial necessitates a reconsideration of how the constitutional rights of a defendant may be vindicated in the modern criminal justice system. The Court has even welcomed the fact that plea-bargaining constitutes the clear majority of activity in the criminal justice system *precisely because* it spares the expenses that accompany adjudications governed by constitutional rights.[234] With this uncritical embrace of plea-bargaining, the Court acquiesces to its own irrelevance as the nation's ultimate arbiter of constitutional rights and tacitly supports a sub-constitutional system of criminal justice. It is time that the Court reexamines its plea-bargaining jurisprudence, based as it is not on constitutional principles, but on policy considerations. The Court should consider whether those considerations continue to justify a

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[232] *See* Patrick Radden Keefe, *Why Corrupt Bankers Avoid Jail*, NEW YORKER (July 31, 2017), http://www.newyorker.com/magazine/2017/07/31/why-corrupt-bankers-avoid-jail.

[233] Consider also the significant obstacles that arise in seeking collateral relief for the defendant who has plead guilty. *See* Rebecca Stephens, *Disparities in Postconviction Remedies for Those Who Plead Guilty and Those Convicted at Trial: A Survey of State Statutes and Recommendations for Reform*, 103 J. CRIM. L. & CRIMINOLOGY 309, 313 (2013) (surveying the "diverse and unclear" state rules regarding postconviction relief for those who plead guilty and arguing that differentiating by plea is inherently unfair).

[234] *See* United States v. Ruiz, 536 U.S. 622, 631-32 (2002); *see also infra* text accompanying notes 283–87.

criminal justice system which operates almost entirely outside the confines of a meaningful constitutional framework.

B. Plea-Bargaining: A History of Unexplained Constitutionality

In the 1970s, the "previously clandestine" practice of plea-bargaining was first addressed openly by the Supreme Court.[235] In *Brady v. United States*, the Court declared that plea-bargaining is not inherently coercive, and thus a defendant's guilty plea in response to an offer of leniency is valid if voluntary.[236] The Court enumerated the perceived benefits of judicial economy and minimized exposure to defendants as elements of the "mutuality of advantage" that presumably made plea-bargaining so common, but it made no reference to any constitutional principle that allowed the practice.[237] Rather than finding the practice constitutional per se, the *Brady* Court instead ruled that guilty pleas are not "constitutionally forbidden."[238] While the gist of the *Brady* opinion was that policy reasons alone justify the practice, the Court advised of the need for continued caution in guaranteeing sound results in plea-bargained cases.[239]

In *Santobello v. New York*[240] the following year, the Court seemed to heed its own call and begin to lay the groundwork for constitutional checks on plea-bargaining. The *Santobello* Court held that the State must keep its promise regarding a sentencing recommendation if that promise resulted in a defendant's guilty plea.[241] The Court conceded that plea-bargaining must be governed by a basic conception of fairness[242] and opined that procedural safeguards might attach to the practice.[243]

Despite the warning of caution in *Brady* and the framework of fairness alluded to in *Santobello*, no subsequent wave of jurisprudence followed developing rules to guarantee sound results in plea-bargained cases. Instead, the Court's plea-bargaining case law after *Santobello* simply acknowledges the practice and presumes its benefits, rather than examining or regulating the potential fundamental-fairness issues

235 Bordenkircher v. Hayes, 434 U.S. 357, 362 (1978).
236 Brady v. United States, 397 U.S. 742, 748-51 (1970).
237 *Id.* at 752.
238 *Id.* at 751-72.
239 *Id.* at 758.
240 404 U.S. 257 (1971).
241 *Id.* at 262.
242 *Id.* at 261.
243 *Id.* at 262.

that plea-bargaining raises. The Court has never considered whether plea-bargaining inherently undermines the constitutional values of truth and accuracy, as the bargaining process collapses the traditional roles of judge, jury, prosecutor, and defense counsel.[244] The Court has not considered whether plea-bargaining makes it easier for prosecutors to obtain convictions in weaker cases.[245] National numbers for convictions have risen dramatically since the Supreme Court conceded to the practice in the 1970s.[246] During that time, questions of fairness in the Supreme Court have been subsumed by a host of policy rationales that cast plea-bargaining, and tacitly the system of mass incarceration, as modern necessities, regardless of any constitutional considerations.

In *Bordenkircher v. Hayes*, the Supreme Court baldly asserted that the plea-bargaining system was legitimate.[247] It made no reference to precedent in which such a wholesale acceptance had been announced and did not explain how that ruling fit with the promise of *Santobello* just seven years earlier. The switch was instead largely justified by policy considerations. In a 5–4 decision, the *Bordenkircher* Court protected the leverage that prosecutors may use in the plea-bargaining process from fairness considerations.[248] After indicting the defendant on a charge of uttering a forged instrument of $88.30 — an offense punishable by a term of two to ten years in prison — the prosecutor offered to recommend a sentence of five years in prison if the defendant pled guilty.[249] If the defendant did not plead guilty to that offer, the prosecutor threatened to seek an indictment under a habitual offender statute, which would subject Hayes to a mandatory sentence of life imprisonment.[250] Hayes chose not to plead guilty, and the prosecutor obtained the threatened indictment.[251] Hayes proceeded to trial, where he was found guilty and sentenced to life

[244] *See* Ken Strutin, *Truth, Justice, and the American Style Plea Bargain*, 77 ALB. L. REV. 825, 831 (2013) (explaining that in the plea-bargaining process, the defendant assumes the role of judge, jury, prosecutor, and defense counsel).

[245] *See generally* Albert W. Alschuler, *A Nearly Perfect System for Convicting the Innocent*, 79 ALB. L. REV. 919, 919-22 (2015) (describing how a prosecutor with a weak case can still get a conviction).

[246] *See* HARRISON & BECK, *supra* note 201, at 1 (showing the total number of U.S. prisoners at yearend 2002 to be 2,166,260); LANGAN ET AL., *supra* note 201, at 15 (showing the total number of U.S. prisoners in 1970 to be 196,441).

[247] Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

[248] *See id.*

[249] *Id.* at 358.

[250] *Id.* at 358-59.

[251] *Id.* at 359.

imprisonment.[252] In a federal writ of habeas corpus, Hayes alleged that the prosecutor's conduct violated his constitutional rights, and on appeal the Sixth Circuit Court of Appeals ruled that the prosecutor's conduct during the bargaining negotiations violated constitutional principles announced in *Blackledge v. Perry* that protect defendants from "the vindictive exercise of [prosecutorial] discretion."[253] The Supreme Court granted certiorari to consider what it deemed "a constitutional question of importance in the administration of criminal justice."[254]

The *Bordenkircher* Court was positioned to rule on the constitutionality of plea-bargaining, but it found no constitutional principle or precedent on which to justify the practice of plea-bargaining wholesale or in the particular circumstances of Hayes's case. Instead, the Court simply announced that plea-bargaining had already been accepted.[255]

The *Bordenkircher* Court acknowledged that "confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights,'" but reasoned that "'the imposition of these difficult choices [is] an inevitable' — and permissible — 'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.'"[256] But, it reasoned backwards that the defendant's rights must not have been impugned since such conduct is part and parcel of the system that it was embracing. It then spelled out the exact nature of this syllogism, saying: "by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty."[257]

This language demonstrates the Court's tacit acceptance of plea-bargaining and locates a government interest in persuading defendants to forgo trial.[258] The abandonment of the constitutional question of fairness has enabled the plea-bargaining regime to persist as part of the negative space of undeveloped legal doctrine. Nearly the full extent of constitutional regulation of plea-bargaining since *Bordenkircher* has surrounded the single question of whether or not a defendant's plea is

252 *Id.*

253 *Id.* at 360.

254 *Id.*

255 *See id.* at 364.

256 *Id.* (quoting Chaffin v. Stynchcombe, 412 U.S. 17, 31 (1973)).

257 *Id.*

258 *See id.*

"voluntary and intelligent."[259] Plea-bargaining has since become exponentially more common, but the Supreme Court has not meaningfully expanded the scope of its review.

C. The Court's Refusal to Regulate

The Supreme Court's neglect in regulating plea-bargaining could perhaps be justified if pleas operated in the shadow of the law of trials. This section shows, however, that the Court has refused to apply to plea-bargaining even the most basic due process rules that apply at trial.

To the extent that the Supreme Court has turned its attention to plea-bargaining, it has focused on the role of defense counsel and has found that defendants have a constitutional right to competent assistance when making pleas.[260] These cases, however, do not address the underlying concerns of fairness and due process which the plea-bargaining regime raises, but instead simply forbid incorrect and incomplete advice from defense counsel when plea-bargaining.[261] These cases are logical successors of the Court's previous holdings that pleas must be voluntary, and they reinforce the Court's pattern of encouraging defendants to participate in a sub-constitutional justice system.

In *Padilla v. Kentucky*, the Court held that defense counsel was required by the Sixth Amendment to inform her client that his plea carried a risk of deportation and that her failure to do so constituted ineffective assistance of counsel.[262] Two years later, in *Missouri v. Frye*, the Court held that the Sixth Amendment required defense counsel to inform clients of plea offers before those offers expire, and that failure to do so may render counsel's assistance ineffective.[263] In *Lafler v. Cooper*, a companion case to *Frye*, the defendant rejected a favorable plea offer on advice of defense counsel that the prosecution would not be able to prove defendant's intent to murder at trial because the victim had not been shot above the waist.[264] Whereas under the plea offer the prosecutor would have recommended a sentence of fifty-one to eighty-five months, after the defendant chose to proceed to trial on that faulty advice, he was convicted and received a mandatory

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[259] *See* Cynthia Alkon, *The U.S. Supreme Court's Failure to Fix Plea Bargaining: The Impact of* Lafler *and* Frye, 41 HASTINGS CONST. L.Q. 561, 568, 588 (2014).

[260] Lafler v. Cooper, 566 U.S. 156, 162 (2012).

[261] *See id.* at 160-69.

[262] Padilla v. Kentucky, 559 U.S. 356, 374 (2010).

[263] Missouri v. Frye, 566 U.S. 134, 145 (2012).

[264] *Lafler*, 566 U.S. at 161.

minimum sentence of 185 to 360 months imprisonment.[265] On appeal, both the prosecution and the defense conceded that defense counsel's advice with respect to the plea offer fell below the standard of effective assistance guaranteed by the Sixth Amendment.[266] The Court held that these facts met the *Strickland* prejudice standard.[267]

In his dissent in *Lafler*, Justice Scalia opined that the majority had opened a "whole new field of constitutionalized criminal procedure: plea-bargaining law."[268] Some commentators suggested that the opinions of *Frye* and *Lafler* were revolutionary, invigorating the defendant's right to counsel.[269] More recent commentators suggest, however, that neither *Frye* nor *Lafler* address the plethora of constitutionally dubious issues emanating from the plea-bargaining regime because their holdings are confined to "single instances of bad lawyering."[270] *Frye* and *Lafler* may rightly be understood as simply the latest additions to a line of Supreme Court cases which uncritically embrace plea-bargaining.

Rather than open the doors to stricter judicial oversight of the plea-bargaining regime, the *Frye* holding actually threatens to subject defendants to a criminal justice system with persistent barriers to constitutional protection. *Frye* places a constitutional duty on defense counsel to plea bargain by requiring defense counsel to inform their clients whenever prosecutors make offers.[271] This holding effectively commands participation in a practice that the Supreme Court has demonstrated a patent unwillingness to review for fundamental fairness, and that often comes at the expense of the defendant's interest in receiving a fair trial to which constitutional protections would apply. The singular focus by the Supreme Court on the behavior of defendants, and now defense counsel, in the plea-bargaining process is no substitute for what is currently needed from the Supreme Court: guidance as to how a criminal justice system that operates with virtually no trials may fulfill the Constitution's promise of due process of law.

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[265] *Id.*

[266] *Id.* at 163.

[267] *Id.* at 174.

[268] *Id.* at 175 (Scalia, J., dissenting).

[269] *See generally* Alkon, *supra* note 259, at 561-62 (summarizing and critiquing the view of these cases as revolutionary).

[270] Alkon, *supra* note 259, at 562; *see also* Alan J. Gocha, *The Sanitization of Violence: Exposing the Plea Bargain Regime as a Tool for Mass Injustice*, 8 GEO. J.L. & MOD. CRITICAL RACE PERSP. 307, 326-27 (2016).

[271] *See* Missouri v. Frye, 566 U.S. 134, 145 (2012).

The Supreme Court has impliedly asserted that "the mutuality of advantage" which plea-bargaining presents justifies the Court's abdication of its responsibility to assess the fairness of such arrangements.[272] As the plea-bargaining regime has expanded, however, so too has the significance of prosecutorial power, which remains almost entirely unregulated by the Court. The plea-bargaining process is structured in accordance with the power of prosecutors to bring charges based upon minimal evidence. Yet, the Supreme Court has refused to consider how due process may be implicated by the pressure that prosecutors are permitted to exert on defendants in the plea-bargaining process.[273] In so doing, the Court excludes itself from a meaningful review of nearly every guilty adjudication in the United States. Further amplifying the Court's irrelevance to the vast majority of activity in the criminal justice system is the way in which the Court has revered prosecutorial power at the expense of constitutional protections.

In the unanimous 2002 decision of *United States v. Ruiz*, the Supreme Court declined to extend to plea-bargained cases the plain language holding of *Brady v. Maryland* that due process entitles defendants to exculpatory evidence.[274] In *Ruiz*, the prosecution offered the defendant a "fast track" plea agreement which provided that the defendant would waive her right to impeachment evidence against adverse informants or witnesses.[275] Ruiz objected to the condition, and the prosecutors withdrew their offer, before indicting Ruiz on a charge of unlawful drug possession.[276] Ruiz then pled guilty, despite the absence of any agreement.[277] She then asked the sentencing judge to sentence her according to the "fast track" agreement, but the judge refused.[278] Ruiz appealed to the Ninth Circuit, which ruled that the prosecutor's plea offer was unlawful for insisting upon the waiver of the defendant's right to exculpatory information.[279] The Supreme Court disagreed, opining that a defendant's right to *Brady* material is

[272] *See* Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978); Brady v. United States, 397 U.S. 742, 752-53 (1970).

[273] *See Bordenkircher*, 434 U.S. at 364 (permitting prosecutors to threaten more serious charges if a defendant refuses to accept a plea deal).

[274] *See* United States v. Ruiz, 536 U.S. 622, 628-31 (2002).

[275] *Id.* at 625.

[276] *Id.*

[277] *Id.* at 625-26.

[278] *Id.* at 626.

[279] *See id.*

part only of the "fair trial" guarantee, rather than an independent due process right.[280]

This decision was not based on clear and convincing precedent. While *Brady* did arise on appeal from a conviction obtained via trial, its holding reads as follows:

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.[281]

The *Brady* decision is indisputably premised on the principle of a fair trial, but it is also indisputably premised on fair treatment of the accused:

> Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.[282]

With *Ruiz*, the Court could have extended in a logical manner a basic due process right to exculpatory evidence, thereby reviving the concept of fairness which undergirded its decision in *Santobello*. But the Court unanimously rejected the contention that fundamental fairness should apply to the plea-bargaining process, favoring instead the Government's interest in securing guilty pleas.[283] The *Ruiz* Court demonstrated an overarching concern that any decision bearing on prosecutorial strategy might lead to the Government abandoning its "heavy reliance" on plea-bargaining.[284]

In effect, the *Ruiz* decision is a recapitulation of *Bordenkircher*'s unsatisfactory explanation as to why plea-bargaining is tolerable in a society premised upon a Constitution that limits government power. The Court in *Ruiz* suggests that the "resource-saving" advantages of plea-bargaining are preferable to a system that requires trial preparation on the part of the prosecution.[285] The Court explicitly deems access to exculpatory information only a "small . . .

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[280] *Id.* at 628, 633.

[281] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[282] *Id.*

[283] *Ruiz*, 536 U.S. at 631.

[284] *Id.* at 632.

[285] *Id.*

constitutional benefit" in comparison with the advantages of conserving prosecutorial resources.[286]

The reasoning of *Ruiz* is a hallmark of the increasing irrelevance of the Supreme Court's continued doctrinal focus on trial rights. As the Supreme Court plainly indicated in *Ruiz*, trial preparation is more costly to the Government than plea-bargaining, and thus the Government reasonably relies on plea-bargaining in more than 90% of federal criminal cases.[287] That reasoning, however, is little more than an acknowledgement that economics govern our criminal justice system rather than the Constitution.

In the United States, pleas have been a typical means of conviction since the early twentieth century,[288] long before plea-bargaining per se was acknowledged openly by the Supreme Court. Around the world, it seems that some measure of plea-bargaining is nearly impossible to suppress regardless of its legality. Notably, Japan explicitly prohibited plea-bargaining by law until very recently.[289] Despite the previous lack of formal plea bargains, however, defendants in Japan could confess in exchange for a prosecutor's recommendation of a lenient sentence.[290] A confession in Japan thereby functioned analogously to a plea bargain, and defendants confessed in Japan nearly 93% of the time despite plea-bargaining's outward illegality.[291] Plea-bargaining may be inescapable as a practical solution to the needs of overtaxed modern criminal justice systems, even if a society might purport to disallow it. If plea-bargaining is likely to be central to any criminal justice system, it accordingly warrants regulation. In the United States, the Supreme Court has defended openly the government's interest in plea-bargaining without offering guidance as to how it might comport with the Constitution's guarantee of due process.

The unanimous decision in *Ruiz* saw the Supreme Court confirm its own irrelevance to the plea-bargaining regime in two discrete, yet interrelated, ways. First, the holding stated that to earn a due process

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[286] *See id.*

[287] *Id.*

[288] Doug Lieb, *Vindicating Vindictiveness: Prosecutorial Discretion and Plea Bargaining, Past and Future*, 123 YALE L.J. 1014, 1023 (2014).

[289] Hanna Kozlowska, *Japan's Notoriously Ruthless Criminal Justice System Is Getting a Facelift*, QUARTZ (May 26, 2016), https://qz.com/693437/japans-notoriously-ruthless-criminal-justice-system-is-getting-a-face-lift; *see also* J. Mark Ramseyer & Eric B. Rasmusen, *Why Is the Japanese Conviction Rate So High?* 3 (Harvard Law Sch. John M. Olin Ctr. for Law, Econ. & Bus., Paper No. 240, 1998) (discussing the prior unavailability of plea bargains in Japanese law).

[290] Ramseyer & Rasmusen, *supra* note 289, at 3.

[291] *Id.* at 4.

protection designed to promote fair and just results, a defendant must proceed to trial.[292] In the same decision, the Court protected the Government's interest in *not* proceeding to trial, where the defendant would receive such protections.[293] By protecting the Government's interest in not proceeding to trial, the Court effectively incentivized the Government to avoid subjecting itself to the demands of the Constitution. Consequently, the political and economic demands that have given rise to the plea-bargaining regime guide the criminal justice system to a far greater extent than does the Supreme Court. Meanwhile, the Court occupies itself primarily with the regulation of the criminal trial, a feature of our constitutional democracy that has never been more irrelevant.

III. MASS INCARCERATION, CONSTITUTIONAL SENTENCING, AND THE DEATH ROW CONSTITUTION

The rate of imprisonment in the United States is a global anomaly. The U.S. now has the highest incarceration rate in the world,[294] imprisoning approximately 25% of the world's prisoners while accounting for only 5% of the world's population.[295] This phenomenon is relatively new. Until around 1975, the rate of imprisonment in the United States remained stable and in line with global averages,[296] before increasing more than sevenfold in the following forty years.[297] During this period, nearly every state and the federal government increased the severity of its sentencing practices by specifying, among other things, longer prison terms for non-capital offenses.[298] The resulting increases in both the severity of punishment

[292] *See Ruiz*, 536 U.S. at 633.

[293] *See id.*

[294] Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 428 (2013).

[295] NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES 2 (2014).

[296] Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 587 (2012).

[297] *See* NAT'L RESEARCH COUNCIL, *supra* note 295, at 2.

[298] *See id.* at 3 (describing how the rate of imprisonment grew exponentially as a result of a number of factors). Perhaps most significantly, punishment policy in the United States began to change in the 1970s, when prison time increasingly became required for lesser offenses. *Id.* Mandatory prison time became even more common in the 1980s, when the U.S. Congress and most state legislatures mandated variations on the 5, 10, and 20 schemes for repeat offenders. *Id.* In the 1990s, Congress and more than one-half of states enacted "three strikes and you're out" laws that mandated minimum sentences of twenty-five years or longer for affected defendants. *Id.* Today,

and the frequency of incarceration have resulted in what is now commonly called "mass incarceration."[299] While mass incarceration has taken shape, the Supreme Court has not accordingly expanded its analysis of the constitutional implications of longer prison sentences for a historically unprecedented number of people. Instead, the Court has spent those years focusing nearly all its attention on a single penalty, which in practice affects only about 3,000 of the approximately 6.9 million people under the supervision of the United States' adult correctional systems (fewer than 0.05%): the death penalty.[300]

This Part examines how the Supreme Court has taken ownership of the death penalty to the exclusion of virtually all other sentencing practices. While imposing death is undoubtedly a unique penalty deserving of the Court's attention, the Court has used its focus on capital punishment to justify eliding its responsibility to apply the Constitution to far more common sentencing practices.

A. Death Row in the Age of Mass Incarceration

In practice, the death penalty affects a statistically negligible portion of the millions of people under penal control in the United States. In 2013, only 3,108 of the approximately 2.2 million people imprisoned in the U.S. (roughly one-tenth of 1% of prisoners) were on death row.[301] An additional 4.8 million people were on probation or parole, meaning that, as of 2013, approximately 6.9 million people were

scholars are increasingly of the opinion that the anomalously high rates of incarceration in the United States create injustices in and of themselves, most glaringly in regards to poor and minority communities. *See id.*

[299] Traum, *supra* note 294, at 426.

[300] *See* DEBORAH FINS, NAACP LEGAL DEF. & EDUC. FUND, INC., CRIMINAL JUSTICE PROJECT, DEATH ROW U.S.A.: SPRING 2013, at 1 (2013), http://www.naacpldf.org/files/publications/DRUSA_Spring_2013.pdf [hereinafter DEATH ROW 2013] (listing the total number of death-row inmates as of April 1, 2013); LAUREN E. GLAZE & DANIELLE KAEBLE, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2013, at 1 (2014), https://www.bjs.gov/content/pub/pdf/cpus13.pdf (listing the total number of people under the supervision of U.S. adult correctional systems as of yearend 2013).

[301] *See* FINS, DEATH ROW 2013, *supra* note 300, at 1 (stating the total number of death-row inmates as of April 1, 2013); GLAZE & KAEBLE, *supra* note 300, at 2 (listing the total number of people incarcerated in the United States as of yearend 2013). The "Highlights" section contains the "1 in" numbers. *Id.* at 1. Table 1 lists adult numbers. *Id.* at 2. Table 5 charts male and female numbers. *Id.* at 6. Appendix table 5 comprises "[e]stimated number of persons supervised by adult correctional systems, by correctional status, 2000–2013." *Id.* at 13. Appendix table 2 specifies "[i]nmates held in custody in state or federal prisons or in local jails, 2000 and 2012–2013." *Id.* at 12.

under correctional supervision.[302] Thus, death-row prisoners make up approximately 0.05% of all people serving criminal sentences in the United States. In recent years, states such as Maryland, Illinois, and New Mexico have abolished the death penalty,[303] while thirty-one states continue to allow the practice, although the frequency with which these States use the practice varies widely. Since 1976, more than half of the 1,468 people executed in the United States were tried and sentenced in only three states: Texas, Oklahoma, and Virginia.[304] Despite the infrequency of the death penalty in the United States, the Supreme Court has considered the constitutional implications of the sentence more than 200 times since 1972,[305] while only rarely considering the constitutionality of sentences involving other forms of punishment.

The system of mass incarceration began its speedy rise at virtually the same moment that the Supreme Court embraced execution as an issue of constitutional significance in the 1970s.[306] A decade before its groundbreaking decision in *Furman v. Georgia*, which effectively struck down all death-penalty schemes in the United States,[307] the Court had ruled that the Eighth Amendment applied to the states by way of the Fourteenth Amendment in *Robinson v. California*, a non-capital case.[308] The rule that criminal defendants in state courts should receive Eighth Amendment protections, however, has since been applied almost exclusively to defendants facing the death penalty. After issuing only two capital case decisions between 1937 and 1967, the Supreme Court changed course dramatically, issuing at least 209 capital case decisions between 1972 and 2006.[309] Over that same period, as nearly every State and the federal government increased the

302 GLAZE & KAEBLE, *supra* note 300, at 2.

303 *States with and Without the Death Penalty*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/states-and-without-death-penalty (last visited Feb. 3, 2018).

304 *See Facts About the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/documents/FactSheet.pdf (last updated Feb. 2, 2018).

305 James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963–2006*, 107 COLUM. L. REV. 1, 14 n.42 (2007).

306 *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 171 (1976) (determining that Eighth Amendment analysis is not limited to the prohibition of "'barbarous' methods that were generally outlawed in the 18th century"); Furman v. Georgia, 408 U.S. 238, 239-240 (1972) (per curiam) (holding that imposition of the death penalty in the instant cases would "constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments").

307 *See Furman*, 408 U.S. at 239-41.

308 *See* Robinson v. California, 370 U.S. 660, 666 (1962); DAVID GARLAND, PECULIAR INSTITUTION 216 (2010).

309 Liebman, *supra* note 305, at 14 n.42.

severity of their non-capital sentencing practices, the Court eroded virtually all of the minimal constitutional sentencing protections that applied to non-capital criminal defendants.[310]

Today, many of the Supreme Court's sentencing doctrines concerning the death penalty have little to no application in non-capital cases. The thousands of pages of ink which the Supreme Court has devoted to sentencing apply almost exclusively to capital punishment, concerning issues such as what evidence might be admitted,[311] what jury instructions defendants are entitled to,[312] who may find facts,[313] the permissible conditions for excusing jurors,[314] and the constitutionality of available methods of execution,[315] to name a few. In contrast, the Court has largely ignored questions of law applicable to the overwhelming majority of those subject to the criminal justice system, even though the animating principles of the Court's death-penalty jurisprudence have been imported from non-death-penalty cases. These principles include the proportionality[316] and evolving standards of decency[317] doctrines. The Court has consistently refused to serve as the final arbiter and constitutional leader in the regulation of sentencing beyond the death penalty, even as the more common, non-capital sentencing practices are increasingly questioned by prosecutors, defense attorneys, and judges alike.[318] This amounts to an abdication of its responsibility to guide lower courts that are unwittingly complicit in the system of mass incarceration.[319]

The Supreme Court's acquiescence to the mass-incarceration system results from its volatile interpretations of the reach of the Eighth

310 *See* NAT'L RESEARCH COUNCIL, *supra* note 295, at 2-3 (describing how the rate of imprisonment grew exponentially from the 1970s, as prison time increasingly became mandatory for lesser offenses, and Congress and more than one-half of states enacted "three strikes" laws mandating minimum sentences of twenty-five years or longer for affected defendants).

311 *See* Bosse v. Oklahoma, 137 S. Ct. 1, 2-3 (2016) (reconfirming the prohibition on characterizations and opinions from a victim's family members about the crime, the defendant, and the appropriate sentence).

312 *See* Kansas v. Carr, 136 S. Ct. 633, 642-43 (2016).

313 *See* Hurst v. Florida, 136 S. Ct. 616, 619 (2016).

314 *See* Davis v. Ayala, 135 S. Ct. 2187, 2200-08 (2015).

315 Glossip v. Gross, 135 S. Ct. 2726, 2731 (2015).

316 *See* Weems v. United States, 217 U.S. 349, 366-67 (1910).

317 *See* Trop v. Dulles, 356 U.S. 86, 101 (1958).

318 *See generally* Mark Osler & Mark W. Bennett, *A "Holocaust in Slow Motion?": America's Mass Incarceration and the Role of Discretion*, 7 DEPAUL J. SOC. JUST. 117, 119-20 (2014) (describing how judges and prosecutors have been complicit in — and concerned about their role in — mass incarceration).

319 *See id.*

Amendment and other constitutional principles to non-capital sentencing practices. In establishing the Court's death-penalty regime in 1976 in *Gregg v. Georgia*, the Court borrowed from its non-capital Eighth Amendment jurisprudence to animate what was effectively a new area of constitutional law: death-penalty law.[320] Many of the Court's decisions concerning the constitutionality of capital and non-capital sentencing practices since *Gregg* have not seen the Court acting with one voice, and a host of decisions have obscured how the Court views the applicability of the Constitution to various sentencing practices. For example, the Court has ruled that the Constitution requires all criminal sentences (capital or not) to be proportionate to the severity of the offense,[321] but has also ruled that this doctrine should apply only to the death penalty, if at all.[322] Amid this doctrinal dissonance, the Court has effectively drawn a line demarcating the death penalty, and, recently, juvenile life without parole,[323] as the only sentencing practices deserving of meaningful constitutional review — two sentencing practices which have virtually no measurable effect on the mass-incarceration system.

Examination of Supreme Court precedent pre-*Gregg* reveals no constitutional rationale for the Court's reluctance to apply the Constitution to non-capital criminal sentencing. In fact, all pre-*Gregg* precedent requires the Court to apply the Eighth Amendment to non-capital sentences.[324] Since *Gregg*, however, the Court has regularly refused to do so based on the conclusory statement that "death is different."[325] The post-*Gregg* period has also seen the Court attempt to justify why it should not apply the Eighth Amendment outside of the death penalty on federalist grounds, even though the Eighth Amendment did apply outside of the capital context before *Furman*.[326] Finally, as we show in Part IV, in ostensibly defending federalist principles, the Court has effectively eroded any meaningful conception of federalism in its capital-sentencing jurisprudence.

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[320] *See* Gregg v. Georgia, 428 U.S. 153, 170-73 (1976).

[321] *See* Solem v. Helm, 463 U.S. 277, 284 (1983).

[322] *See* Harmelin v. Michigan, 501 U.S. 957, 992-94 (1991) (Scalia, J., delivering a separate opinion); Rummel v. Estelle, 445 U.S. 263, 271-72 (1980).

[323] *See infra* Subpart IV.C.

[324] *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 99-100 (1958); Weems v. United States, 217 U.S. 349, 379-82 (1910).

[325] *Gregg*, 428 U.S. at 188.

[326] *See, e.g.*, Robinson v. California, 370 U.S. 660, 666-67 (1962); *Trop*, 356 U.S. at 99-101; *Weems*, 217 U.S. at 379-82.

B. Constitutionalizing Death with Non-Death Jurisprudence

In 1972, the Supreme Court struck down virtually all death-penalty schemes in the United States with a per curiam opinion that lacked a majority rationale.[327] The *Furman* decision was unprecedented and controversial, as the Court had rejected a similar constitutional challenge to the death penalty the previous year.[328] *Furman* consisted of nine separate opinions, but while the Court lacked a cohesive opinion, five concurring justices identified as constitutionally infirm the apparent arbitrary application of the death penalty in the absence of procedural safeguards.[329] Justices Stewart, Marshall, and Douglas also expressed concerns about the apparent racial bias against black defendants engendered by seemingly arbitrary processes.[330]

The national reaction to *Furman* was mixed, and within two years, thirty-five states had enacted new capital statutes.[331] By the end of 1974, 231 people had been sentenced to death under statutes enacted after *Furman*.[332] Only four years after effectively dismantling the death penalty, the Court began the work of constitutionalizing its administration in *Gregg v. Georgia*, an ongoing process that continues to absorb the Court's attention forty years later. To constitutionalize the death penalty and effectively create a new field of constitutional law, the Court borrowed from its non-capital sentencing jurisprudence to provide a doctrinal foundation rooted in precedent. In attempting to animate that foundation, the Court imported the non-capital sentencing doctrine of proportionality — which had been a part of the Court's Eighth Amendment jurisprudence since 1910[333] — and the non-capital evolving standards of decency doctrine first announced in 1958.[334]

In *Gregg*, the Supreme Court effectively reinstated the death penalty after reviewing updated state statutes which had been tailored to cure the constitutional infirmities identified in *Furman*.[335] The cures were

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[327] *See* Furman v. Georgia, 408 U.S. 238, 239-40 (1972) (per curiam) (striking down the death penalty in the instant cases due to evidence of capital sentences violating the Eighth Amendment).

[328] *See* McGautha v. California, 402 U.S. 183, 196 (1971).

[329] *See Furman*, 408 U.S. at 240.

[330] *See id.* at 242, 249-57 (Douglas, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 364-65 (Marshall, J., concurring).

[331] GARLAND, *supra* note 308, at 233.

[332] *Id.*

[333] *See* Weems v. United States, 217 U.S. 349, 367 (1910).

[334] *See* Trop v. Dulles, 356 U.S. 86, 101 (1958).

[335] *See* Gregg v. Georgia, 428 U.S. 153, 196-207 (1976).

various among the states, but the Georgia statute, approved in the lead case of *Gregg*, provided for bifurcated trials, mandatory appellate review of comparable cases to determine whether a sentence of death would be disproportionate to the crime committed, and an inquiry by the state supreme court as to "[w]hether the sentence of death was imposed under the influence of passion, prejudice, or [any] arbitrary factor."[336]

Proportionality was the doctrinal touchstone of *Gregg*'s controlling plurality opinion. The Court, in reviving the death penalty, attempted to address the federalist critique of *Furman* by explaining that, while the Court had drawn lines over which the states could not cross, it would defer to legislatively enacted punishments so long as they were not "disproportionate" to the crime involved.[337] The Court approved the use of proportionality review as a procedural safeguard in the Georgia statute, and since *Gregg*, proportionality review has been employed in many states' death-penalty schemes.[338]

Yet, after importing the rule of proportionality from its non-capital precedent to animate its new death-penalty jurisprudence, the Court has been startlingly uneven in its recognition of the proportionality principle as a feature of the Eighth Amendment outside of the death penalty. The Court declared in *Solem v. Helm* that proportionality review was a general constitutional requirement in all criminal sentencing,[339] only to state in *Rummel v. Estelle* that proportionality is virtually inapplicable outside of the death penalty context.[340] Neither *Rummel* nor *Solem* has been overruled, and they both remain viable precedent, even though they presumably require different outcomes.[341]

With the applicability of the proportionality rule in limbo, from 1983 until 2010 not a single non-capital sentence was ruled unconstitutional by the Court for want of proportionality. While the principles of federalism and judicial deference to legislatures were relied on to justify this stance, the Court's incongruous treatment of proportionality more rightly reflects a repudiation of its responsibility to determine how the Eighth Amendment should be interpreted outside of the death penalty.

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336 *Id.* at 163, 166-67.

337 *See id.* at 174-76.

338 *See* Pulley v. Harris, 465 U.S. 37, 42-44 (1984).

339 *See* Solem v. Helm, 463 U.S. 277, 284 (1983).

340 *See* Rummel v. Estelle, 445 U.S. 263, 272 (1980).

341 *Solem*, 463 U.S. at 288 n.13 (stating that it does not overrule *Rummel*).

Furthermore, the federalism concerns the Court proclaimed that it was protecting by refusing to apply the Eighth Amendment in non-capital contexts were belied by the Court's embrace of its supervisory role as arbiter of the death penalty. As detailed below, recently the Court has applied the Eighth Amendment to life sentences without possibility of parole for juveniles;[342] but it has done so without providing any coherent explanation, consistent with principles of federalism, for why death and juvenile life sentences are different from all other sentencing practices.

C. Sentencing Weems *to Death*

Gregg's main plurality opinion drew the proportionality principle from the non-capital case of *Weems v. United States*.[343] In *Weems*, a 5–2 majority found unconstitutional a Philippine court's imposition of punishment for falsifying an official document by *cadena temporal*. The punishment included imprisonment for twelve years and one day during which the prisoner should at all times carry a chain at the ankle, hanging from the wrists, performance of hard labor for the benefit of the state, loss of certain civil rights, and, thereafter, lifetime surveillance.[344] The *Weems* Court concluded such penalties are astonishing to those who "believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense."[345]

The *Weems* Court addressed federalist concerns about the role the Court should play in reviewing legislatively enacted punishments, referencing an 1899 case from the Supreme Judicial Court of Massachusetts for the following discussion:

> It is for the legislature to determine what acts shall be regarded as criminal and how they shall be punished. It would be going too far to say that their power is unlimited in these respects. Ordinarily, the terms "cruel and unusual" imply something inhuman and barbarous in the nature of the punishment . . . . But it is possible that imprisonment in the state prison for a

[342] *See infra* Subpart IV.C.

[343] *See* Gregg v. Georgia, 428 U.S. 153, 171-72 (1976) (citing Weems v. United States, 217 U.S. 349, 366-67 (1910)).

[344] *Weems*, 217 U.S. at 364.

[345] *Id.* at 366-67.

> long term of years might be so disproportionate to the offense as to constitute a cruel and unusual punishment.[346]

The *Weems* Court took pains to explain that the cruel and unusual punishments clause was not meant to be an empty promise or merely an admonishment to sovereigns; rather, it was a vehicle for the Court to prevent legislatures from imposing punishments which in application may be cruel and unusual. Referencing Patrick Henry, the Court concluded that the clause expressly limited the powers of legislatures: while certain framers thought that the cruel and unusual punishments clause would be unnecessary because the spirit of liberty would prevent such enactments, "Henry and those who believed as he did would take no chances."[347] The Court wrote of the ratification of the cruel and unusual punishments clause:

> With power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprisonment with what accompaniments they might, what more potent instrument of cruelty could be put into the hands of power? And it was believed that power might be tempted to cruelty. This was the motive of the clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the Stuarts', or to prevent only an exact repetition of history. We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked.[348]

The *Weems* Court also found that the Eighth Amendment, like all provisions of the Constitution, "must be capable of wider application than the mischief which gave it birth."[349] Thus, the cruel and unusual punishments clause did not apply solely to punishments which might have been considered cruel and unusual historically, for such a construction would render the principle almost entirely moot.[350] The

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[346] *Id.* at 368 (citing McDonald v. Commonwealth, 53 N.E. 874, 875 (Mass. 1899) (citations omitted)). The *Weems* Court also referenced a dissenting opinion of Justice Field in the case of *O'Neil v. Vermont*, 144 U.S. 323, 339-40 (1892). *Weems*, 217 U.S. at 371 ("[T]he inhibition was directed not only against punishments which inflict torture, 'but against all punishments which, by their excessive length or severity, are greatly disproportioned to the offenses charged.'").

[347] *Id.* at 372.

[348] *Id.* at 372-73.

[349] *Id.* at 373.

[350] *See id.*

Court declared that it was and is the province of the courts to provide meaningful and continuing oversight over all manner of legislatively enacted punishments. Ultimately, the Court held that the punishment handed down in the instant case was "cruel in its excess of imprisonment,"[351] but not because of the foreignness of the sentence, finding that the sentence would be unconstitutional if it were found in a federal enactment.[352]

Although *Weems* continues to be good law, the Court has bifurcated its treatment of proportionality as a principle of constitutional sentencing since *Gregg*. The Court has approved the use of proportionality review to prevent states from arbitrarily imposing the death penalty but has frequently refused to review all other sentences for proportionality. This has in large part been due to the Court's conservative justices' insistence that the Court would breach federalist principles if it were to occupy a supervisory role over legislatively enacted punishments. Post-*Furman*, the Court's conservative wing has seemed willing "to split the baby" by accepting the Court's supremacy over the death penalty while eschewing review of non-capital sentencing practices.

In 1980, the conservative wing of the Court demonstrated its hostility to a general proportionality rule applying outside the context of the death penalty. In *Rummel v. Estelle*, the Court considered a defendant's challenge to his life sentence imposed by Texas under the state's recidivist statute.[353] In 1964, Rummel had pled guilty to the fraudulent use of a credit card in the amount of $80; in 1969, he had pled guilty to passing a forged check in the amount of $28.36; and in 1973, he was convicted of felony theft by a jury for obtaining $120.75 by false pretenses.[354] Since he had been convicted of two prior felonies, the trial court imposed the life sentence mandated by Texas's recidivist statute.[355] In a petition for a writ of habeas corpus in the federal district court, Rummel argued that his life sentence was so disproportionate to the crimes he had committed as to constitute cruel and unusual punishment.[356]

In the Supreme Court, then Associate Justice Rehnquist, writing for a five-vote majority, described the Court's relationship to the proportionality rule as noncommittal: "This Court has *on occasion*

[351] *Id.* at 377.

[352] *Id.*

[353] Rummel v. Estelle, 445 U.S. 263, 264-65 (1980).

[354] *Id.* at 265-66.

[355] *Id.* at 266.

[356] *Id.* at 267.

stated that the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime."[357] The Court noted that the proportionality "proposition" had appeared most frequently in the context of the Court's recent death-penalty jurisprudence.[358] While Rummel attempted to rely on these death-penalty cases as support for the application of the proportionality standard in his own case, the majority cited Justice Stewart in *Furman* for the proposition that the "penalty of death differs from all other forms of criminal punishment" because it is "unique in its total irrevocability."[359] From this language, the majority insisted that its decisions applying the prohibition of cruel and unusual punishments to capital cases were only of "limited assistance" in deciding the constitutionality of the life-imprisonment punishment meted out to Rummel.[360]

The Court also reasoned that the proportionality proposition had not historically been applied to sentences of imprisonment. To support this contention, the majority distinguished *Weems* by virtue of the fact that Weems was sentenced to wear a chain and work hard labor as part of his punishment.[361] The majority concluded that the express language regarding the proportionality principle in *Weems* was tied up with the accessories of that punishment.[362] From there, the Court reasoned that for all non-death-penalty punishments, "the length of the sentence actually imposed is purely a matter of legislative prerogative."[363] Four justices dissented, arguing that the Eighth Amendment prohibits punishments that are grossly disproportionate to the crimes committed.[364] In response to the dissent's examples of hypothetical sentences that would be unconstitutional for gross disproportionality, the majority conceded (in a footnote) that its ruling should not be construed as foreclosing all possibility of a proportionality principle coming into play in "extreme cases," such as a legislature making "overtime parking a felony punishable by life imprisonment."[365]

357 *Id.* at 271 (emphasis added).
358 *Id.* at 272.
359 *Id.*
360 *Id.*
361 *Id.* at 273-74.
362 *Id.* at 274.
363 *Id.*
364 *Id.* at 285, 288 (Powell, J., dissenting).
365 *Id.* at 274 n.11 (majority opinion).

Rummel represents a significant departure from the conception of the Eighth Amendment in *Weems* because of its conclusion that "the length of the sentence actually imposed is purely a matter of legislative prerogative."[366] The *Rummel* majority cited no precedent for this proposition, relying solely on its contention that *Weems* did not require the general application of the proportionality principle. The *Rummel* majority supported this contention by citing a three-page opinion in a case decided six years after *Weems*.[367] In *Badders v. United States*, the Court did not apply the doctrine of proportionality in rejecting a defendant's challenge to a federal statute that penalized separate instances of "putting a letter into the post office" as distinct, punishable offenses, as opposed to a single punishable offense of a scheme of fraud.[368] The *Badders* Court in its terse opinion stated that the defendant's contentions "need[ed] no extended answer," and concluded that there was no ground for declaring the punishment unconstitutional, citing a previous case in which a punishment of imprisonment for ten years for conspiracy to defraud was found not cruel and unusual.[369] The *Rummel* majority had no basis for concluding that *Badders* had reopened the question of the proportionality rule or had overruled *Weems*.

Three years after *Rummel*, a 5–4 Court majority once again changed course on the application of the proportionality principle to non-capital punishments, as Justice Blackmun, who had joined the majority in *Rummel*, switched sides, joining the majority in *Solem v. Helm*.[370] In *Solem*, Justice Powell, writing for the majority, ruled that the cruel and unusual punishments clause prohibits all "sentences that are disproportionate to the crime committed."[371] Similar to the facts in *Rummel*, Helm had been convicted of six non-violent felonies and after he pled guilty to uttering a "no account" check for $100, his seventh felony conviction; Helm was sentenced to life imprisonment under South Dakota's recidivist statute.[372] Justice Powell described the issue presented as "whether the Eighth Amendment proscribes a life sentence without possibility of parole for a seventh nonviolent felony."[373]

366 *See id.* at 274.

367 *Id.* (citing Badders v. United States, 240 U.S. 391, 394 (1916)).

368 *Badders*, 240 U.S. at 393-94.

369 *Id.* (citing Howard v. Fleming, 191 U.S. 126, 135 (1903)).

370 *See* Solem v. Helm, 463 U.S. 277, 304 (1983) (Burger, C.J., dissenting).

371 *Id.* at 284 (majority opinion).

372 *Id.* at 279-82.

373 *Id.* at 279.

The *Solem* majority attempted to enshrine proportionate sentencing as a constitutional guarantee regardless of the challenged penalty, stating that "[t]he constitutional principle of proportionality has been recognized explicitly in this Court for almost a century."[374] The Court concluded that there was no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences, a conclusion directly at odds with its reasoning in *Rummel*.[375] The *Solem* majority addressed the use of proportionality in capital cases and found that no distinction was drawn in those cases from cases of imprisonment.[376] The majority conceded that outside of capital punishment, successful challenges to the proportionality of particular sentences would likely be "exceedingly rare," but that did not mean that proportionality analysis would be entirely inapplicable in noncapital cases.[377] The Court stated that no sort of penalty is per se constitutional.[378] It stated that while in certain cases no term of imprisonment would be considered disproportionate, in others a single day in prison may be unconstitutional.[379]

The four-justice dissent in *Solem* reveals how contentious the application of the proportionality doctrine outside of the death penalty had quickly become. The dissenters insisted that the death penalty alone warranted proportionality review, claiming that the controlling law governing the case was "crystal clear" and accused the majority of "distort[ing] the concept of proportionality of punishment by tearing it from its moorings in capital cases."[380] The dissent asserted that the majority had discarded "any concept of stare decisis" by not following *Rummel*.[381] The majority, in turn, pointed the finger at the dissenting justices as discarding prior precedent, notably *Weems*, by asserting that the principle of proportionality was only a "narrow" one.[382]

Thus, the Court had announced two manifestly contradictory 5–4 opinions within three years. The majority in *Rummel* and the dissenters in *Solem* attempted to draw a clear line of demarcation between the death penalty and non-capital sentences, even going so far

374 *See id.* at 286.
375 *Id.* at 288-90.
376 *Id.* at 288-89.
377 *Id.* at 289-90.
378 *Id.* at 290.
379 *Id.*
380 *Id.* at 304 (Burger, C.J., dissenting).
381 *Id.*
382 *Id.* at 288 n.13 (majority opinion).

as to assert that the concept of proportionality was "moor[ed] in capital cases," rather than in the non-capital case of *Weems*.[383]

In the year after *Solem*, in the capital case of *Pulley v. Harris*, the Court clarified that the proportionality review mandated in many post-*Furman* capital sentencing statutes was distinct from a proportionality principle of general applicability.[384] Harris argued that he was entitled to a writ of habeas corpus because the California statute under which he had been sentenced to death did not provide for comparative proportionality review between his crime and sentence and the sentences imposed on other people convicted of similar crimes.[385] The Court distinguished this manner of proportionality review from the sort conducted in *Solem* and in *Enmund*, which concerned proportionality between the gravity of the offense and the severity of the penalty.[386] Many post-*Furman* capital statutes solely inquired as to whether a given death sentence was disproportionate when compared to the punishments imposed on others convicted of similar crimes.[387] Comparative proportionality review, the *Pulley* Court ruled, was not required by the Eighth Amendment, but was a mechanism that states could use in order to comply with the Eighth Amendment in sentencing people to death.[388] While the *Pulley* Court recognized a proportionality review of general applicability, that rule was not once found by the Court to have been violated after *Solem* for almost three decades, until the juvenile life without parole case of *Miller* in 2012.[389]

The Court revisited the subject of proportionality outside of the death penalty in *Harmelin v. Michigan*,[390] which was distinguishable from both *Rummel* and *Solem*, in that it involved a challenge to a mandatory sentence of life imprisonment without possibility of parole for a single drug possession offense, rather than a challenge to a recidivist statute.[391] Yet, the Court refused to find that Harmelin's sentence of life imprisonment without possibility of parole for possession of 672 grams of cocaine was constitutionally

383 *See id.* at 304 (Burger, C.J., dissenting); *see also* Rummel v. Estelle, 445 U.S. 263, 271-72 (1980).

384 *See* Pulley v. Harris, 465 U.S. 37, 42-44 (1984).

385 *Id.* at 39-40.

386 *See id.* at 42-43.

387 *Id.* at 44.

388 *Id.* at 50-51.

389 *See* Miller v. Alabama, 567 U.S. 460, 469-80 (2012).

390 501 U.S. 957, 961 (1991) (Scalia, J., delivering a separate opinion).

391 *See id.* at 961-64.

disproportionate. A different plurality attempted to recast the proportionality doctrine as prohibiting "grossly disproportionate" sentences, while rejecting the notion that mandatory life imprisonment without possibility of parole for a single drug possession offense should be considered grossly disproportionate.[392] If indeed there was a proportionality rule, its application was to be so restricted as to make the rule meaningless.

Before the Supreme Court, Harmelin argued that his sentence was unconstitutional because (1) it was "significantly disproportionate" to his crime; and (2) the sentencing judge had been statutorily required to impose it without taking into account the particularized circumstances of the crime and the criminal.[393] The Court's consideration of *Harmelin* resulted in five different opinions, each of which discussed the Court's roles with respect to capital and non-capital sentencing.[394] A majority concurred that the individualized sentencing doctrine applicable in capital proceedings — which requires consideration of aggravating and mitigating factors before imposition of a mandatory sentence — did not apply to non-capital sentences.[395] Five justices concurred that Harmelin's claim that he was entitled to an individualized determination that his sentence was appropriate was supported by the Court's "death penalty jurisprudence," but no such entitlement existed outside of the capital sentencing context.[396]

Harmelin's claims were ultimately unsuccessful; nevertheless, seven justices on the Court concluded that the Constitution provided some form of protection against disproportionate sentences in non-capital cases. Only Justice Scalia and Chief Justice Rehnquist concluded that the Eighth Amendment contains no proportionality guarantee whatsoever, dismissing *Solem* outright as being "simply wrong."[397] Justices White, Blackmun, and Stevens dissented, pointing to the language in *Weems* that it is a "precept of justice that punishment for crime should be graduated and proportioned to [the] offense."[398] They concluded that Michigan's "statutorily mandated penalty of life

[392] *Id.* at 1001, 1009 (Kennedy, J., concurring in part and concurring in the judgment).

[393] *Id.* at 961-62 (Scalia, J., delivering a separate opinion).

[394] *See* Marc A. Paschke, Harmelin v. Michigan*: Punishment Need Not Fit the Crime*, 23 LOY. U. CHI. L. J. 273, 273 n.5 (1992).

[395] *See Harmelin*, 501 U.S. at 994-96 (majority opinion).

[396] *Id.* at 995.

[397] *Id.* at 965 (Scalia, J., delivering a separate opinion).

[398] *Id.* at 1012 (White, J., dissenting).

without possibility of parole for possession of narcotics is unconstitutionally disproportionate."[399] Justice Marshall also dissented on proportionality grounds, pointing out that Michigan's statute mandated life sentences without possibility for parole "even for first-time drug possession offenders."[400]

The now-dominant approach to proportionality in the non-capital context was set out in a concurrence by Justice Kennedy, joined by Justices O'Connor and Souter. Justice Kennedy attempted to reconcile the tumultuous history of the proportionality principle by recognizing that a "narrow proportionality principle" applies to noncapital sentences.[401] The opinion concluded that "[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime."[402] In application, these concurring justices concluded that Harmelin's crime of drug possession "was far more grave" than the crime at issue in *Solem* and concluded that the severity of the "drug epidemic" in the United States meant Harmelin's sentence fell within "constitutional boundaries."[403]

The concurrence was effectively a death-knell for a general application of the proportionality principle. Doctrinally, the concurring justices forged a partial compromise by not holding the Court to the general applicability of a straightforward proportionality principle as announced in *Weems* and *Solem* and yet repeatedly alluding that the Court might find room to intervene in unnamed "extreme" cases.[404] The history since *Harmelin* demonstrates that the modern Court is almost never willing to perform the function the Court advocated in *Weems* of providing a meaningful check on the legislature.[405] The only successful assertion of this principle came in 2010, when the Supreme Court found that life sentences without possibility of parole for juvenile offenders were sufficiently "extreme" under the principle Justice Kennedy set forth in his concurrence in *Harmelin*.[406]

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399 *Id.* at 1027.

400 *Id.* at 1028 (Marshall, J., dissenting).

401 *Id.* at 996-97 (Kennedy, J., concurring in part and concurring in the judgment).

402 *Id.* at 1001.

403 *Id.* at 1001-04.

404 *See id.* at 962, 985 (Scalia, J., delivering a separate opinion); *id.* at 998, 1001, 1007 (Kennedy, J., concurring in part and concurring in the judgment).

405 *See* Weems v. United States, 217 U.S. 349, 372-73 (1910).

406 *See* Graham v. Florida, 560 U.S. 48, 49-50, 59-60 (2010) (citing *Harmelin*, 501 U.S. at 997, 1000-01 (Kennedy, J., concurring in part and concurring in the

Just how high that "extreme" threshold is was illustrated by an infamous pair of cases that arose in the interim. Justice O'Connor authored both *Ewing v. California* and *Lockyer v. Andrade*, which together affirmed the constitutionality of California's "three strikes" sentencing laws.[407] Both cases came before the Court after defendants were sentenced to indeterminate life sentences for stealing three golf clubs and nine videotapes, respectively.[408]

Lockyer in particular revealed that after *Harmelin* the proportionality analysis of *Solem* was "questionable" and the issue of which case law controlled was confused, as the California Court of Appeal had applied *Rummel* instead of *Solem* in rejecting Andrade's constitutional claim.[409] After the federal district court denied Andrade's petition for a writ of habeas corpus, the Ninth Circuit reversed, reasoning that both *Solem* and *Rummel* were good law and the California Court of Appeal's disregard for *Solem* was error.[410] The Supreme Court reversed the Ninth Circuit, reasoning that "through [the] thicket of Eighth Amendment jurisprudence" the principle of "gross disproportionality" alone was applicable to sentences for terms of years.[411] The Court stated, however, that its own cases "exhibit a lack of clarity regarding what factors may indicate gross disproportionality," but that such a finding would be applicable only to an "exceedingly rare" and "extreme" case.[412] The Court did not find Andrade's case to be so extraordinary.[413]

Thus, from 1983 in *Helm* until the juvenile case of *Graham* in 2010, not one non-capital defendant was found by the Supreme Court to have been sentenced in violation of the Constitution for want of proportionality. What had been considered in 1910 a "precept of justice"[414] had become relevant only to defendants facing the penalty of death. This evolution of the proportionality doctrine now sees the Court acting in non-capital sentencing cases only in "rare" situations — that is, the Court embraces the numerical irrelevance of its jurisprudence.

judgment)).

[407] *See* Lockyer v. Andrade, 538 U.S. 63, 66-68, 77 (2003); Ewing v. California, 538 U.S. 11, 30-31 (2003).

[408] *Lockyer*, 538 U.S. at 66; *Ewing*, 538 U.S. at 28.

[409] *Lockyer*, 538 U.S. at 68-69.

[410] *Id.* at 69-70.

[411] *Id.* at 72.

[412] *Id.* at 72-73.

[413] *See id.* at 77.

[414] *See* Weems v. United States, 217 U.S. 349, 366-67 (1910).

That irrelevance is not only numerical. In this same span of time, the system of mass incarceration expanded into what it is today.[415] The Court has gone to great lengths to tear the concept of proportionality away from its moorings in non-capital cases — going so far as to falsely claim its purely capital origins. The Court has distanced its jurisprudence from the founders' embrace of proportionality as fundamental in the non-capital context. And it has done all this while the prisons fill up with an unprecedented proportion of the population. The Court has focused nearly all of its intellectual energy on minutely regulating the rarest of punishments, the death penalty, while ignoring not only the vast majority of those subject to such imprisonment, but the well-recognized social problem that mass incarceration represents.[416] It has abdicated its role as the final arbiter of due process in all but a minuscule portion of the criminal justice system.

IV. EVOLVING STANDARDS OF DECENCY AND THE IRRELEVANCE RULE

In the Court's death-penalty era, the Court has not only avoided reviewing 99.9% of actual criminal sentencing activity in the United States, it has also made itself largely irrelevant within death-penalty jurisprudence. Beyond refusing to apply its two central Eighth Amendment doctrines — proportionality and the evolving standards of decency — in the non-capital context from which those doctrines emerged, the Court has minimized its capacity to review even capital sentences by conditioning review on the rarity of a sentencing practice.[417] In this way, the Court has cemented its own irrelevance by proclaiming that it will interpret the Constitution only when its decisions will protect a miniscule minority of people under the control of the world's largest criminal justice system.

The Court's abnegation of responsibility in reviewing the constitutionality of sentencing practices has occurred largely in the

[415] *See generally* THE SENTENCING PROJECT, TRENDS IN U.S. CORRECTIONS (2017), http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf (showing, among other trends, a 500% increase in incarceration over the last forty years).

[416] Bipartisan efforts at reform now recognize this as well. *See* Matt Ford, *Can Bipartisanship End Mass Incarceration?*, ATLANTIC (Feb. 25, 2015), https://www.theatlantic.com/politics/archive/2015/02/can-bipartisanship-end-mass-incarceration/386012.

[417] The one non-capital exception it has made — extending constitutional protections to juveniles sentenced to life in prison without possibility of parole — was also done on the premise of rarity of that issue arising. *See* Graham v. Florida, 560 U.S. 48, 65-67 (2010); *see also infra* Subpart IV.C.

name of federalism.[418] Yet, as one of us has argued previously, the manner in which the Court applies the evolving standards of decency doctrine undermines the most basic tenets of federalism.[419] The Court now ascertains an evolving consensus by asking whether most states have rejected a given penal practice.[420] If so, the Court then prevents the remainder of states from exercising said practice, disregarding the principle of the states being free to act as laboratories, while forestalling review until the practice has become almost negligible in its effect.[421] As such, the Court has effectively cordoned itself off from review of nearly all criminal sentencing activity in the United States, leaving the States to tell the Court what the Constitution means. In focusing on rarity instead of frequency of application of punishments, the Court ignores problems of racial inequality in capital sentencing, particularly the alarming regularity by which death is imposed on traditionally disadvantaged minority racial groups.[422]

A. The Evolving Incoherence of Evolving Standards

The evolving standards of decency doctrine has been applied to hold various applications of the death penalty unconstitutional, but each decision has applied to very limited subsets of the already limited number of defendants sentenced to death. On average, each of the Court's death-penalty decisions applying the evolving standards of decency doctrine before 2000 extended constitutional protections to fewer than seven additional offenders.[423] Even with the extension in

[418] *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 324 (2002) (Rehnquist, C.J., dissenting) (asserting that state legislatures are better suited than courts to evaluate "the complex societal and moral considerations" that inform appropriate punishment).

[419] Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1105 (2006).

[420] *See, e.g.*, Penry v. Lynaugh, 492 U.S. 302, 331 (1989) (asserting that state legislation is the "clearest and most reliable objective evidence of contemporary values").

[421] *See* Jacobi, *supra* note 419, at 1106-07.

[422] *See* McCleskey v. Kemp, 481 U.S. 279, 282, 287, 293-96, 308, 319 (1987).

[423] *See* Thompson v. Oklahoma, 487 U.S. 815, 832-33, 838 (1988) (extending constitutional protections to the eleven death-row inmates who were fifteen years old or younger at the time of their offenses); Enmund v. Florida, 458 U.S. 782, 797, 818 (1982) (extending constitutional protections to the three defendants on death row who had been convicted of felony murder without killing, intending to kill, or attempting to kill); Coker v. Georgia, 433 U.S. 584, 596-600 (1977) (extending constitutional protections to the five defendants on death row who had been convicted of rape of an adult woman).

Graham in 2010 to prisoners serving life sentences without possibility of parole for non-homicide offences committed when they were juveniles, only 123 of the 1,612,395 prisoners in the United States at the time (0.008% of all prisoners) received additional constitutional protections from the Court's decision.[424] These numbers mean the Court's evolving standards of decency decisions benefit an insignificant number of defendants within the United States criminal justice system. The way the Court applies the doctrine requires these numerically insignificant results and prevents the Court from considering the constitutionality of far more frequently imposed punishments. Before applying the doctrine to hold unconstitutional the imposition of a given punishment on a given class of offenders, the Court first determines if a national consensus exists against imposing the punishment on that class. To establish this national consensus, the Court engages in two inquiries that together serve to demonstrate the rarity of the punishments at issue.

In the first inquiry, the Court counts the jurisdictions that have already eliminated a given punishment for a given class of offenders. This inquiry is meant to demonstrate that a sufficient number of states oppose a particular mode of punishment to establish a national consensus against it.[425] Under this inquiry, the Court may also look to historical trends and count the legislatures that have recently eliminated a mode of punishment to determine whether a national "trend towards abolition" of that mode of punishment exists.[426] Under this inquiry, the Court conditions its intervention on the findings that (1) many states have already eliminated what the Court now says it must eliminate; and (2) that in all likelihood the states that have not eliminated the punishment would eliminate the punishment in the

[424] *See* Graham v. Florida, 560 U.S. 48, 64 (2010) (extending constitutional protections to the 123 juvenile offenders sentenced to life imprisonment without possibility of parole); Roper v. Simmons, 543 U.S. 551, 578, 596 (2005) (extending constitutional protections to the over seventy juvenile offenders on death row); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (extending constitutional protections to the inexact number of people on death row defined as "mentally retarded" — 370 people by the most liberal estimates); PAUL GUERINO ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2010, at 1 (2012), https://www.bjs.gov/content/pub/pdf/p10.pdf (reporting that state and federal correctional authorities had jurisdiction over 1,612,395 prisoners at yearend 2010).

[425] *See Graham*, 560 U.S. at 62-63; *Roper*, 543 U.S. at 564; *Atkins*, 536 U.S. at 314-16; *Thompson*, 487 U.S. at 826-29; *Enmund*, 458 U.S. at 789-92; *Coker*, 433 U.S. at 593-94.

[426] *Roper*, 543 U.S. at 566; *see also Atkins*, 536 U.S. at 314-16.

near future without the Court's input. The first inquiry thus implicitly requires the irrelevance of the Court's decisions.

In the second inquiry, the Court looks to the rarity with which judges and juries impose a given punishment on a class of offenders in the jurisdictions that still allow the punishment.[427] This inquiry attempts to demonstrate that, even in those states whose legislatures condone a mode of punishment, juries choose to impose that punishment so rarely that the Court can conclude that a national consensus against the punishment exists. The second inquiry thus explicitly promotes the irrelevance of the Court's decisions.

This methodology is incoherent for at least two reasons. First, the Court changes the ways in which it conducts the doctrine's central inquiries in different cases, seemingly to reach outcomes that could not be reached if the Court were to conduct them in the same manner in every case. Rather than a consistently applied doctrine, the only salient feature of the Court's evolving standards of decency decisions is the exceptionally small percentage of prisoners that benefit from its decisions. Curiously, the Court justifies its decisions under the doctrine by attempting to show that the decisions will not significantly change the practical reality of the criminal justice system. Second, on a more general level, the evolving standards of decency doctrine assumes something that the last forty years has proven to be false: that society "evolves" unidirectionally towards leniency. The doctrine provides no protection from the very real possibility — an actuality, in fact, in the era of mass incarceration — that the public will "evolve" towards imposing more severe penalties rather than eliminating them.[428]

The two forms of incoherence are rooted in the fact that the Court has sought to abdicate its role as the nation's supreme constitutional arbiter in sentencing. Under the doctrine, the Court purports to rubber stamp the popular sentiment on which it is supposed to be imposing constitutional constraints. In a certain sense, there is no actual legal doctrine animating the evolving standards of decency doctrine. The Court simply examines what the public is in the process of deciding, and, if the Court deems that the public is on the verge of a decision, the Court helps it take the final step. Thus, whatever guidance the Court does give under the doctrine is largely

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[427] *See Thompson*, 487 U.S. at 832-33; *Enmund*, 458 U.S. at 794-95; *Coker*, 433 U.S. at 596-97.

[428] *See* NAT'L RESEARCH COUNCIL, *supra* note 295, at 2-3 (explaining how punishment policy in the United States moved towards longer sentences for lesser offenses beginning in the 1970s).

unnecessary. The problem of mass incarceration makes it imperative that the Court reconsider the evolving standards of decency doctrine. It must approach the Eighth Amendment with an eye to its constitutional role of providing a meaningful, independent check on the power of legislatures to impose punishments that may in application be cruel, unusual, and excessive.

B. How the Evolving Standards of Decency Doctrine Became a Numbers Game

The phrase "evolving standards of decency" was first used by the Supreme Court in 1958 in *Trop v. Dulles* when it held that the Eighth Amendment prohibited the United States from depriving a person of citizenship as punishment for wartime desertion.[429] The *Trop* Court relied on *Weems* for the interrelated propositions that the meaning of the cruel and unusual punishments clause is not precise and its scope is not static.[430] Interpreting this language in *Weems*, the *Trop* Court stated that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[431]

The *Trop* Court did not explain how a court might determine that society's standards of decency have evolved. The Court simply declared that the punishment of denationalization was "offensive to cardinal principles for which the Constitution stands," pointing out that "[t]he civilized nations of the world [were] in virtual unanimity that statelessness [was] not to be imposed as punishment for crime."[432] The Court did not rely on the frequency or rarity with which the punishment of denationalization was imposed, and it did not attempt to establish that a national consensus against the punishment existed.

Similarly, when the Court struck down all death-penalty schemes then in use in *Furman v. Georgia*, the Court did not conclude that a national consensus against the punishment existed or claim that its decision was based on the views of the public.[433] Justice Brennan referenced public sentiment and debate, as well as the "national conscience" regarding the death penalty, to demonstrate that the death

[429] Trop v. Dulles, 356 U.S. 86, 101-04 (1958).

[430] *Id.* at 100-01.

[431] *Id.* at 101.

[432] *Id.* at 102.

[433] *See* Furman v. Georgia, 408 U.S. 238, 242 (1972) (Douglas, J., concurring).

penalty was unique,[434] while Justice Marshall suggested that a punishment might be invalid if "popular sentiment abhor[red] it."[435] Justice White separately mentioned the infrequency with which the death penalty was imposed by juries, reasoning that the legislative judgments authorizing the death penalty "los[t] [their] force," as juries refused to impose it.[436] But Justice Brennan explicitly rejected the notion that the Court's decision in *Furman* should depend on whether a national consensus against the punishment existed:

> If the judicial conclusion that a punishment is cruel and unusual depended upon virtually unanimous condemnation of the penalty at issue, then, like no other constitutional provision, the Clause's only function would be to legitimize advances already made by the other departments and opinions already the conventional wisdom. We know that the Framers did not envision so narrow a role for this basic guaranty of human rights.[437]

It was the dissenting justices in *Furman* who more directly broached the question of a national consensus. They argued that there were no "obvious indications that capital punishment offend[ed] the conscience of society" to such a degree that the Court should abandon its practice of deferring to legislative judgment.[438] The dissent also pointed out that the Court had never before held a punishment unconstitutional on the basis of a shift in accepted social values, and the majority had not suggested "judicially manageable criteria for measuring such a shift."[439]

Due to the lack of a majority voice in *Furman*, critics had reason to believe that the decision was "very vulnerable" precedent.[440] Within a few months after the decision, activists were campaigning for reinstatement of the death penalty in every state.[441] Within two years, thirty-five states had enacted new capital statutes, as a pro-death-penalty movement emerged from a coalition of voices espousing "law and order," "states' rights," and "culture-war" conservatism.[442] Four

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[434] *See id.* at 299 (Brennan, J., concurring).

[435] *Id.* at 332 (Marshall, J., concurring).

[436] *See id.* at 314 (White, J., concurring).

[437] *Id.* at 268 (Brennan, J., concurring) (quotations and brackets omitted).

[438] *Id.* at 385 (Burger, C.J., dissenting).

[439] *Id.* at 383.

[440] *See* Lesley Oeisner, *Banned — but for How Long?*, N.Y. TIMES, July 2, 1972, at E1.

[441] GARLAND, *supra* note 308, at 232.

[442] *Id.* at 233-34.

years later, in *Gregg v. Georgia*, the reworked death-penalty statutes were affirmed, effectively reviving the death penalty as a constitutional punishment for the crime of murder with sufficient aggravating circumstances.

A three-vote plurality announcing the judgment of the Court in *Gregg* established an entirely new regime which the Court has since applied to its capital-punishment analysis.[443] In much the same way that the *Gregg* Court imported the proportionality doctrine from the non-capital context to animate its death-penalty jurisprudence, it also applied the evolving standards of decency doctrine to explain the constitutionality of the death penalty, stating that "an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment."[444] This assessment, the Court noted, must not be subjective, but must be based on "objective indicia that reflect the public attitude toward a given sanction."[445] It claimed that legislative enactments provided "the most marked indication of society's endorsement of the death penalty,"[446] and that jury verdicts were also a reliable source that could be used to determine a national consensus.[447]

The *Gregg* Court concluded that, according to these two "objective indicia," no standard had evolved against imposition of the death penalty on persons convicted of murder with sufficient aggravating factors. In *Furman*, the Court had perhaps underestimated the nation's strong support for the death penalty, and much of the nation responded clearly that it still intended to sentence people to death. Thus, the Court's first decision applying a numbers-based approach to the evolving standards of decency doctrine legitimated a popular movement towards punishing defendants more severely. While the decision in *Furman* might have been unpopular, the Court in *Gregg* introduced a construction of the Eighth Amendment that replaced meaningful judicial review with a simple counting mechanism, a judicial innovation that Justice Brennan had decried as inconsistent with the Framers' constitutional design four years earlier in *Furman*.[448] This innovation has since been among the Court's most contentious

[443] *See* Gregg v. Georgia, 428 U.S. 153, 179-87 (1976) (plurality opinion).

[444] *Id.* at 172-73.

[445] *Id.* at 173.

[446] *Id.* at 179.

[447] *Id.* at 181-82. The Court found that juries had acted in accordance with post-*Furman* legislative enactments, sentencing more than 460 people to death between the time of *Furman* and the end of March 1976. *Id.* at 182.

[448] *See* Furman v. Georgia, 408 U.S. 238, 268 (1972) (Brennan, J., concurring).

doctrinal developments, as not a single decision applying the doctrine has received unanimous support. Since *Gregg*, the allegedly objective counting mechanism has been revealed as anything but — inconsistent in approach and unpredictable in outcome.

C. The Inconsistency of the "Objective" Evolving Standards of Decency Doctrine Methods

In applying the evolving standards of decency doctrine, the Court subtly changes the terms on which it conducts its statistical inquiries from case to case. In certain cases, the Court relies more heavily on non-numerical principles, such as culpability and proportionality, to justify its shifting use of statistics. A brief review of the major developments in the field reveals as many methods of counting states to determine an evolving standard as there are cases. The Court has repeatedly had to contort its own jurisprudence to establish or reject an evolving standards of decency doctrine for application of the death penalty to a particular group, but such judicial acrobatics achieve little in terms of affecting the criminal justice system: the only consistent feature in all its decisions is that the Court always attempts to justify its evolving standards of decency decisions by demonstrating that a statistically insignificant number of prisoners will benefit from its rulings.

In its first foray into the numbers game, in *Coker v. Georgia* the Court stressed a near-unanimity among legislatures and juries to show an evolving consensus against the punishment of death for the crime of rape of an adult woman.[449] First, it pointed out that at no time in the previous fifty years had a majority of states authorized death as a punishment for rape.[450] At the time of *Furman*, five years earlier, sixteen states and the federal government had authorized the death penalty as punishment for rape.[451] After *Furman* invalidated the death-penalty statutes then in existence, only three states subsequently provided the death penalty as punishment for rape of an adult woman.[452] Among those three states, only Georgia's law was still valid at the time of the Court's decision in *Coker*.[453] With Georgia's law the last left standing, the Court reasoned that the nation's current judgment in the form of legislative enactments weighed heavily on the

[449] Coker v. Georgia, 433 U.S. 584, 595-97 (1977).

[450] *Id.* at 593.

[451] *Id.*

[452] *Id.* at 594.

[453] *Id.* at 594-96.

side of rejecting the punishment.[454] The Court did not acknowledge that the circumstances were unusual, with states not having known until the year before, when *Gregg* was decided, whether their capital punishment schemes would be upheld at all. As such, the Court did not consider whether those states were actually evincing a consensus against executing those convicted of rape or simply waiting to see if it was worth the time to develop any kind of comprehensive capital-punishment scheme.

The Court was forced to play a more nuanced numbers game in *Enmund v. Florida* to overcome the lack of unanimity on the question of whether it was constitutional to apply the death penalty to those convicted of felony murder who did not kill, attempt to kill, or intend to kill.[455] The Court carved out a category of offenders to whom protections would apply, despite apparent legislative disagreement, ignoring the fact that any class of offenders might be made small enough if the Court were simply willing to carve it up in enough ways. Rather than considering all of the states which allowed execution for some sort of indirect involvement in a killing, the *Enmund* Court emphasized that only eight jurisdictions authorized the death penalty for participation in a robbery in which another robber takes life.[456] It treated that separately from the nine additional states in which a defendant could be executed for felony murder if sufficient aggravating factors outweighed mitigating circumstances.[457] Even when separated in this way, opposition to the punishment was far from unanimous. Thus, the Court emphasized that none of the *newly enacted* death-penalty statutes authorized the punishment for defendants who did not intend to kill,[458] a concept that would be developed in the Court's equally dubious focus on recency,[459] but that once again ignored the potentially endogenous effect of its own decision in *Furman*. The Court also contrasted the six actual exercises of executions for "nontriggermen" with the seventy-two people who had been executed for rape between 1955 at the time of the Court's decision in *Coker*.[460] The *Coker* Court, however, had not mentioned, let alone relied upon, the fact that as many as seventy-two people had been executed for rape between 1955 and its decision in 1977.

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[454] *Id.* at 596.

[455] *See* Enmund v. Florida, 458 U.S. 782, 797 (1982).

[456] *Id.* at 789.

[457] *Id.* at 791.

[458] *Id.* at 792-93.

[459] *See infra* Subpart IV.D.

[460] *Enmund*, 458 U.S. at 794-95.

In analyzing jury behavior, the *Enmund* Court found even more ways of dividing the categories of application to make them seem small, saying that of 739 death-row inmates for whom sufficient data was available, only forty-one did not participate in the fatal assault of the victim.[461] Only sixteen of these forty-one were not physically present when the fatal assault was committed.[462] Only three of these sixteen, one of whom was the petitioner, were sentenced to die absent a finding that they had somehow intentionally participated in a scheme designed to kill the victim.[463] In Florida specifically, the Court found that Enmund was the sole death-row inmate who had been found neither to have been the triggerman nor to have had an intent to kill.[464] Thus, by narrowing the category of application that it deemed relevant in the case, the Court drastically narrowed the relevance of its own determination.

This approach was not enough to hold unconstitutional the imposition of the death penalty on defendants who were under the age of sixteen at the time of their offense. In *Thompson v. Oklahoma*, the Court also engaged in selective incorporation of non-punitive legislation, international norms, and execution statistics.[465] The *Thompson* Court first discussed legislation that did not pertain to the death penalty, considering various statutes that defined persons under sixteen as children or minors who were treated differently under the law in such matters as voting or serving on a jury.[466] In turning to legislation concerning capital punishment, the Court selectively counted legislation, noting that of the states which then authorized the death penalty, nineteen provided no minimum age for its imposition.[467] Of the eighteen states that defined a minimum age, however, all required the defendant to have attained the age of sixteen at the time of his or her capital offense to be eligible for the death penalty.[468]

The Court then stepped entirely outside its own methodology, surveying professional organizations, such as the American Law Institute, and practices of certain countries in the Western European tradition and the Soviet Union — all of which had condemned the

461 *Id.* at 795.
462 *Id.*
463 *Id.*
464 *Id.*
465 Thompson v. Oklahoma, 487 U.S. 815, 821-38 (1988).
466 *See id.* at 823-25.
467 *Id.* at 826-27.
468 *Id.* at 829.

imposition of the death penalty on juveniles.[469] Data from these organizations and countries supported the conclusion that executing a person who was under sixteen at the time of his or her offense "would offend civilized standards of decency."[470] In considering the "behavior of juries," the Court cited recent scholarship concerning executions, rather than jury decisions, finding that, during the twentieth century, eighteen to twenty people had been executed for crimes committed when they were under the age of sixteen.[471] The Court then cited statistics from the Department of Justice indicating that between 1982 and 1986, of the 1,393 people sentenced to death, only five were less than sixteen years old at the time of their qualifying offense.[472] The *Thompson* Court did not include any facts pertaining to jury decisions before 1982 in its opinion.

In twin opinions in 1989, the Court entrenched its reliance on counting states in ascertaining an evolving consensus — although changing once again how it calculated such consensus. The Court ruled that the Eighth Amendment did not mandate a categorical exemption from the death penalty for the "mentally retarded" in *Penry v. Lynaugh*,[473] and declined to extend protections to sixteen- and seventeen-year-old offenders sentenced to death in *Stanford v. Kentucky*.[474] In both cases, the Court looked to state legislation and found inadequate numbers to show a national consensus. Only two States had enacted laws banning the imposition of the death penalty on a "mentally retarded" person convicted of a capital offense,[475] which the court deemed inadequate "even when added to the 14 States that have rejected capital punishment completely."[476] In subsequent cases, the Court seesawed as to whether non-capital punishment states were relevant, and this consideration frequently became a determining factor.[477] Similarly, the Court found no national consensus against executing those aged sixteen or seventeen, since a majority of States permitted imposing the death penalty for crimes committed at age sixteen and above.[478] But the Court was forced to develop a new

469 *Id.* at 830-31.
470 *Id.*
471 *Id.* at 831-32.
472 *Id.* at 832-33.
473 Penry v. Lynaugh, 492 U.S. 302, 340 (1989).
474 Stanford v. Kentucky, 492 U.S. 361, 380 (1989).
475 *Penry*, 492 U.S. at 334.
476 *Id.*
477 *See infra* Subpart IV.D.
478 *Stanford*, 492 U.S. at 371.

analysis for jury determinations, rejecting the significance of the extremely low number of juries that had imposed the death sentence on juveniles because "a far smaller percentage of capital crimes [were] committed by persons under 18 than over 18, [and thus] the discrepancy in treatment [was] much less than might seem."[479] The Court majority justified complete reliance on its numbers-based approach because it claimed that such a method avoided the Court imposing its "own conceptions of decency" on the public,[480] even though this proportional analysis of jury determinations was entirely novel and produced quite different numbers than the Court's previous raw totals.

Both *Penry* and *Stanford* were overruled within sixteen years by *Atkins v. Virginia*[481] and *Roper v. Simmons*,[482] respectively, when the Court relied on new types of evidence, including proposed bills, the direction of change, execution statistics, and even international opinions. Although the *Atkins* Court reiterated its commitment to conducting an inquiry into evolving standards based upon "objective factors," those factors were substantially less numerous than in prior cases.[483] The Court claimed that thirty states prohibited the practice.[484] Not only was this far from *Coker*'s unanimity standard, but the *Atkins* Court was only able to claim a *majority* by including those states that prohibited the death penalty entirely, rather than only looking to those states that had addressed the question specifically of whether it was wrong to execute "mentally retarded" offenders.[485] To buttress its conclusion, the Court noted that at least one house of the legislatures of three additional states had adopted bills prohibiting the practice.[486] This was the first time the Court had relied on the adoption of a bill,

[479] *Id.* at 374.

[480] *See id.* at 369.

[481] *See* Atkins v. Virginia, 536 U.S. 304, 306-16, 321 (2002).

[482] 543 U.S. 551, 565-66, 574-79 (2005).

[483] *Compare Atkins*, 536 U.S. at 312-16 (considering only legislative action as an objective factor as it is the "clearest and most reliable objective evidence"), *with* Thompson v. Oklahoma, 487 U.S. 815, 821-38 (1988) (considering multiple objective factors such as domestic legislation, international law, jury determinations, and juvenile culpability).

[484] *But see Atkins*, 536 U.S. at 342 (Scalia, J., dissenting) (claiming that the majority reached a national consensus by dividing the eighteen states that prohibit capital punishment for the mentally retarded by the thirty-eight states that allow capital punishment at all).

[485] *See id.* at 322 (Rehnquist, C.J., dissenting) (criticizing this as merely a *post hoc* rationalization for the majority's subjectively preferred result).

[486] *See id.* at 315 (majority opinion).

rather than an enactment of law, as a factor in its analysis. The propriety of such consideration is dubious, as typically fewer than 5% of bills introduced in the U.S. Congress each year become law.[487]

In light of these weaker numbers, the Court framed its inquiry as one focused on legislative *developments* since *Penry*,[488] stating for the first time that the number of jurisdictions that had passed legislation was not as significant as "the *consistency* of the direction of change."[489] The Court found it significant that no State had passed legislation authorizing the execution of the "mentally retarded" since *Penry*,[490] without mentioning what circumstances would be expected to prompt such change. This became even more important when revisiting the question of executing juveniles. The *Roper* Court described the evidence of a national consensus against the death penalty for juveniles as similar to the evidence held sufficient to demonstrate a national consensus in *Atkins*,[491] but conceded that the rate of legislative abolition was demonstrably slower. Only five states had eliminated the death penalty for juveniles (one by judicial decision) in the wake of *Stanford*, whereas sixteen had eliminated it for the "mentally retarded" after *Penry*.[492] The Court dealt with this by reiterating its *Atkins* claim that the number of States was not as significant as the "consistency of direction of change."[493]

Notably, for the first time in its evolving standards analysis, the majority in *Atkins* did not include information about jury determinations in its decision. Instead, the Court cited New Hampshire and New Jersey as states that continued to authorize executions of the "mentally retarded" yet had not carried out such an execution in decades.[494] "Thus, there [was] little need to pursue legislation barring the execution of the mentally retarded in those States."[495] The Court then turned to the number of executions that

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[487] *Timeline*, LEGIS. EXPLORER, http://legex.org/timeline/index.html#legislation=bills&chamber=all&party=all&committee=all&majority=all&gender=all&state=all&outcomes=all&topics=all&view=outcomes&zoomed=false&graphbar=true&relative=false (last visited Feb. 4, 2018).

[488] *Atkins*, 536 U.S. at 312. The Court found that sixteen states had prohibited the execution of the "mentally retarded" in the wake of *Penry*, adding to the two states that had already prohibited the practice. *See id.* at 314-15.

[489] *Id.* at 315 (emphasis added).

[490] *Id.* at 315-16.

[491] Roper v. Simmons, 543 U.S. 551, 564 (2005).

[492] *Id.* at 565.

[493] *Id.* at 565-66.

[494] *Atkins*, 536 U.S. at 316.

[495] *Id.*

had taken place since *Penry*, and found that only five offenders with a known IQ of less than seventy had been executed in that period.[496] Justice Scalia in his dissent questioned these numbers, claiming that "12 States executed 35 allegedly mentally retarded offenders during the period from 1984–2000" and that "10% of death-row inmates" were "mentally retarded."[497] With 3,557 total death-row inmates in 2002,[498] Scalia's claim would bring the number up to 355 "mentally retarded" death-row inmates, making this dispute over so-called objective numbers vary by more than a factor of ten. Meanwhile, the question of how to determine whether an inmate is "mentally retarded" continues to plague the courts.[499]

Roper and *Atkins* both also challenged the language of a plurality of the Court in *Stanford* that the Court must not bring its own independent judgment to bear on the acceptability of the juvenile death penalty,[500] offering assessments of personal culpability and its relationship to the deterrent effect of the death penalty.[501] In bringing its own judgment to bear on the question, the Court relied heavily on scientific evidence distinguishing juvenile behavior from that of adults and its view of an *international* consensus against the punishment.[502] Thus, the Court introduced an entirely new set of factors to count in its analysis.[503] Additionally, it found that the "objective indicia of consensus" itself provided sufficient evidence that juveniles were categorically less criminal,[504] fusing the national-consensus inquiry with the classic penological concept of culpability, and thus blurring the line between allegedly objective and admittedly subjective criteria.

Finally, the Court used rarity of application to overcome a majority of state legislatures seemingly endorsing a practice, while limiting the jurisdictions it was willing to analyze in its numerical characterization and embracing once again its own independent judgment. In *Graham v. Florida*, the Court found unconstitutional a non-capital punishment

496 *Id.*

497 *Id.* at 346.

498 *Size of Death Row by Year — (1968 – present)*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year#year (last visited Mar. 15, 2018).

499 *See, e.g.*, Hall v. Florida, 134 S. Ct. 1986, 1998 (2014) (prohibiting a strict IQ score cut off in making the determination).

500 *See* Roper v. Simmons, 543 U.S. 551, 562-64 (2005); *see also Atkins*, 536 U.S. at 313.

501 *Roper*, 543 U.S. at 563; *Atkins*, 536 U.S. at 320.

502 *See Roper*, 543 U.S. at 567-78.

503 Justice Scalia awarded this "the Prize for the Court's Most Feeble Effort to fabricate 'national consensus.'" *Atkins*, 536 U.S. at 347 (Scalia, J., dissenting).

504 *Roper*, 543 U.S. at 567.

for the first time since instituting its numbers-based approach to the doctrine, holding that life-without-parole sentences for juveniles convicted of non-homicide offenses were unconstitutional.[505] This development may seem like a reversal of the Court's abnegation of responsibility in determining how the Eighth Amendment applies to non-death-penalty defendants — the overwhelming majority of prisoners. Nevertheless, a closer look reveals that *Graham* preserved the most salient feature of the Court's numbers-based approach by hinging constitutional protection on the extremely small number of prisoners benefitted.

The *Graham* Court paid lip service to state legislation as the clearest and most reliable objective evidence of contemporary standards of decency.[506] Nonetheless, despite thirty-seven State legislatures, the District of Columbia, and the federal government's continued authorization of life without parole sentences for juveniles convicted of non-homicide offenses[507] the Court found a consensus because "[t]here are measures of consensus other than legislation."[508] Similar to the *Enmund* Court's idea of splitting categories, the Court split States by frequency of application of capital punishment, rather than by different legislative rules. The Court found significant that of the 123 juvenile non-homicide offenders serving life without parole sentences, seventy-seven were serving sentences imposed in Florida, and the other forty-six were imprisoned in just ten other states.[509]

With the weight of legislative determinations clearly against it, the *Graham* Court emphasized the rarity with which the sentences were imposed in finding that the evolving standards of decency doctrine applied.[510] It used a different kind of proportionality analysis, here downplaying the number of juveniles sentenced to life imprisonment without possibility of parole because each was, by definition, likely to remain in prison for decades. Therefore, the actual number of prisoners currently serving the sentence constituted an accumulation of prisoners over many years, demonstrating how rarely the sentence had been imposed nationally.[511] It acknowledged that, in terms of absolute numbers, the sentences were more common than in other cases in which the Court had found a national consensus against a

[505] Graham v. Florida, 560 U.S. 48, 82 (2010).
[506] *Id.* at 62.
[507] *Id.*
[508] *Id.*
[509] *Id.* at 64.
[510] *Id.* at 65.
[511] *See id.*

punishment. Yet, it used another kind of proportionality analysis to mitigate the significance of this finding, noting that the far greater number of offenses that made defendants *eligible* for life without parole sentences (as opposed to death sentences) meant that the actual numbers of those sentenced to the punishment were "as rare as other sentencing practices found to be cruel and unusual."[512]

Overall, then, even while continuing to insist that counting states is an objective endeavor, the Court has quietly changed the standard from unanimity to (1) a bare majority; (2) a majority reached only when including additional categories; (3) less than a majority but dividing up the numbers in favor of a practice so as to undercut the significance of that majority; (4) emphasizing instead the direction of change; and (5) emphasizing the most recent instances of that change. It has also varied what factors go into assessing the consensus among the states. These include legislation passed, legislation considered, jury determinations, the number of actual executions completed, the views of various international actors, and the justices' own views of culpability, including by relying on scholarly work and other indications of the views of external actors.

The Court's wildly inconsistent application of its so-called objective factors has only one constant element: in each of these cases, the Court buttressed its variously dubious numbers by pointing to the irrelevance of its own determinations in terms of the number of people affected by its rulings:

- In *Coker*, since Georgia's juries were by then the sole set under consideration,[513] of the sixty-three rape convictions since 1973, only six saw the jury impose a death sentence.[514] As one of those sentences had previously been set aside by the Georgia Supreme Court, only five people were on death row for the crime of rape of an adult woman at the time of the decision in *Coker*.[515] The *Coker* Court, then, granted additional constitutional protections to a total of five people,[516] 0.002% of the U.S. prison population at the time.[517]

[512] *Id.* at 65-66.

[513] *See* Coker v. Georgia, 433 U.S. 584, 595-96 (1977).

[514] *Id.*

[515] *Id.* at 596-97.

[516] *See id.*

[517] *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE AND FEDERAL

- In *Enmund*, after massively narrowing the scope of which applications the Court would consider relevant, the Court justified its ruling in part because it was granting additional constitutional protections to only three people, 0.0008% of the United States prison population at the time of the Court's decision.[518]
- In *Thompson*, the Court looked only at post-1982 data, of which 0.4% of the persons sentenced to death between 1982 and 1986 were under sixteen years old at the time of their offense.[519] After *Furman*, eleven people were sentenced to death for crimes committed when they were fifteen years old as of 1988.[520] Thus, *Thompson* extended constitutional protections to no more than eleven of the 627,402 people in prison in 1988, just 0.002% of the total prison population.[521]
- In *Atkins*, the Court acknowledged that the exact number of prisoners who should be categorized as "mentally retarded" was ambiguous;[522] but even taking Justice Scalia's more liberal estimates, approximately 355 people of the 3,697 people on death row in 2002 were "mentally retarded."[523] So *Atkins* could be liberally construed as extending constitutional protections to 355 of the 2,033,022 people in prison in 2002, still less than 0.02% of the total prison population.[524]

PRISONERS, 1925–85, at 2 (1986), https://www.bjs.gov/content/pub/pdf/sfp2585.pdf (reporting the total prison population to be 285,456 in 1977).

518 *See* Enmund v. Florida, 458 U.S. 782, 796 (1982); LANGAN ET AL., *supra* note 201, at 13 (showing the total prison population to be 385,343 in 1982).

519 *See* Thompson v. Oklahoma, 487 U.S. 815, 832-33 (1988).

520 *See* VICTOR L. STREIB, THE JUVENILE DEATH PENALTY TODAY 9 (2005), https://www.deathpenaltyinfo.org/files/pdf/juvdeathstreib.pdf.

521 BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 1988, at 2 (1989), https://www.bjs.gov/content/pub/pdf/p88.pdf.

522 Atkins v. Virginia, 536 U.S. 304, 317 (2002).

523 *See id.* at 347 (Scalia, J., dissenting) (writing that 10% of death-row inmates were "mentally retarded" in 2002); DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2002, at 1 (2002), https://deathpenaltyinfo.org/files/pdf/yrendrpt02.pdf (reporting that there were 3,697 people on death row in 2002).

524 PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS IN 2003, at 2 (2004), https://www.bjs.gov/content/pub/pdf/p03.pdf.

- In *Roper*, at the time of the Court's decision, seventy-one death sentences for juvenile offenders still remained in force.[525] Thus, the Court's decision extended additional constitutional protections to seventy-one of the 2,193,798 prisoners in the United States, 0.003% of the total prison population.[526]
- In *Graham*, the Court granted additional constitutional protections to 123 of the 1,612,395 prisoners in the United States as of 2010, 0.008% of all prisoners.[527]

Of course, these numbers cannot be taken on face value: they do not tell us how many people *would have* been sentenced to execution but for each determination. It is the Court itself that stresses that in each case, the nation's legislatures, and sometimes its juries, have already demonstrated virtually unanimous rejection of the punishment even without the Court's input. Thus, by counting states, the Court is doing two things: first, it is claiming that it is avoiding subjectivity, which is belied by the various ways in which it counts; second, it is asserting the irrelevance of its own decisions.

D. The Implicit and Explicit Irrelevance of the Evolving Standards of Decency Doctrine

Throughout the shifting terms on which the Court has applied the evolving standards of decency doctrine — from unanimity to finding a consensus against a punishment authorized by thirty-seven States, the District of Columbia, and the federal government[528] and from focusing on jury verdicts to focusing on number of executions — the Court has nevertheless never wavered from the premise that because a punishment is extremely unlikely to be carried out, the punishment is therefore unconstitutional. Most recently, the *Graham* Court suggested that the rarity with which a punishment is inflicted on a certain class of defendants is *sufficient* under the evolving standards doctrine for the Court to conclude that a national consensus against a particular mode of punishment exists.[529] But, if the rarity with which a punishment is

[525] STREIB, *supra* note 520, at 3.

[526] PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS IN 2005, at 2 (2007), https://www.bjs.gov/content/pub/pdf/p05.pdf.

[527] Graham v. Florida, 560 U.S. 48, 64 (2010); GUERINO ET AL., *supra* note 424, at 2.

[528] *Graham*, 560 U.S. at 97 (Thomas, J., dissenting).

[529] *Id.* at 67 (majority opinion).

imposed were indeed the only criterion used by the Court to declare a punishment unconstitutional, then, as Justice Scalia pointed out in his dissent in *Thompson*, the Court might by that logic hold unconstitutional the death penalty for women.[530] Presumably, if the relevant statistical analysis were conducted, a standalone rarity principle could also justify such patently nonsensical constitutional prohibitions as the execution of the left-handed, of people born in American Samoa, or of people who had parented septuplets. The Court has never, and likely never will, hold unconstitutional the imposition of a punishment on a class of offenders *solely* on the grounds of the rarity with which the punishment is imposed on that class.

Numbers alone do not and cannot explain why the Court has chosen to hold unconstitutional the modes of punishment that it has. Other concerns, such as culpability and proportionality, have subtly moved the Court to decide the cases it has decided, even though the Court represents itself as basing its decisions on numerical statistics. Political and moral concerns have been shown to animate the Court's decision making in almost every area of law,[531] so it is unsurprising that traditional penological considerations can be seen operating on the sidelines of the Court's evolving-standards opinions. In *Coker*, the plurality noted that rape is morally distinguishable from murder in that, while unquestionably serious, it does not necessarily involve the deliberate taking of human life.[532] In *Enmund*, the Court framed its inquiry as being focused on the defendant's "culpability," distinct as it was from the culpability of robbers who actually did take human life.[533] In *Thompson*, the Court concluded that "indicators of contemporary standards of decency confirm our judgment that such a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty."[534] The proportionality and culpability touchstones were of course expanded in *Atkins*, *Roper*, and *Graham*.

In each case where the Court acknowledges the significance of these concerns, each narrow majority is chastised by dissenting justices for imposing its own judgment on the acceptability of the questioned

[530] Thompson v. Oklahoma, 487 U.S. 815, 871 (Scalia, J., dissenting).

[531] *See* Matthew Sag, Tonja Jacobi & Maxim Sytch, *Ideology and Exceptionalism in Intellectual Property — an Empirical Study*, 97 CALIF. L. REV. 801, 804-12 (2009) (summarizing the empirical judicial politics literature showing the predictability of Supreme Court decision making in a comprehensive set of studies).

[532] Coker v. Georgia, 433 U.S. 584, 598 (1977).

[533] Enmund v. Florida, 458 U.S. 782, 798 (1988).

[534] *Thompson*, 487 U.S. at 823.

mode of punishment.[535] The Court's continued insistence that its Eighth Amendment decisions be based on numbers — as opposed to generally applicable principles such as proportionality — unnecessarily hamstrings the Court's capacity to interpret the Eighth Amendment and leads to untenable results. Chief Justice Roberts' dissent in *Miller v. Alabama* illustrates the illogic of the numbers-based approach.

In *Miller*, the majority did not consider the rarity of legislative enactments or jury verdicts as the primary grounds for determining that mandatory sentences of life without possibility of parole for juveniles violate the Eighth Amendment.[536] Instead, the *Miller* majority cited *Roper* for the proposition that the Eighth Amendment guarantees individuals the right not to be subject to excessive sanctions.[537] That right, the Court explained, flows from the basic "precept of justice," announced in *Weems*, "that punishment for crime should be graduated and proportioned" to both the offender and the offense.[538] The "concept of proportionality," the *Miller* Court stated, is "central to the Eighth Amendment."[539] The *Miller* Court referenced evolving standards of decency not for the proposition that objective indicia must guide the Court's analysis, but for the proposition that the concept of proportionality should not be viewed through a "historical prism."[540] The Court then explained that mandatory sentences of life without possibility of parole for juveniles fail to take into account characteristics of juvenile offenders that bear on

[535] *See* Graham v. Florida, 560 U.S. 48, 97 (2010) (Thomas, J., dissenting) (characterizing the majority's opinion as an application of its moral judgment); Roper v. Simmons, 543 U.S. 551, 588 (2005) (O'Connor, J., dissenting) ("[T]he rule decreed by the Court rests, ultimately, on its independent moral judgment that death is a disproportionately severe punishment for any 17-year-old offender."); Atkins v. Virginia, 536 U.S. 304, 322 (2002) (Rehnquist, C.J., dissenting) (insisting that only the "objective" factors should be considered); *Thompson*, 487 U.S. at 873 (Scalia, J., dissenting) (characterizing the majority's opinion as being based on "the perceptions of decency" of "a majority of the small and unrepresentative segment of our society that sits on this Court"); *Enmund*, 458 U.S. at 826 n.42 (O'Connor, J., dissenting) (characterizing the majority's conclusions concerning the blameworthiness of the defendant's conduct as "legislative judgments" that are "uniquely suited to legislative resolution"); *Coker*, 433 U.S. at 604 (Burger, C.J., dissenting) (stating that "the Court has overstepped the bounds of proper constitutional adjudication by substituting its policy judgment for that of the state legislature").

[536] *See* Miller v. Alabama, 567 U.S. 460, 468-74 (2012).

[537] *Id.* at 469.

[538] *Id.*

[539] *Id.*

[540] *Id.*

considerations of proportionality.[541] The majority addressed the objective indicia of a national consensus, but did so principally by way of a response to the dissenting opinion of Chief Justice Roberts that sufficient objective indicia of a national consensus against the punishment did not exist.[542]

In his dissent, writing for the Court's four conservative justices, Chief Justice Roberts argued that the frequency with which jurisdictions imposed the punishment of life without possibility of parole on juveniles — 2,000 prisoners were currently serving the sentence — demonstrated that the punishment was not "unusual," and thus the Court's Eighth Amendment analysis should have stopped there.[543] He stressed that the Court should be guided solely by objective indicia, lest the Court impose its "own subjective values or beliefs."[544] Chief Justice Roberts, who had joined the majority in *Graham*, explained that *Graham* was distinguishable because the punishments there at issue were "exceedingly rare."[545]

Chief Justice Roberts' dissent in *Miller*, as well as the bulk of the Court's evolving standards of decency precedent, conditions the Court's ability to interpret and apply the Eighth Amendment on the fact that the punishments at issue are "exceedingly rare" out of respect for federalism. But, such insistence on an Eighth Amendment based on numbers is inconsistent with a federalist system in which the judiciary, as a co-equal branch of government, places meaningful checks on legislatures through its interpretation and application of the Constitution.[546] As one of us has previously pointed out, the numbers-based evolving standards of decency doctrine destroys the states' positions as separate sovereigns, as the doctrine is used to force States to bend to the will of other states.[547]

Both prongs of the evolving-national-consensus inquiry make the Court's role as the nation's supreme constitutional arbiter almost entirely irrelevant, both implicitly and explicitly. The first inquiry, under which the Court seeks to demonstrate that most of the nation's legislatures have already eliminated a mode of punishment, implicitly

[541] *See id.* at 468-74.

[542] *See id.* at 482-86, 483 n.10.

[543] *Id.* at 494 (Roberts, C.J., dissenting).

[544] *Id.*

[545] *Id.* at 496.

[546] *See* Jacobi, *supra* note 419, at 1105-06 (arguing that counting states undermines federalism, both in terms of the federal-state balance and the freedom of each state to act free from regulation by another state).

[547] *Id.* at 1107.

suggests that the Court's decisions are irrelevant.[548] Under this inquiry, if most of the nation's legislatures reject a mode of punishment, or if the Court decides that there is a "trend towards abolition," the Court may then conclude that there is an evolving standard of decency against the punishment. The Court's variation in counting legislatures in *Atkins* and *Roper* reveals the underlying logic of this inquiry. In *Atkins*, the Court focused not so much on the total number of States that prohibited the execution of the mentally ill, but on "the consistency of the direction of change."[549] The fact that a number of states had recently passed legislation prohibiting the punishment, while no state had passed legislation authorizing it, provided "powerful evidence" that society was evolving.[550] The Court's reasoning here is founded upon a view of history as inevitably progressive. Because States had evolved against the execution of the "mentally retarded," the Court could then conclude that these States would not in the future evolve in the other direction, and that additional States in the future would soon join these States in prohibiting the punishment. But if history is indeed inevitably progressive, what need is there for the Court's input in cases like *Atkins* and *Roper*? If society as a whole was in the process of evolving, then State legislatures would surely prohibit the mode of punishment in a matter of time without the Court's opinion. Thus, the Court's decisions under this approach to the doctrine are implicitly irrelevant.

It is far from clear, however, that history is naturally progressive. The Warren Court anticipated that as society "evolved" and became "more mature," the Court would interpret the Constitution in a manner that reflected society's increasingly "humane" standards.[551] Yet, with the national trend towards more severe punishments in the 1980s and 1990s, especially for drug offenders, sex offenders, and recidivists,[552] the promise of the evolving standards of decency test was in a practical sense broken. According to the numbers-based approach to the Eighth Amendment, the doctrine now provides no

548 *See* Coker v. Georgia, 433 U.S. 584, 593 (1977).

549 Atkins v. Virginia, 536 U.S. 304, 315 (2002).

550 *Id.* at 315-16.

551 John F. Stinneford, *Evolving Away from Evolving Standards of Decency*, 23 FED. SENT'G REP. 87, 88 (2010).

552 *See supra* Part I; *see also* Michelle S. Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs*, 45 LAW & SOC'Y REV. 33, 34 (2011) (describing the increase in the last thirty years "towards more degrading forms of punishment such as the return of chain gangs, tougher penalties for young people convicted of crimes, increased panic and legislation concerning sex and drug-related crimes, and an increase in punitive 'supermax' facilities").

means by which the Court can respond to the increasing popularity of more severe punishments for crimes that have historically been punished less severely or not at all. The evolving standards of decency test unreasonably assumes that public opinion moves in only a single direction — towards leniency.[553] The rise of mass incarceration has proved that this assumption is simply incorrect.

Under the second inquiry, the Court is explicitly irrelevant. In *Enmund*, *Thompson*, and *Graham*, the Court emphasized the exceeding rarity with which the punishments at issue were imposed.[554] Under the "exceedingly rare" criterion for an evolving standard, the Court does little more than explain that the practice in question is already virtually nonexistent. In *Coker*, *Enmund*, *Thompson*, and *Graham*, the Court explained that society was already unwilling to impose the punishment, as sentences had either not been handed down or executions carried out on these defendants in recent years. Thus, the Court's second inquiry is an attempt to show only that society has already done what the Court says it will now do and that the Court's decision will require what society already requires in nearly every relevant case.

This is contrary to the Article III responsibility of the judiciary, for if the contours of the Eighth Amendment were based solely on numbers, the Court would serve no role in interpreting it, other than to affirm the popular sentiment of the nation and its legislatures — a role that is fundamentally at odds with our constitutional structure. These problems result because the numbers-based evolving standards doctrine is an abnegation of judicial responsibility, rather than a doctrine of constitutional interpretation. The very heart of the doctrine is the premise that the people and the states should decide what the Constitution means rather than the Court. If, for instance, every jurisdiction in the United States in 2018 passed legislation to impose corporal punishment on defendants convicted of rape, then, according to the Chief Justice, the Court must then conclude that the nation had "evolved" to impose a harsher punishment merely because legislatures were unanimous and corporal punishment was imposed by juries frequently.[555]

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[553] *See generally* Jacobi, *supra* note 419, at 1119-23 (explaining how public opinion can swing in either a liberal or a conservative direction).

[554] *See supra* Subpart IV.C.

[555] Note that ear cropping and tongue cutting were both common at the time of the founding. *See* Tonja Jacobi, *Cruel and Unusual Punishment (VIII)*, *in* 1 ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 383, 385 (Paul Finkelman ed., 2006).

The Court is only able to intervene when the threat of widespread manifest injustice is exceedingly small. But, if manifest injustice were to arise in the form of heinous and severe punishments being imposed frequently on a particular class of people, on this logic, the Court would be prevented by the evolving standards of decency doctrine from intervening when its intervention would be most needed. Arguably, with the rise of the system of mass incarceration and the racial and class inequities exhibited in that system, this last possibility has already come to fruition.[556] Under the approach used by the Court in *Graham* and argued by Chief Justice Roberts in his dissent in *Miller*, the fact that the criminal justice system *frequently* sentences poor minorities to longer sentences prevents the Court from addressing that very issue.

The Court's reluctance to intervene when injustice occurs frequently is evidenced by its decision in *McCleskey v. Kemp*, where a five-vote majority of the Court rejected a defendant's challenge to the Georgia capital-sentencing statute under which he was sentenced to death.[557] In *McCleskey*, the defendant relied on the comprehensive Baldus study that revealed that black defendants who had murdered white victims were much more frequently sentenced to death than their white counterparts in cases where the crime was not clearly so heinous as to make the imposition of the death penalty very likely.[558] While the Court's decision in *McCleskey* was ostensibly based on the defendant's inability to demonstrate invidious discriminatory intent,[559] the Court could just as easily have determined that the significant increase in the frequency with which blacks were sentenced to death in the midrange of unpredictable cases warranted the Court's intervention on the same grounds that Georgia's sentencing scheme was arbitrary and capricious as in *Furman*.[560] Under *McCleskey*, racial disparities in sentencing that disproportionately impact blacks were deemed constitutionally insignificant if defendants cannot prove intentional racial discrimination, even if defendants can prove that it is both likely and

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[556] *See* DOUGLAS C. MCDONALD & KENNETH E. CARLSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SENTENCING IN THE FEDERAL COURTS: DOES RACE MATTER? 1 (1993), https://www.ncjrs.gov/pdffiles1/Digitization/145328NCJRS.pdf; Charles J. Ogletree, *The Significance of Race in Federal Sentencing*, 6 FED. SENT'G REP. 229, 230 (1994).

[557] McCleskey v. Kemp, 481 U.S. 279, 314-20 (1987).

[558] *Id.* at 286-87.

[559] *See id.* at 313.

[560] *See id.* at 320-22 (Brennan, J., dissenting).

frequent.[561] Years after *McCleskey*, statistics continue to show that racial minorities regularly receive comparatively disproportionate punishments, an injustice that occurs far more frequently than the "exceedingly rare" punishments with which the Court has concerned itself under the terms of its largely irrelevant Eighth Amendment jurisprudence.[562]

In this era of mass incarceration, the Court should abandon an approach to the Eighth Amendment that is based on the rarity of potential harms to constitutional rights. Departing from the numbers-based approach to the evolving standards of decency doctrine would not propel the Court into uncharted waters but would enable it to return to firm constitutional footing that predates its innovation in *Gregg* by decades. If the Court were to embrace generally applicable constitutional principles, such as proportionality, it could finally guarantee that racial minorities are not subjected to cruel and unusual punishments due to their race. An approach to the Eighth Amendment based on rarity is incoherent, inconsistent with a federalist system of governance, and destructive of the judicial branch's status as a co-equal branch of government.

In *Weems*, the Court concluded that the Eighth Amendment could not be construed as an empty promise that "prevent[ed] only an exact repetition of history."[563] Instead, the *Weems* Court concluded that the Eighth Amendment provided the means for the Court to place limits on possible future legislative enactments that may prove to be cruel and unusual in their application.[564] The *Weems* Court recognized that while the function of the legislature is primary, its function has constitutional limits, and "those . . . the judiciary must judge."[565] When those limits are reached, the legislative power may be brought to the judgment of a power "superior to it for the instant," and the proper exercise of that superior power requires the judiciary to comprehend "all that the legislature did or could take into account[] — that is, a consideration of the mischief and the remedy."[566] In short, the *Weems* Court described the role of the Court as one in which the Court exercises its own judgment regarding the appropriateness of a punishment.[567] Such a straightforward approach presumes the co-

561 *See id.* at 321-22.

562 *See* MCDONALD & CARLSON, *supra* note 556, at 1; Ogletree, *supra* note 556, at 230.

563 Weems v. United States, 217 U.S. 349, 373 (1910).

564 *Id.*

565 *Id.* at 379.

566 *Id.* at 378-79.

567 *See id.* at 379-80.

equal status of the judiciary as safeguard of the Constitution, as opposed to the numbers-based evolving standards of decency doctrine, which requires the Court to determine what legislatures, juries, and the public at large would prefer that the Court do.

Although numbers may seem objective, they do not explain the Court's conclusions in its Eighth Amendment cases. By manipulating which numbers it considers and how to assess those numbers, the Court has clearly been exercising its independent judgment as to the propriety of particular punishments. In *Miller*, the Court embraced a role comparable to that which the Court adopted in *Weems*. Such a role seems preferable to the Court's incoherent numbers-based approach, which has in reality proven far more malleable than an approach based on a generally applicable principle, such as proportionality.

While the Court should not lightly impose its subjective beliefs, neither should we quickly conclude that determinations concerning proportionality are hopelessly subjective. The concept of proportionality exists at the very heart of any understanding of criminal law and legally authorized punishment. Proportionality informs both the retributive and the utilitarian concepts of punishment, and it has been a part of the Court's Eighth Amendment jurisprudence since 1910.[568] The notion of proportionality is thus a concept that the justices are familiar with and expert in applying, similar to the concept of foreseeability in torts or voluntariness in criminal law. In contrast, the Court has shown itself to be at best inexpert in numerical analysis, and at worst entirely disingenuous.

Subjectivity is inherent in judgment, and masking judgment behind choice in numbers only clouds accountability, rather than providing any genuine objectivity. But even if the Court could ascertain how to perfectly and consistently count state legislation, it should not do so, for it should not abdicate its responsibility to give meaning to a broadly-worded constitutional provision that is on its face not limited to an enumerated checklist of prohibited punishments. The Court should follow the precedent of *Weems* and meaningfully subject punishments to the independent judgment of a co-equal branch of government.

CONCLUSION

A potential justification for the Supreme Court refusing to regulate doctrines that impact both the vast majority of people in the criminal

[568] *See id.* at 385-88.

justice system and the most pressing problems that the system faces is that the Court regulates all of these topics indirectly. In its exclusionary-rule jurisprudence, this claim is explicit — that the innocent will be protected by prohibiting police from violating the rights of those against whom evidence is actually found.[569] This assumption has been shown to be unsound, but the Court continues to rely on this convenient untruth. In other contexts, the claim is implicit. For instance, pleas arguably occur in the shadow of the highly-regulated trial context, yet not only is this an unsafe assumption at the best of times, the Court has undermined such logic by severing the link between due process in each context. Similarly, the argument that the extreme nature of death-penalty cases may shed light on the fundamental rules of sentencing jurisprudence more generally is made untenable by the Court unmooring the most foundational principle of fairness in the criminal justice system (proportionality) from all but the rarest punishment (execution) even though the doctrine grew from the non-capital context.

Some states have taken the leeway provided by the Court's inaction even further. For instance, some states have expanded on *Ruiz*'s ruling that *Brady* does not apply to pleas by allowing prosecutors to withhold evidence from defendants until shortly before trial, including witness names, statements, and other key evidence.[570] While some states have filled the gap by passing reforms that the Supreme Court refuses to craft,[571] the Court's abdication in this area leaves fundamental rights ill-defined and unregulated. This is not because courts are incapable of filling such an institutional role: the Seventh Circuit's close attention to the constitutionality of conditions of supervised release belies that claim.[572]

Other more specific defenses also fall apart under scrutiny: for instance, the defense of the Supreme Court's refusal to examine disproportionate non-capital sentences because the Eighth Amendment is concerned only with procedure is contradicted by the

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569 *See supra* Subpart I.C.

570 Beth Schwartzapfel, *Defendants Kept in the Dark About Evidence, Until It's Too Late*, N.Y. TIMES (Aug. 7, 2017), https://www.nytimes.com/2017/08/07/nyregion/defendants-kept-in-the-dark-about-evidence-until-its-too-late.html?emc=edit_ta_20170807&nl=top-stories&nlid=20948488&ref=headline.

571 *See id.*

572 *See* Kim Janssen, *U.S. Appeals Court Slams Handling of Supervised Release, Reverses Four Sentences*, CHI. SUN-TIMES, (Jan. 13, 2015, 5:09 PM), https://chicago.suntimes.com/news/u-s-appeals-court-slams-handling-of-supervised-release-reverses-four-sentences (describing multiple cases in which the Seventh Circuit struck down unconstitutional supervised release conditions).

Court's willingness to apply the Eighth Amendment to substantive issues in capital punishment, such as whether juveniles are adequately culpable for that penalty.

As we have shown, the Supreme Court's minimalist jurisprudence constitutes a cone of shame in which the Court disregards most people affected by its rulings at every step of the way. It protects as few as 2% of those subject to *Terry* stops and regulates the less than 3% of that small group who are then charged and go to trial. Furthermore, it shields less than 1% of that tiny subset facing capital rather than non-capital sentences, and it focuses on the handful of even those facing execution, premising action on its own irrelevance.

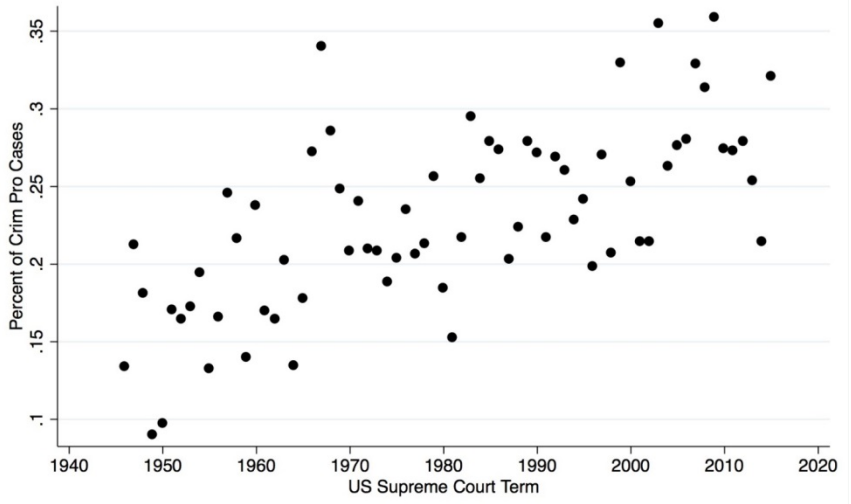
Not only are the vast remainder of people ignored, but in each of those steps, racial minorities — particularly African-Americans — are particularly harmed by the Court's failure. Each of the major crises in the criminal justice system unfolding today is the result of the Court's abdication of its responsibilities, and each disproportionately affects African-Americans: discriminatory stops, including those designed to harass and intimidate; fatal police shootings; potentially unconscionable plea deals; mass incarceration; unnecessarily long prison terms leading to a missing generation of black men; and the disproportionate execution of black prisoners. Whereas the Warren Court was drawn into criminal procedure through the lens of race, the modern Court appears to be avoiding every racially significant issue. This raises the natural question of whether the Supreme Court is truly blind to these issues or whether it is purposely neglecting them. Either way, the Court's extensive jurisprudence in criminal procedure has become a sideshow in the actual operation of the criminal justice system.

A better question than asking whether the Supreme Court's avoidance is deliberate is how its hand can be forced to address these issues. The Supreme Court responds to constituencies. The death-penalty bar has become an influential force, and the Supreme Court has responded with comprehensive jurisprudence over the death penalty. More recently, the juvenile bar has become a powerful player, and the Supreme Court has responded with multiple decisions protecting juveniles, not only in the death penalty context but by crafting a rare non-capital prophylactic. To bring about change, interested actors need to forge coherent constituencies. As *Whren* illustrated, it is manifestly difficult to bring race-based challenges in the criminal context, but cases do not need to be developed in racial terms to affect such change. In recent years, bipartisan agreement has been developing over excessively long sentences, bringing together

interests concerned with fairness and those concerned with resources.[573] Developing more such constituencies will pressure the Court to act, however grudgingly, to embrace its responsibility and cease its abdication in criminal procedure jurisprudence.

APPENDIX

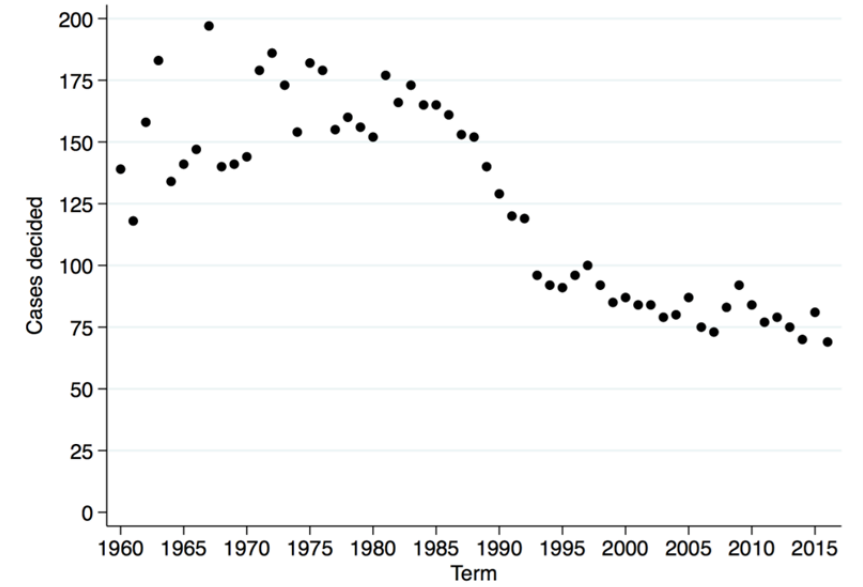
Figure 1: Percentage of Supreme Court Criminal Procedure Cases, by Term



Data: Harold J. Spaeth et al., *2017 Supreme Court Database, Version 2017 Release 01*, WASH U. L., http://supremecourtdatabase.org (last visited Mar. 20, 2018).

[573] *See* Norman J. Ornstein, *There Are Emerging Bipartisan Coalitions on Prison and N.S.A. Reforms*, N.Y. TIMES: ROOM FOR DEBATE (Sept. 29, 2015, 12:48 PM), https://www.nytimes.com/roomfordebate/2014/11/05/the-possibility-of-post-election-bipartisan-deals/there-are-emerging-bipartisan-coalitions-on-prison-and-nsa-reforms.

Figure 2: Supreme Court Case Load, by Term



Data: Harold J. Spaeth et al., *2017 Supreme Court Database, Version 2017 Release 01*, WASH U. L., http://supremecourtdatabase.org (last visited Mar. 20, 2018).