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In Memoriam
Professor David Williams II

Introduction

This issue of the Ohio State Law Journal is dedicated to David Williams II, former professor at The Ohio State University Moritz College of Law and celebrated university administrator, who died on February 8, 2019. He was 71.

Williams was born and raised in Detroit, Michigan, where he worked as a middle school teacher and coach in Detroit public schools from 1970 to 1980. He earned a Juris Doctor degree from the University of Detroit Law School in 1982 and a master’s degree in taxation from New York University Law School in 1984.

An expert on tax law, law and education, and sports law, Williams joined Moritz as an Assistant Professor of Law in 1986 and achieved the rank of Professor in 1995. In addition to directing the University of Oxford—Ohio State Summer Law Program, he also served as Vice Provost for Minority Affairs and as Vice President for Student Affairs at Ohio State.

Williams was appointed Vice Chancellor, General Counsel, and Secretary of Vanderbilt University in 2000, and he also joined the faculty of the law school. He had a groundbreaking career at Vanderbilt, which spanned nearly two decades. He was named Vice Chancellor for Athletics and University Affairs as well as Athletics Director in 2012, becoming the first African American Vice Chancellor at Vanderbilt and the first African American Athletic
Director in the Southeastern Conference. Vanderbilt won four national championships under his tenure and celebrated many other athletic successes.

He also spearheaded a number of initiatives for student-athletes at Vanderbilt: he began a lauded summer internship program, guided major renovations of Vanderbilt’s athletic facilities, and was instrumental in launching the University’s Sports and Society Initiative. He returned to Vanderbilt University Law School in January 2019, where he instituted a Sports, Law and Society Program.

The Student Recreation Center at Vanderbilt is being named in honor of Williams. Williams is survived by his wife, Gail; four children, Erika, David III, Samantha, and Nicholas; six grandchildren; and one great-grandson. Williams will be interred at Woodlawn Cemetery in Detroit, Michigan.
Tribute to Professor David Williams II

E. GORDON GEE*

All of us have known people who, simply by their presence, made us better. For the thirty years that I knew him, David Williams played that role in my life.

During my first term as Ohio State president (1990–97), I quickly realized that I needed to have a strong voice in support of diversity and inclusion, as the Ohio State campus was riven with problems and tensions facing, particularly, our African American community. I started to search for someone who had a strong commitment to minority affairs and who could speak truth to power. David Williams’s name was given to me. David, at the time, was a distinguished member of our law faculty. After meeting with him, I knew that David had greatness and uncanny leadership ability. But he did not want to become a University administrator. Finally, while he was serving as a faculty leader at the University’s Oxford program, I called him at a pub in Oxford and begged him to come back and lead the minority division at the University. He reluctantly accepted.

What I immediately learned about David was that he was not simply a powerful voice for good, but he was an unusually gifted administrator. I soon realized that he was bigger than the task at hand. And David was a big man physically who, when he was in the room, you knew he was there. As an aside, he always played a deceptive role of appearing to be somewhat unkempt and even a bit sloppy, which gave our students comfort, but which deceived others who thought they could get something past him.

I asked David to assume ever-wider assignments. Ultimately, he became Vice President for Student Affairs and had major responsibility for the University’s athletic program. Under David’s leadership, we hired Andy Geiger as our Athletic Director, and the rest is history. Ohio State quickly regained its place as one of the premier athletic programs in the country.

I left Ohio State in 1997 to assume the presidency of Brown University. I asked David if he would join me. I can still remember him looking at me in only the way that he could look at anyone, smiling, and saying, “Do I look like I belong in the Ivy League?” But three years later when I accepted the chancellorship at Vanderbilt University in 2000, I was able to persuade David and his family to join me. David came as Vice Chancellor and General Counsel. He and I started on the same day, August 1, 2000. I can remember well the first time our Board of Trust caught a glimpse of David, which gave some of them heartburn. David was the first African American Vice Chancellor at Vanderbilt. Breaking the color barrier was very comfortable for David. At that southern institution, with its complicated history regarding race, not only did David break ground as the first African American Vice Chancellor, he quickly showed himself to be a leader willing to stand up and speak out for what was right.

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As at Ohio State, I realized that David was a brilliant utility infielder. So, I again made David Vice Chancellor for Student Life as well as University General Counsel. I then placed athletics under David. As you can imagine, for Vanderbilt, a highly selective and small institution, playing in the Southeastern Conference was an enormous challenge. But David insisted that our greatest strength was to emphasize the “student” in student-athlete. Too often, college athletics stands apart from the core higher education mission. At Vanderbilt, David helped to change that by ensuring that student-athletes received a well-rounded education. For example, his experiences teaching abroad convinced him that student-athletes could benefit from international travel. Today, Vanderbilt athletes enjoy opportunities to study abroad, hold internships, and take part in other enriching activities that few, if any, other student-athletes in the country enjoy.

Unsurprisingly, all the changes that David instigated have paid off, bringing the student-athlete graduation rate in line with that of other students at Vanderbilt and helping many of those student-athletes gain spots in graduate and professional schools. And, I can also say that Vanderbilt has enjoyed an unparalleled level of success in winning national championships in baseball, bowling, and women’s tennis and has become much more competitive in the SEC.

David also worked hard to educate Vanderbilt students, faculty, and staff about the University’s past by honoring trailblazers such as Perry Wallace and Godfrey Dillard, Vanderbilt’s first black student-athletes and the first black players in the Southeastern Conference.

Years before Confederate monuments became a major national issue, David helped lead a long battle to rename Vanderbilt’s Confederate Memorial Hall. I remember that shortly after we both arrived at Vanderbilt, David said that as long as there was a building on campus with the Confederate name on it, we would never really, truly be able to make our minority students, faculty, and staff feel comfortable.

Making the change was a no-brainer to me, but the United Daughters of the Confederacy—who originally donated the building to Peabody College, which Vanderbilt later acquired—saw things differently. As I mentioned at David’s memorial service, I gave him the daunting task of explaining our position to the Daughters of the Confederacy face-to-face.

“Either you will charm them or scare the hell out of them,” I joked. In truth, David’s open and empathetic nature helped him to advance understanding on both sides.

As he later said: “The thing that was most interesting to me was, though we had a totally different view, in most cases we were able to remain friends. I had a better understanding of where they were coming from, and they had a better understanding of where I was coming from.” The lawsuit’s progress through the court delayed progress on the official renaming, but Memorial Hall stands today as one of the many monuments to David’s integrity and courage.
Those same qualities made him my most trusted advisor and one of my closest and dearest friends. He always embraced me as a member of his family. His wife, Gail, who in and of herself is a force of nature, along with his children, were very much the center of David’s life. His devotion to his work was outweighed only by his love for his family and by the love he held for so many of his friends.

Over my forty years as a University president, I have learned that fulfillment comes from living with sincerity and from reaching always toward growth and betterment. On that paramount lesson, David Williams was and will always remain one of my most powerful teachers.
Remembering My Professor and My Friend:
David Williams II

JOHN M. JACKSON*

In rare moments in your life, you will come across someone who seems too good to be true. They have so much education and pedigree, but they are still simple, everyday people who you can talk to. They have the respect of executives, college presidents, and boards of directors, but yet they know the names of the hourly staff in the building. They could flex about all they know and who they know, but yet they choose to simply be helpful to you in your time of need (without arrogance or any expectation of anything in return).

My friend and my professor, David Williams, was one of those people. I first met him in the fall of 1990 as a first-year law student at The Ohio State University College of Law. His physical presence was undeniable—he had a walk and a swag that was different from the others; the clothes that he wore were the most stylish in the school; he had the gift of the tongue—as he was smooth and could persuade you like none other. He also exhibited an uncanny balance between cultural comfortability, political savviness, and academic excellence that I had never witnessed before. As a result, I wanted to know more about him; I wanted to be more like him. I was seeing the type of man that I wanted to become, so I watched, I listened, I emulated.

A pivotal phrase that I believe in is “They Will Be What They Can See,” which implies that people will encounter a number of people who represent first experiences for them. Professor Williams represented a number of FIRSTs in my life. He was the:

- FIRST African American male teacher or professor that I had;
- FIRST African American male who I knew with multiple degrees, including an M.B.A., a law degree, and an advanced law degree in tax;
- FIRST African American male to be selected as an Athletic Director of an SEC university;
- FIRST tax professor to have swag and the ability to make it fun, exciting, and applicable;
- FIRST image of what a successful African American male attorney looks like (now I could actually believe that I could be because of the “larger than life” physical example that he was).

Professor Williams was an ambassador for Diversity and Inclusion/Equity and Fairness. He was a trailblazer in many areas and created opportunities for others (athletically, academically, and career-wise) for over forty years. He filled his classrooms with wisdom, commitment to academic excellence, racial

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consciousness, political savviness, and a love for young people and young minds. He was special. He was one of my favorite professors. He was one of the two law school professors (he and Professor Vincene Verdun) who personally invested in me, validated me, encouraged me, and made sure that I knew that I had the talent, the ability and the passion to be a thriving corporate attorney. Twenty-five years later, his vision for me still holds true.

**KEY MEMORY #1 – 1ST SEMESTER EXAMS**

My first critical interaction with Professor Williams is likely the most important interaction that I ever had with him. It was the week before Thanksgiving in 1990 (my first year of law school). Many of my first year Black Law Student Association (BLSA) members and I were nervous and scared about the upcoming finals. We knew that how well we did on these exams would determine our three-year cumulative grade point average, our internship opportunities, and potentially the trajectory of our careers. To say that we were stressed is a material understatement.

None of us had taken a law school exam before. We did not have sample exams to use as a point of reference. The professors had not sat down and walked us through what they wanted or what constitutes an “A” versus a “C.” Since Professor Williams was the BLSA Faculty Advisor, he called an emergency meeting of the 1st-Year BLSA students, and he asked us this simple question:

In the real world, what do we call it when you have a client with as many complicated issues as we create, that has as many counter-challenging facts as we provide, and you file a complaint or brief with the courts within three hours of you having your first client meeting?

Student after student gave suggestions but much to no avail—no one had any right answers. When we finally gave up, Professor Williams (in his smooth, calming voice) said, “In the real world, we simply call this behavior MALPRACTICE.”

I have never forgotten this experience or these words because he validated each of us as law students in that moment. He gave me hope that I was ready and that I would ultimately become a successful attorney. He then went on to explain that no one memorizes cases and black letter law in the real world (“that’s why we have books and libraries”). He also made it clear that a law school pedigree does not win court cases; being on law journal does not win court cases; being in the top ten percent of your class does not win court cases. In the real world, he said, the only 1:1 direct correlation to winning a court case is which attorney is willing to work the hardest; who is willing to research that extra issue when everyone else is willing to quit; who is willing to spend the extra time looking for a creative solution for his/her client rather than simply making excuses based on the budgeted number of hours for business and time-management purposes. So, on this day, Professor Williams helped me realize that my effort and my willingness to never quit would be what would enable me
to be the best attorney that I aspired to be (not my first semester grades, not my hometown, not my financial upbringing).

**KEY MEMORY #2 – RACIAL STATEMENTS PAINTED ON THE WALL**

In the following year, Professor Williams was at the center of a racial “revelation” moment that forever changed how I thought about evaluating and addressing racial matters. On the Monday after Thanksgiving, I returned early in the morning to The Ohio State University College of Law and noticed that someone had spray painted all along the second-floor wall, “Go Back to Africa You Niggers.” I was physically shaking from the anger and frustration. I was emotionally hurt because I had convinced myself that 1991 was a post-racial era (at least within the law school, where we were intellectuals and above all of this ignorance and foolishness). Unfortunately, on this day, we realized that this was now our reality. As the Vice President of BLSA, I had to do something about this (as my emotions would not allow me to keep still).

So I went to Professor Williams and told him that I was calling an emergency meeting of the BLSA students to discuss the issue. For nearly forty-five minutes Professor Williams patiently listened to student after student speaking about their fears, their emotional frustrations, their disappointments, and ultimate rants about what should the administration do. What were we going to demand? What were our requirements? We were ready for a sit-in and other types of demonstrations, if necessary, to force the Dean to do the right thing.

Then Professor Williams brought calmness, strategy, and perspective into the room. He first asked a question: Do you think that the timing of this was random or strategic? Why did they choose this week, this day? He explained to us that the “intent” of the perpetrator was to wreak emotional fear and havoc in us and to “get us off of our game.” It was 100% strategic that it was done two weeks before finals. So he instructed us to “quit playing checkers and begin to play chess,” to “quit being tactical and be strategic,” and to “keep our eyes on the prize.” Then he made it plain to all of us. He said the perpetrator wants you to spend the next two weeks worrying about some spray paint (which independently has no power) rather than studying. And if you are not prepared for finals and get grades that are not becoming of your genius, then you would have allowed the perpetrator to win the war. The war is about your academic excellence. The war is about you getting great summer internship opportunities. The war is about your impacting the world through your legal minds and legal strategies. So go back to studying and let me do what I do.

Ever since that day, I have chosen to “up my game” and play chess; to focus on the strategic priorities of my opponent (whether on an M&A transaction, on a public policy debate, or simply in life). Ever since that day I have chosen to “major in the majors” and not sweat the small stuff. I learned that I have to think differently. I have to strategize differently. I have to choose differently. All because I know better now—because of Professor Williams.
The full essence of Professor Williams can be summed up in his honest and sincere love for people. His desire to counsel them to make them better informed; to equip them with better knowledge; to produce better results. He simply wanted to utilize his time, talent, knowledge, education, credibility, relationships, and experience to benefit someone else, especially athletes, especially young people, and certainly young students of color.

This passion for young people is why Professor Williams served as the Faculty Advisor for our BLSA chapter. It is why Professor Williams strategized with me and equipped me for “the fight” when I got called into a meeting before the Dean and his leadership team. It is why he remained in the room with me as I debated with six administrators who I knew were my academic superiors but yet I felt safe. Professor Williams was in the house, and I knew that he had my back.

However, the most telling moment for me of how Professor Williams loved young people and was a never-ending supporter of diversity and inclusion came in November 2018. My daughter, Sydney, was a senior in high school and had narrowed her final two college choices to The Ohio State University and Vanderbilt University. While we were in Nashville, I called Professor Williams to let him know that we were in town, that we were visiting the campus and just wanted to say hello; but he was not having it. He cancelled his meetings the next day, had us meet him at the Vanderbilt University Sports Complex, and gave the two of us a personal tour of the Vanderbilt Campus—telling us about the growth of the campus in academic research and relevance; telling us about the new academic buildings and dorms being built on campus; and spending most of his time and energy on how proud he was of the journey of the University in its recruitment and retention of students of colors throughout the United States and internationally. Four hours later, after my daughter got an impromptu, personal campus tour from the Vanderbilt Athletic Director, he looked her dead in the eye and said, “Because of my relationship with your Daddy, I am committed to doing everything within my power to ensure that you have a successful experience while you are here at Vanderbilt University.” As a father, my heart was at peace because I knew, even though I was six hours away, my child was in safe hands. All this grace, mercy, and favor being shown by Professor Williams for the daughter of a student who he had in tax class twenty-seven years earlier. Today, she is a thriving pre-med student at Vanderbilt, continuing on his legacy of academic excellence for students that he believed in. Relationships mattered to him.

All of these stories represent the man, the teacher, the advisor, the advocate, and the leader that I knew, respected, and loved. He was the intellectual. He was the strategist. He was the calm throughout the storm. He was the voice for fairness and equity. He was the voice for excellence. He was the voice for The Ohio State University. He was the voice for Vanderbilt University. He was the
voice for love and family. Ultimately, he was the voice that family members, friends, co-workers, athletes, and students will continue to miss, because there are none like him.

The final words that I would like to say to you, Professor Williams, can be found in Matthew 25:21: “Well done, my good and faithful servant. You have been faithful over a few things and I have put you in charge of many things. Enter into the joy of your Master.”

It has been a privilege to learn and study at your feet, to seek you for wise counsel, and watch you in your brilliance!! The Ohio State University College of Law, Vanderbilt University, and thousands of people throughout the world are better simply because of the man that you chose to be and the example that you were. You walked the walk. You talked the talk. And we respected you because of that. Thank you, thank you for sharing your love and kindness with each of us, one person, one experience, one opportunity at a time! You were simply the best that has ever come along!!
David Williams II—Mentor, Colleague, Friend

LEROY PERNELL*

In 1985, I was the only African American male professor at The Ohio State University College of Law. Being the only one carried with it a privilege, a responsibility, and a burden. While there was and is much talk about the significance of Black law faculty as role models for students and for aspiring African American lawyers in the community, there is and was an equal, if not greater need, for such models for other Black faculty as well. Teaching in the legal education academy is at best a largely monastic and sometimes nomadic experience for all, and particularly for those whose very professional existence screams both uniqueness and challenge to the repressive status quo of a White-dominated elite world. In short, try as I might, to move forward each day, driven by a commitment to open doors of opportunity and diversity both within and outside the legal profession, I was both needy and desperate for partners and compatriots on this journey.

Therefore it was as much for selfish reasons as for bringing about a transformative change that I sought in 1985 to once again seek out persons and convince the institution to bring them on board, not just as an arrow in the quiver of diversity, but as a strong catalyst for both the law school community and myself.

I was blessed when we successfully attracted David to join the faculty. His presence was a strong reinforcement for students and faculty alike (myself included) of the power of diversity strength. But his significance went well beyond enhanced demographics. What David Williams II, appointed to the Ohio State faculty, meant was also a shot across the bow for those who had a rigid, elitist, and racist conception of what an African American law professor was all about.

In 1985, the perception was still strong and widely held that any concession to the presence of faculty of color came with the largely unspoken (but not always) notion that such change might be “acceptable” if such faculty were restricted to teaching those subjects that were of value and existence in the then-recognized expertise allotted to Black faculty. Only the most repressive and uninformed would deny our expertise and leadership in areas such as civil rights and racial justice, which was provided by Black lawyers icons such as Charles Hamilton Houston, Wiley A. Branton, Constance Baker Motley, and, of course, Thurgood Marshall. The largely White legal academy was less confident that Black intellectual, instructional leadership could be provided in subject areas

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that ventured outside the white-imposed comfort zone and ventured into subject matters that were not only considered “White” but also critical to a majority-concept of areas necessary for real professional success and prestige. Such courses were often viewed as the gateway to large firm practice, business achievement, and elite recognition.

Then came David Williams II—teaching tax. In the imagined picture-encyclopedia, next to a training roadmap for money and prestige in the practice of law, you will find the image of tax law and the tax law professor. Only a handful of Black law professors (outside of the faculty of historical Black law schools) had ventured down this path by the 1980s. Dave came onto the faculty not only boldly declaring his mastery of the heretofore “reserved” subject, but bringing to it an expertise based not only on intellectual acumen but on practice and practical experience as well.

David Williams, the tax law professor, was remarkable not only for his bold challenge to the status quo but also for the remarkable degree of acceptance he received from the students who had the foresight to take him and his fellow faculty who, sometimes begrudgingly, grew to know him as a colleague. David’s initial impact, however, went way beyond the classroom. He was immediately a source of mentorship, an advisor, a counselor, and a sounding board for students—particularly students of color, who desperately needed a showcase all the possibilities of law as a profession.

Others, perhaps, can speak in greater detail about what David Williams II meant to students. I can speak as to what he meant to me. His presence, along with Professor Vincene Verdun, allowed a nucleus to be formed of African American faculty who could both support each other and further the larger mission of opening both the doors of excellence and opportunity. This was work, the burden of which needed to be shared. David did more than his part in bringing about a transformation that today is still a beacon as to what a law school can do in providing opportunities for excellence for a diverse population deserving a chance for a legal education. As a person who is an alumnus of this law school, seeing what he did in this regard has an emotional and intellectual impact that these words cannot adequately describe.

My connection and remembrance of David Williams is not limited to Dave Williams the law professor. As I have suggested in other essays, the role of academics of color is to speak with many unique voices. The need for those voices transcends the legal education academy and exists in the larger world of higher education as well. The opportunity to articulate our unique perspective while, at the same time, acting administratively to implement policies and provide real-time opportunity is often limited. David Williams, however, had such an opportunity and took full advantage of it, when in 1992 he assumed the mantle of Vice Provost (first interim and then permanent) of Minority Affairs for The Ohio State University. This position was unique in the history of Ohio

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State. First occupied by the legendary Frank Hale, Jr., and created in recognition of his leadership, the position allowed for the direct involvement in recruiting and funding opportunities for students of color to attend the graduate and professional programs offered throughout the University. The history of this office accounts for hundreds of PhDs, masters, M.D.s, and J.D.s of color who have served this nation with distinction—all because of the Office of Minority Affairs (OMA). The Vice Provost for Minority Affairs also had the unique position of answering both to the President of the University and to Academic Affairs, headed by the Provost.

David Williams II was the successor to Dr. Frank Hale, Jr. in this critical University and community-supporter position. Under his leadership, the impact of the office was expanded to include not only graduate/professional student recruitment, but support, monitoring, and encouragement of minority faculty hiring. David’s leadership not only continued the vision of Frank Hale, but also focused the President and University leadership on providing the resources necessary to accomplish the dream.

When David’s expertise in minority affairs, as well as his academic and practical interest in college athletics, were rewarded with his appointment as Vice President for Student Affairs, by President Gordon Gee in 1993, I was fortunate enough to be convinced by David to succeed him as the next Vice Provost for Minority Affairs. Together we were able to forge paths that ran deep into opportunities for not just African Americans, but for Native Americans, Latino-Latina Americans and Asian Americans as well. I found David to be the perfect partner in this endeavor. Our different approaches melded into substantial opportunities for the University and the larger community.

I do not know if my path through legal education, which led down the road of leadership (including deanships) at three law schools, would have occurred without David. There is a certain amount of irony in that the person who I helped recruit to The Ohio State University College of Law in turn helped to open the broader vistas of administration at both the university and law school levels, for me. I do know that I will both cherish and deeply miss the colleague, the mentor, and the man. I came to know both him and his family, and I have often marveled and smiled at their success then and now. I will not know if I was as much a mentor for him as he was for me. I do know that we shared a bond, a vision, and a friendship that will always be.
In Memoriam of Professor David Williams II

ROBERT L. SOLOMON*

I first met Professor David Williams in the Fall of 1986. It was my second year of law school at the Moritz College of Law. It was his first year as an Assistant Professor at Ohio State. Prior to his arrival, there had only been one African American faculty member in the law school at that time, Professor LeRoy Pernell. As a Black male, first generation college student and law student, I was ecstatic to learn that he had joined the faculty. Professor Pernell was the Black Law Student Association (BLSA) Advisor, so all of BLSA was anxious to see what David’s role might be and what kind of person he was.

David was a tall and physically imposing figure. His serious face was a bit intimidating. He exuded confidence and strength. We could not help but to admire him. Of course, those who knew him will attest that he was in fact a warm, caring, engaging man. At the time, he was single and had not yet met his wife, Gail, so his gracious hospitality as a single man was surprising. One of my fondest memories was how he would routinely open his home in Victorian Village to us. He was close friends with local lawyer, Michael Coleman, before Coleman became Columbus’s long-standing accomplished mayor. On one occasion, he and Michael Coleman were hosting BLSA at his home. David was in his kitchen cooking food for us. In fact, I learned a very special recipe from him that day, which I still prepare regularly! We spent an entire Saturday relaxing, talking, laughing, and watching movies. David mentored all of us in the most profound ways. He made us feel at home, valued, and special. He truly cared about us and nurtured our futures. Moreover, his care and concern extended to all his students. He was not a respecter of persons. He was a teacher and mentor at heart, and he was willing to give to every student who crossed his path.

David was also an extraordinary teacher. The Moritz College of Law is not only known for the exceptional scholarship of its faculty, but also for the high quality of classroom instruction. David was no exception to this rule and contributed to this sterling reputation. During my law school tenure, Federal Income Tax was still on the Ohio bar examination, so we were all advised to take Tax while in law school to prepare. I confess that I was intimidated by this course and dreaded the notion of taking Tax. However, David was a renowned Tax professor and expert. Though terrified, I enrolled in his Tax course. Yes, I hated the subject matter as much as I had suspected. Albeit, the clear, concise, and effective way David taught the course made it possible for me to thoroughly grasp the material and post one of my highest law school grades! It is no surprise

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that David was voted Outstanding Professor of the year on multiple occasions throughout his tenure at Ohio State.

After graduating and practicing law for several years, I returned to OSU to work. Throughout my tenure as an Assistant Dean in the law school, David became a supportive colleague, still mentoring and nurturing. When his career continued to advance and he moved to Vanderbilt University, he always made time for his former students. I could go without communicating for a couple years and then suddenly reach out to him for advice. He would always return my calls and emails. Most recently, we had been in touch because my son was in college in Nashville, so I was often in town. My undergraduate alma mater, Lipscomb University is in Nashville, so I would always cover the law school recruiting events there—in my role as Dean for Admission at Moritz, and then later as an alumni volunteer, when I assumed the role of Assistant Vice Provost in the Office of Diversity & Inclusion at Ohio State. Last year, I had begun to interview for Vice President positions at universities around the country, so David made time to sit down with me to talk about his experiences as a VP and share lessons he had learned. Weeks before his passing, he invited me to his home to meet his Vanderbilt colleagues to network and expand my circle of contacts. He wasn’t cooking this time. Gail oversaw the event details at their home, but he was ever the gracious host as usual. He was creating an opportunity for a newly hired Vice Chancellor at Vanderbilt to meet the community. My last memory of David mirrors my first: a caring, giving, generous soul who opened his home as a tool to help others grow, develop, and connect. There is no doubt that this world is a much better place because of David Williams. I know I am, and I am eternally grateful that he touched my life in countless ways over the past thirty-four years.

Recently, I assumed my new role as Vice President for the Office of Inclusion Diversity and Equal Opportunity at Case Western Reserve University. I have no doubt that David’s example and mentorship helped to make this next step a reality. Rest well my friend. Your legacy is thriving and still touching lives through all the people you touched through your amazing life.
David Williams II, Esquire, the Trailblazer
Whose Legacy is Transcendent…

ROSE A. WILSON-HILL*

It is not often that we meet somebody who has sustained energy, only matched by the person’s powerful intellect, presence, and love of family. I found this unique combination at The Ohio State University, when I first met David Williams II in his role of Vice Provost for Minority Affairs in 1992. No one on staff knew of his insatiable drive and zest for excellence and without excuses. Strangely, it seemed beyond its borders. We discovered, in short order, that he wanted students to be their very best and afforded the necessary resources to assist them in “connecting all of the dots” at every juncture of their academic journeys.

I remember Dave as having this “larger than life” personality, with wit, fairness, and firmness. He was truly a servant leader, with a bigger-than-life and unforgettable presence resonating throughout campus and beyond. When you first met him, you instantly knew he was “no nonsense” and valued, and perhaps, commanded that “extra mile” performance.

In his post as Vice Provost, I had the unique opportunity to work closely with him and observe his remarkable negotiating prowess. On all occasions at the microphone, he spoke with clarity about his vision and that of the University. His agenda was precise and never mistaken about the timely trajectory, both short-term and long-range. I knew he could not serve for an extended time, as it seemed his “calling” spoke of one whose destiny would more broadly be captured in a most robust sphere, whether at this University or elsewhere. And so it was, after his sojourn with Minority Affairs for one year, he was appointed Vice President for Student Affairs, while maintaining his professorial appointment in the Moritz College of Law.

As this quiet giant went about the business of making indelible contributions to his profession, he could have penned many a manuscript about what was an example of the truest humanitarian. Wife Gail was his world, along with his magnificent children: Erika, David III, Samantha, and Nicholas. This devotion is mirrored in his rigorous work ethic, his capacity to multitask proficiently, and his ability to encourage the best in all who crossed his path.

All who had the privilege of knowing Dave, the professor, colleague, friend, advocate, Vice Provost, and Vice President, have cemented the reality that he, without question, made The Ohio State University and beyond a better place! Surely a “well done” sign hangs on his memory. It is fitting to close with Dave’s

* Rose A. Wilson-Hill served as one of the directors in the Office of Minority Affairs (now the Office of Diversity and Inclusion) during the year Professor Williams was Vice Provost (1992–1993), with a seat on his executive council. She is currently Special Assistant to the Vice Provost for Diversity and Inclusion and the Chief Diversity Officer. She simultaneously serves as Director of ODI’s Administration/Special Programs unit.
own mantra, which Gail shared at the recent NCAA awards ceremony in his honor: “I cannot always do what I want to do, but I certainly can do what I can do, and I will.”

So, fair thee well to this “Trailblazer” who ran the race with dignity and all deliberate speed! It is urgent that we “go thou and do likewise.”
Representative Defendants

NIREJ SEKHON*

Everyone except the defendant in a criminal proceeding represents “the people.” Prosecutors, judges, and juries are all considered public agents. Defendants, in contrast, are thought of as parochial, interested in nothing more than saving their own skins. This broadly shared understanding of criminal court actors was not historically fated, nor is it legally accurate today. The Constitution tasks criminal defendants with significant public responsibility. They frequently represent the interests of third parties who have no direct stake in defendants’ criminal cases. Defendants vindicate the participatory rights of excluded jurors, they deter unconstitutional searches and seizures that could harm innocent civilians in the future, and they help ensure the transparent and expeditious functioning of the criminal justice system for the public’s benefit. Neither courts nor commentators recognize these representative actions as part of a coherent account of defendants’ role in the legal system. But representative defendants serve some of the same functions that representative plaintiffs do in the civil setting: overcoming information deficits, low-dollar-value harms, and resource scarcity, all of which make it unlikely that individual harm bearers will seek recourse in civil courts. Courts, commentators, and the public should be clear-eyed about the role defendants play in our legal system. Doing so would help modulate criminal justice policy and enable defense counsel to more effectively challenge the systemic, third-party harms that criminal justice institutions generate.

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I. INTRODUCTION

In conventional thinking, everyone except the defendant in a criminal proceeding represents “the people.” Prosecutors bring criminal cases in the name of “the people.” The criminal law under which charges are brought is the people’s morality as codified by their representatives in the legislature. The judge is a public referee, steering the proceeding towards truth while minimizing inefficiency. And of course, the jury is the most literal representative of the people. The jury is selected from the people to apply its lay, common sense to the facts of a case. The only actor in the criminal court who sits alone, brooding and self-interested, is the defendant.

The conventional view of defendants and criminal proceedings is incorrect. The Constitution tasks defendants with significant public responsibility. Defendants represent third-party interests when challenging unconstitutional police conduct, the discriminatory exclusion of prospective jurors, and violations of the speedy and public trial requirements. In most of these contexts, the Court has not given full-throated recognition to the defendant’s representative role, let alone developed a coherent account of it. This is due to the Court’s investment in the traditional view of criminal proceedings and attendant hostility to criminal defendants. But despite itself, the Court has embedded the idea of the defendant’s representative role in our constitutional jurisprudence.

The Court has been clearest about the defendant’s representative role in the context of Batson challenges. The Fourteenth Amendment prohibits the discriminatory exercise of peremptory challenges to exclude prospective jurors based on impermissible criteria such as race. The Court has permitted defendants to challenge such exclusions even when the defendants do not themselves possess the identity trait that was the basis for excluding the juror. For example, a white defendant may challenge the exclusion of black jurors. Defendants vindicate the prospective jurors’ right to be free of discrimination.

In other constitutional contexts the Court has assigned defendants a representative role without being as forthright about having done so. For example, the Fourth Amendment exclusionary rule serves only one end: deterring future police misconduct. In a criminal proceeding, the only remedy

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3 This was the exact situation presented in Powers. Id. at 402–03.
4 See id. at 414.
5 See, e.g., Davis v. United States, 564 U.S. 229, 246 (2011) (“Rather, we have said time and again that the sole purpose of the exclusionary rule is to deter misconduct by law enforcement.”); Herring v. United States, 555 U.S. 135, 142 (2009) (“The exclusionary rule
available to defendants for an unconstitutional search or seizure is exclusion of unconstitutionally obtained evidence. The Court has stated that exclusion is not designed to compensate defendants for the constitutional harm they suffered. Rather, its purpose is to deter future violations generally. This is to cast defendants as representative agents for third parties who might otherwise be subject to similar police mistreatment in the future.

The Court has understood the Sixth Amendment rights to speedy and public trial as protecting the public’s interests in an efficient and transparent criminal justice machinery. Members of the public, however, do not have standing to vindicate those interests, leaving it to defendants to perform that role on their behalf.

The Court’s reluctance to acknowledge defendants’ representative role across these contexts owes to the Court’s insistence that the criminal process is singularly about determining guilt or innocence. While that one value explains

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was crafted to curb police rather than judicial misconduct . . . .”); Hudson v. Michigan, 547 U.S. 586, 591 (2006) (“We have rejected indiscriminate application of the rule and have held it to be applicable only where its remedial objectives are thought most efficaciously served— that is, where its deterrence benefits outweigh its substantial social costs.”) (internal punctuation and citations omitted); Stone v. Powell, 428 U.S. 465, 491 (1976) (“[A]lthough the [exclusionary] rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately it may well have the opposite effect of generating disrespect for the law and administration of justice.”); United States v. Calandra, 414 U.S. 338, 347 (1974) (“The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim . . . . Instead, the rule’s prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures . . . .”).


7 See infra Part III.B.

8 See id.


10 See Gannett Co. v. DePasquale, 443 U.S. 368, 383 (1979) (recognizing “an independent public interest in the enforcement of Sixth Amendment guarantees”); Barker v. Wingo, 407 U.S. 514, 519 (1972) (noting that “there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused”).

why criminal proceedings have moral salience in our society, it cannot capture all the values at play in institutions as large and complex as our criminal justice systems. Among those values are ones encouraging civic participation, deterring police misconduct, and educating the public. Individual members of the public, however, have little ability or incentive to protect these values themselves.

Drawing on the extensive literature about private attorneys general, this Article suggests that representative defendants solve many of the same problems that representative plaintiffs solve in the civil context.\textsuperscript{12} The procedural tools that private attorneys general avail themselves of—class actions, third-party standing, fee shifting, and qui tam provisions among others—are supposed to ensure optimal remediation of public harms in court.\textsuperscript{13} Information deficits, collective action problems, and litigation costs make it unattractive if not impossible for individual plaintiffs to vindicate harms that do not generate significant financial loss for any single individual.\textsuperscript{14} In theory, this is where institutional regulators should come into play. But such regulators, where they exist at all, may not be able to fulfill their regulatory mandate because of information deficits, lack of political will, and capture.\textsuperscript{15}

Analogous structural impediments prevent the public from vindicating its constitutional interests in being free from unreasonable searches and seizure, civic participation in the criminal process, learning about criminal proceedings, and the criminal justice system expeditiously processing wrongdoers. Representative defendants help ensure that these interests are adequately protected.

Courts and commentators should more transparently and enthusiastically embrace the representative defendant. Just doing so as a rhetorical matter—whether in the law school curriculum, judicial opinions, scholarship, or otherwise—may help shift opinions about criminal justice in a salutary direction. A public that views defendants as its (nonexclusive) representatives is less likely to reflexively support harsh criminal justice policy.\textsuperscript{16} If we are serious about defendants playing a representative role, then they and their counsel should also be provided the procedural and financial tools to do so effectively. That would entail a series of reforms that might include creating financial incentives for defense counsel to take up systemic challenges to criminal justice institutions, allowing for aggregation of constitutional claims in

\textsuperscript{12} See infra notes 223–27 and accompanying discussion.
\textsuperscript{13} See id.
\textsuperscript{14} See id.
\textsuperscript{15} See id.
\textsuperscript{16} Such reflexive support has, at least until recently, been the political norm in the United States for more than a generation. See JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 49 (2003) (describing American harshness since the 1970s in comparison to contemporary Europe and American policy before 1970).
criminal courts, better judicial data collection, and more expansive disclosure requirements for criminal justice actors.

This Article proceeds in four parts. Part II offers a brief historical sketch of criminal court actors which suggests that today’s conventional wisdom about defendants was not fated. Nonetheless, most courts and commentators have come to take defendants’ parochialism as a fixed reality. Part III, the Article’s analytical heart, is a descriptive rejoinder to the conventional view. It details the various ways constitutional criminal procedure tasks defendants with representing third-party interests. Part IV argues that representative defendants are analogous to representative plaintiffs, at least when vindicating the kinds of public norms described in Part III. Relying on literature about representative plaintiffs in the civil context, Part IV concludes that it is normatively desirable for defendants to play a representative role and Part V identifies that conclusion’s implications. Part VI briefly concludes.

II. THE PAROCHIAL DEFENDANT

The conventional view takes the defendant as solitary and parochial, representing no one’s interests other than her own. This is in contrast to all the other actors in the courtroom, as described above. The parochial defendant is a holdover from nineteenth century criminal justice. Before then, prosecutors and judges, such as there were,17 were all parochial. Prosecutors and judges graduated into benighted public servants,18 leaving defendants behind. Prosecutors and courts grew more bureaucratic in the ostensible service of sorting guilty from innocent.19 Historians have not delved deeply into how the rise of public prosecutors and courts affected social conceptions of the criminal defendant. But existing historical accounts reveal the contingency and malleability of the roles played by criminal justice actors over time.20 This suggests that we should not take the defendant’s parochialism as a fixed fact, its deep traction in today’s conventional thinking notwithstanding.

It was not until the mid- to late-nineteenth century that the idea of prosecutors and judges as truth-seeking, public servants developed. Before then,

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20 See generally id. (describing the evolution of the role of aldermen, public prosecutors, police, and courts in criminal prosecution in the nineteenth century).
prosecutors, judges, and defendants were all parochially self-interested. Throughout the nineteenth century and even into the twentieth century, criminal cases were an adjutant of private dispute resolution. There is no exhaustive account of these practices given that most proceedings were not formally recorded anywhere. Criminal justice was hyper-local and, to that extent, historical accounts of practices in particular places can be revealing, even if not comprehensively so. Allen Steinberg’s account of the rise of public prosecutors in nineteenth century Philadelphia is an example.

Steinberg described how early in American history, private individuals—usually victims or their relations—prosecuted criminal cases themselves or through privately retained counsel. And “judges” were typically laypersons, often politically connected and paid piecemeal by complainants. These judges prodded most cases to settlement, leaving only a small portion to move on to grand jury review. This system (such as it was) served a rural society, a state with minimally developed bureaucratic capacity, and where crimes tended to involve a perpetrator and a victim. Those basic features were completely transformed by dramatic urbanization and accompanying social change beginning in the late nineteenth century.

The system of private prosecution gave way to our modern concepts of public prosecutors, police, and criminal courts in response to the changing needs of American cities. The vast inflow of immigrants, combined with pervasive worker unrest, created new social control exigencies for the middle and upper classes. The same structural shifts had occurred in other large industrial

\[21\] Before the birth of the modern public prosecutor, the word “prosecutor” was used to refer “to the person we would [know] understand to be the plaintiff.” Allen Steinberg, The “Lawman” in New York: William Travers Jerome and the Origins of the Modern District Attorney in Turn-of-the-Century New York, 34 U. Tol. L. Rev. 753, 754 (2003).

\[22\] See Harold J. Krent, Executive Control over Criminal Law Enforcement: Some Lessons from History, 38 Am. U. L. Rev. 275, 293 (1989) (describing many players in the court system and their wide discretion to perform their respective roles); Ramsey, supra note 18, at 1323–27 (providing a historical account of the players in the New York court system and their focus on serving their own respective interests).

\[23\] See generally Steinberg, supra note 19, at 570–71 (formulating “an alternative history of criminal prosecution in America based on research on nineteenth-century Philadelphia”).

\[24\] See id. at 571.

\[25\] See id. at 571–73 (observing that city aldermen performed the role of judge and were paid by-the-case).

\[26\] See id. at 573–74, 578–79, 583–84.

\[27\] See id. at 584.

\[28\] See FRIEDMAN, supra note 17, at 19–20 (“The settlers of the seventeenth century came at first in dribs and drabs, then in greater numbers; eventually, they overwhelmed the natives and their law.”); Steinberg, supra note 19, at 584; Samuel Walker, Governing the American Police: Wrestling with the Problems of Democracy, 2016 U. Chi. Legal F. 615, 625 (“[T]he police served the will of the dominant political ideologies in a discriminatory manner.”).
cities,\textsuperscript{29} and the response was the same: to create a municipal police force to manage the lower classes and new arrivals.\textsuperscript{30} The police in turn began generating arrests for violations of criminal laws like public unrest, drunkenness, and vagrancy, which were inordinately committed by the lower classes.\textsuperscript{31} Because these offenses did not involve discrete victims, there was no one to bring private prosecutions nor would there have been a bureaucratically plausible way to process the volume of arrests generated by the newly created municipal police.\textsuperscript{32} Public prosecutors arose in response to these pressures.\textsuperscript{33}

The birth of the public prosecutor immediately raised the question of how effectively it represented the public. Historians have documented that caseload management practices like plea bargaining are coextensive with the rise of public prosecutors.\textsuperscript{34} And the practice appears to have been as unpopular with the public in the nineteenth century as it is today.\textsuperscript{35} The question of how to bridge the gulf between public preferences and prosecutors’ choices has long been a preoccupation for law scholars.\textsuperscript{36} They have imagined the central problem in terms of agency costs: how prosecutors (and criminal courts more generally) can be induced to resist bureaucratic incentives that favor quick, low-visibility case disposal in favor of the public’s ostensible preference for more thorough and transparent vetting.\textsuperscript{37} The dilemma’s historical persistence suggests that there can be no final answer. But, for present purposes, the thing to notice is the question’s longstanding salience.

No parallel question was (or is) typically asked about defendants. Accounts of modern criminal justice emphasize the growth and professionalization of

\textsuperscript{30} See ERIC H. MONKONEN, POLICE IN URBAN AMERICA 1860–1920, at 55 (2004). See generally Steinberg, supra note 21, at 754 (studying the history of law enforcement in New York City).  
\textsuperscript{31} See Steinberg, supra note 19, at 572–73.  
\textsuperscript{32} See id. at 579.  
\textsuperscript{33} See id. at 582–83.  
\textsuperscript{34} See Ramsey, supra note 18, at 1332–34, 1336–37 (discussing public criticism of prosecutors’ use of discretion in nineteenth century New York City); Steinberg, supra note 19, at 585–86 (discussing the same criticism in Philadelphia).  
\textsuperscript{35} See Ramsey, supra note 18, at 1336–37.  
\textsuperscript{36} See, e.g., Stephanos Bibas, Prosecutorial Regulation Versus Prosecutorial Accountability, 157 U. PA. L. REV. 959, 963 (2009) (analogizing to agency cost problems in the corporate context); Daniel C. Richman, Old Chief v. United States: Stipulating Away Prosecutorial Accountability?, 83 V A. L. REV. 939, 960–65 (1997) (noting the difficulty in ascertaining the public’s enforcement priorities); Anthony C. Thompson, It Takes a Community to Prosecute, 77 NOTRE DAME L. REV. 321, 329 (2002) (“What . . . accounts for the traditional prosecutor’s tendency to maintain distance from the constituency she has been elected or appointed to represent?”).  
\textsuperscript{37} See Bibas, supra note 36, at 961–63.
police,38 prosecutors,39 and the criminal courts.40 Little attention has been paid to what consequence these reforms had on the social conception of defendants and why there was no corresponding institutionalization of the criminal defense function. Sealing the criminal defendant off in an envelope of parochial otherness likely served important symbolic functions. The defendant’s selfishness and deviance perhaps underscored the rationality and integrity of prosecutors and courts, whose public charge was to sort guilty from innocent defendants.41

It is likely that the parochial defendant was, at least in part, an ideological effect of the crime control bureaucracies that sprang up in the nineteenth century.42 Not only did those institutions require a “unitary field of objects” to act upon,43 but the media, and in turn the public, relied on those very institutions to generate information about defendants and criminals.44 They likely did so in ways that rationalized their own existence, emphasizing defendants’ deviant otherness.

That the historical record has developed a fuller account of prosecutors and police than defendants almost certainly owes to the absence of institution-building around criminal defense during the nineteenth and early twentieth centuries.45 Studying the rise of an institution is easier than studying its absence. But the advent of public defenders in the mid-twentieth century does not appear to have fundamentally shifted conceptions of the defendant’s parochialism. Neither scholars nor anyone else seems particularly bothered by questions of agency cost or transparency. Even among defenders themselves, ideals of

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38 See ROBERT M. FOGELSON, BIG-CITY POLICE 11 (1977) (describing phases of reform of big-city police during the twentieth century).
39 See Ramsey, supra note 18, at 1316–23; Steinberg, supra note 19, at 570–71.
41 This, at least, appears to be how reformists who supported professionalization of the police, prosecutors, and courts viewed things. See Jeffrey S. Adler, “It Is His First Offense. We Might as Well Let Him Go”: Homicide and Criminal Justice in Chicago, 1875–1920, 40 J. SOC. HIST. 5, 10 (2006) (“According to a local crime-beat reporter, jurors often concluded that ‘both [the victim and the defendant] belong to the lowest of the low . . . .’”).
43 See id.
individualized representation echo notions of defendants’ parochialism at the expense of more collective and transformative notions of the defense function.\footnote{See Taylor-Thompson, supra note 45, at 2428–29 (describing the paradigm of individualized representation of defendants as the dominant model among public defenders).}

Framing criminal justice as a contest between a truth-seeking public agency and a solitary defendant has deep traction in scholarly literature. Take Herbert Packer’s iconic “crime control–due process” dualism model.\footnote{HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 153 (1968).} He posited each model as an idealized account of criminal procedure. The former is fixated on “the repression of criminal conduct.”\footnote{Id. at 158.} The latter values the creation of “impediments to carrying the accused” through the process because of concerns about the system’s accuracy, coerciveness, and egalitarian bent.\footnote{Id. at 163, 165–66, 168.} Scholars continue to embrace Packer’s gloss on constitutional criminal procedure.\footnote{Perhaps not felicitously. See Robert Weisberg, Criminal Law, Criminology, and the Small World of Legal Scholars, 63 U. COLO. L. REV. 521, 532 (1992).}

Packer tells us that the crime control model favors the quick screening of suspects and defendants, relying heavily on the professional judgments of police and prosecutors.\footnote{Packer, supra note 47, at 158–60.} Crime control tolerates false positives, but only to the extent consistent with its underlying purpose of deterring crime.\footnote{See id. at 164–65.} In contrast, the due process model posits criminal justice as a kind of obstacle course that seeks to sustain “the primacy of the individual and the complementary concept of limitation on official power.”\footnote{Id. at 165 (“Power is always subject to abuse . . . . Precisely because of its potency in subjecting the individual to the coercive power of the state, the criminal process must . . . be subjected to controls . . . .”).}

Packer invokes a familiar libertarian framing that pits the State’s aggregated power as a potential threat to individual freedom.\footnote{Id. at 166 (“‘Power is always subject to abuse . . . . Precisely because of its potency in subjecting the individual to the coercive power of the state, the criminal process must . . . be subjected to controls . . . .’”).} It is because the defendant stands alone that there is moral imperative for law to protect her—at play here is a deeply intuitive idea about law’s role in leveling the field in favor of the weaker party to a contest. Packer suggests that, if unchecked, the State may use its coercive power against disfavored groups, if not everyone.\footnote{Id.} This suggests the possibility that the due process model takes the defendant as a kind of “every person,” but the notion is left implicit and undeveloped in Packer’s account.

Even progressive scholars preoccupied with the connection between defendants and communities have not explored the defendant’s role as public representative. For example, scholars of restorative justice are preoccupied with the relationship between defendants and community.\footnote{See Erik Luna, Punishment Theory, Holism, and the Procedural Conception of Restorative Justice, 2003 UTAH L. REV. 205, 227–29.} But their concerns are socio-legal and therapeutic—they ask what dispute resolution, punishment, and
reintegration practices facilitate community healing and minimizes defendants’ ostracism. Questions about constitutional criminal procedure are marginal if not irrelevant.

Jocelyn Simonson’s recent work on community participation in criminal justice practices sits provocatively between restorative justice discourse and constitutional criminal procedure. Her work takes the relationships between criminal defendants and communities as a starting point. She rightly critiques an abstracted notion of “the People” that both excludes poor, minority communities and casts prosecutors and police as broadly representative. She argues that criminal procedures should allow “communal resistance” and “popular interventions on behalf of defendants.” But she minimizes the practical significance of the defendant’s representative role.

The only effort at sketching the defendants’ representative role was a partial one by Daniel Meltzer in 1988. He saw it as less a frame for viewing defendants’ significance in our criminal justice system than as an ironic foil for expanding Article III and prudential standing principles to enable more civil litigation. He recognized that when defendants bring Fourth Amendment suppression motions or Fourteenth Amendment challenges to grand jury composition, they act in a representative capacity. But he offered this in the way of critiquing the Supreme Court’s cases limiting civil plaintiffs from challenging the government policy on third-party standing principles. If the Court is willing to let criminal defendants represent third-party interest, he argued, surely it made sense to let upstanding plaintiffs do the same.

Missing from legal scholarship is an account that identifies the full scope of the defendant’s representative role, the justifications for that role, and for enabling it more fully. The rest of this Article develops that account.

57 See id.
60 See id. at 286–88.
61 See id. at 271–73, 279–82.
62 See id. at 256–57, 299–303.
63 See id. at 275–76 (“[W]hile [a] strand of Fourth Amendment jurisprudence does indeed imply that defendants are part of a broader ‘people,’ . . . the context of adjudicatory procedure does not support the inverse idea, that the ‘people’ support the defendant.”).
64 Meltzer, supra note 9, at 298.
65 See id. at 295–300.
66 See id. at 298.
67 See id. at 327–28.
68 See id.
III. CRIMINAL DEFENDANTS AND THIRD-PARTY INTERESTS

Constitutional criminal procedure tasks defendants with representing the interests of third parties, although that role is not as clearly defined as it is in the civil context. In civil cases, plaintiffs perform a representative function as class representatives under the rules of civil procedure or when authorized to sue as private attorneys general.69

Criminal defendants represent the interests of excluded jurors, future victims of police misconduct, and the public more generally. The Sixth and Fourteenth Amendments empower defendants to challenge the discriminatory exclusion of jurors and to protect the participatory rights of minority communities to serve as prospective jurors. The Fourth Amendment exclusionary rule casts defendants as representative of citizens who may be future victims of police misconduct. Constitutional criminal procedure also relies on defendants to protect the transparency and integrity of the criminal justice system on behalf the public in a more general way. The Sixth Amendment rights to speedy and public trial are examples.

In none of these contexts has the Court formally assigned criminal defendants the duty to represent the interests of unnamed third parties. Rather, the Court has tethered defendants’ self-interest in avoiding conviction to public-regarding functions. The Court has typically done so equivocally, avoiding clear articulation of defendants’ representative role in vindicating constitutional norms. The ambivalence owes to the Court’s investment in the parochial conception of defendants,70 and relatedly, the view that the criminal process is singularly devoted to ascertaining defendants’ guilt or innocence.71 That view is belied by the complexity and scale of our criminal justice systems which necessarily implicate a range of constitutional values beyond ascertaining guilt or innocence. Often enough, it is defendants who are called upon to protect that broad, but underrecognized range of values on behalf of themselves and others.

A. Vindicating Jurors’ Participatory Rights

The Supreme Court has been clearest about defendants’ representative role in Fourteenth Amendment challenges to the discriminatory exclusion of petit jurors. That role extends to fair cross-section challenges under the Sixth Amendment, although the Court has been more elliptical about the defendant’s representative role in that context. In neither context is the defendant required

69 See infra Part IV.A.
70 The sentiment is exemplified by Cardozo’s famous quip about the “constable[’s]... blunder[]” in People v. Defore, 150 N.E. 585, 587 (N.Y. 1926), that is often held out as underscoring the costs of the Fourth Amendment exclusionary rule. See Hudson v. Michigan, 547 U.S. 586, 614 (2006) (Breyer, J., dissenting) (invoking Cardozo).
to possess the identity trait that was the alleged basis for excluding prospective jurors. Defendants’ representative role underscores how the constitutional harms associated with juror exclusion often have little to do with defendants’ selfish interests in selecting jurors inclined to acquit. Rather, it is that such discrimination degrades minorities’ civic status and erodes the public’s perception that criminal courts fairly administer justice.\(^\text{72}\)

In *Powers v. Ohio*, the Court decided that a white criminal defendant has standing to challenge a prosecutor’s discriminatory use of peremptory challenges against prospective black jurors.\(^\text{73}\) This extended *Batson v. Kentucky*, where the Court read the Fourteenth Amendment to forbid racial discrimination in the use of peremptory challenges.\(^\text{74}\) Peremptory challenges allow both sides to strike jurors for any reason; this seems to not just allow, but encourage, strikes based on racial and other stereotypes.\(^\text{75}\) Unwilling to do away with peremptory challenges altogether,\(^\text{76}\) the Court required that trial court judges screen prosecutors’ motivations for bias only where the defense makes a prima facie showing of race-based peremptory strikes.\(^\text{77}\)

The *Batson* Court noted how race-based peremptory strikes deny would-be jurors’ rights to civic participation,\(^\text{78}\) suggesting an analogy to voting.\(^\text{79}\) A big part of the reason for enshrining the right to jury trial in the Constitution was to ensure ordinary citizens’ opportunity to participate in the administration of justice.\(^\text{80}\) Excluding jurors on the basis of race not only robs minority citizens of this opportunity to participate in civic life, but stigmatizes them based on race.\(^\text{81}\) Race-based exclusion reproduces the notion that racial minorities cannot be trusted to perform their civic duty.\(^\text{82}\)

When a defendant and prospective jurors share the relevant identity trait, like in *Batson* where both were black, there is shared stigmatic harm. The racial meaning produced by the juror’s exclusion inures to the disadvantage of both juror and defendant.\(^\text{83}\) Permitting criminal defendants to vindicate that harm


\(^{74}\) *Batson*, 476 U.S. at 89.

\(^{75}\) See *id.* at 102–05 (Marshall, J., concurring).

\(^{76}\) See *id.* at 108 (Marshall, J., concurring) (contending that peremptory challenges ought to be eliminated).

\(^{77}\) See *id.* at 96–98.

\(^{78}\) See *id.* at 87.


\(^{80}\) See *Batson*, 476 U.S. at 91.

\(^{81}\) See *id.* at 122 (Burger, C.J., dissenting) (citing United States v. Leslie, 783 F.2d 541, 554 (5th Cir. 1986)).

\(^{82}\) See *id.* at 104–05 (Marshall, J., concurring).

\(^{83}\) *Id.* at 86 (“Purposeful racial discrimination in selection of the venire violates a defendant’s right to equal protection because it denies him the protection that a trial by jury is intended to secure.”).
prevents racial stigmatization affecting both individuals. The shared identity trait satisfies the standing doctrine requirement that the representative have suffered an injury that bears close relation to that suffered by the third party. But what about when the defendant and the juror do not share the same identity trait? Then, it would seem the defendant is acting more like a whistleblower with little at stake in the challenged conduct.

In Powers, the Court recognized the defendants’ representative role, but refused to cast them as whistleblowers. Instead, the Court insisted that racial discrimination against prospective minority jurors inflicts personal harm on white defendants. Diminution in the likelihood of a not-guilty verdict does not constitute a cognizable constitutional harm. Rather, the Court explained that the harm lies in the defendants’ loss of “confidence in the court and its verdict” when excluded jurors’ objections cannot be heard. The Court also suggested that white defendants’ injury is no different than black defendants,’ revising its account in Batson.

In Powers, the Court stated that defendants’ race is just a matter of fact “relevant to discerning bias in some cases,” but nothing more. The passing analysis lacks conviction and rings false. White defendants’ “injury,” if it can even be called that, would hardly suffice for standing in other contexts. This gets at what appears to be an even deeper disconnect between defendants’ motivations in any particular case and the harm that juror discrimination generates.

Defendants’ motivations for challenging juror discrimination is the hope that the excluded juror(s) would be more inclined to find the defendant “not guilty.” But there can be no right to that result, only to a process that fairly allows for the possibility of such a result. This structural reality sits

85 See infra Part IV.A.
86 See Powers, 499 U.S. at 411.
87 The defendant’s injury is explained unartfully: “The rejected juror may lose confidence in the court and its verdicts, as may the defendant if his or her objections cannot be heard.” Id. at 414. It is unclear whether the pronouns “his or her” refer to the defendant or the juror. If they refer to the “defendant,” as ordinary grammar seems to require, then it just begs the very question at the heart of the litigation: Why should the defendant get to object at all? The quote is clearer if “his or her” refers to the “juror.” The idea then would appear to be that the juror’s inability to object tears the civic fabric in a way that offends both the excluded juror and the defendant.
88 Id. at 416. Compare id., with Batson, 476 U.S. at 86 (emphasis added) (citations omitted) (“The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race . . . or on the false assumption that members of his race as a group are not qualified to serve as jurors . . . .”).
89 See Powers, 499 U.S. at 414 (“[T]here can be no doubt that [the defendant] will be a motivated, effective advocate for the excluded venirepersons’ rights. . . . [Because] discrimination in the jury selection process may lead to the reversal of a conviction.”).
90 See id. at 426–29 (Scalia, J., dissenting).
91 The nature of the harm—exclusion from participating in a civic process—suggests an analogy between jurors and voters. See Underwood, supra note 79, at 746–47.
uncomfortably with the formalistic, anti-discrimination norms that animate equal protection and fair cross-section jurisprudence. The Court has reasoned that what makes racial and gender discrimination wrong is that the excluded jurors are no less able to impartially decide cases than white or male jurors. But if true that minority and women jurors behave similarly to their white male peers, then why should a defendant have the right to be judged by the former? If the Court were to recognize that minority and women jurors view defendants more favorably, it would justify prosecutors’ use of peremptory challenges to strike them. This contradiction is soluble if one takes defendants as representative actors who receive the possibility of a more favorable trial result as a bounty for having vindicated the excluded jurors’ interests.

A parallel contradiction underlying discrimination claims involving grand jurors is similarly resolved by recognizing the defendant’s representative role, as Daniel Meltzer recognized. Equal protection prohibits the intentionally discriminatory exclusion of minorities and women from grand juries. Generally, procedural defects in grand jury proceedings are cured by conviction; conviction demonstrates the propriety of having indicted the defendant in the first place. Not so where the State has discriminatorily excluded jurors. Courts are to vacate convictions that are based on indictments handed down by grand juries constituted through the purposeful exclusion of women or minority jurors. A convicted defendant’s challenge is thus best understood, as Daniel Meltzer proposed a generation ago, as a representative one. The defendant seeks to vindicate the excluded jurors’ participatory rights; the vacated conviction is just an incentive to litigate, not a remedy for the harm suffered.

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92 Commentators have characterized the Court’s commitment to colorblind, race jurisprudence as formalistic. See, e.g., Anthony V. Alfieri, Black and White, 10 LA RAZA L.J. 561, 584 (1998) ("The [color-blindness] canon severs legal doctrine from its racial and political foundation. Thus severed, doctrine occupies a formalist position of color-blind impartiality. From this culturally detached position, racial hierarchies appear imperceptible and subordinate narratives unfold naturally."); Bernie D. Jones, Critical Race Theory: New Strategies for Civil Rights in the New Millennium?, 18 HARV. BLACKLETTER L.J. 1, 23 (2002) ("In the eyes of formalist justices, any attention to race was improper and illegal; the law was supposed to be color-blind.").


94 See Muller, supra note 93, at 101–03.

95 Earlier Supreme Court cases recognized that race might play a role in predicting outcomes. See id. at 98–100.

96 See id. at 100–01.

97 See Meltzer, supra note 9, at 259–60, 298; see also Underwood, supra note 79, at 739.


101 See id.

102 See Meltzer, supra note 9, at 259–60, 298.
Sixth Amendment fair cross-section claims also presuppose that defendants play a representative role. Unlike the Fourteenth Amendment, the Sixth Amendment expressly creates a right to an impartial jury.\textsuperscript{103} Where excluded jurors themselves may bring an Equal Protection Clause challenge in their own name, they cannot bring a Sixth Amendment challenge. While the Amendment confers a right on the defendant, its scope and purpose are unclear unless one understands defendants’ role as representative.\textsuperscript{104}

Defendants’ right only extends as far as the venire—the petit jury must be drawn from a fair cross-section of the community,\textsuperscript{105} but the petit jury itself need not reflect a fair cross-section.\textsuperscript{106} If fair cross-section is central to a jury being impartial, then why must a petit jury not itself reflect a fair cross-section of the community?\textsuperscript{107} If excluding the unique perspective of minorities and women from the venire creates the harm of a potentially partial jury, then why does the same not hold true for petit juries?\textsuperscript{108} If, on the other hand, it is wrongful to exclude minorities and women because they are no different from white men, what harm befalls defendants from excluding these prospective jurors?\textsuperscript{109} As with Batson challenges, the Court has understood the Sixth Amendment not to require that defendants belong to the group excluded from the jury venire as a prerequisite for challenging the exclusion.\textsuperscript{110} An account rooted in shared stigmatic harm is as inadequate in the Sixth Amendment context as it was in the Batson context.

These questions are answered if, like with Batson claims, one conceives of prospective jurors’ having a stake in Sixth Amendment fair cross-sections cases. And in this regard, juror participation rights are analogous to voting rights. Just like the right to vote does not entail the right to pick the winning candidate, one only has the right to a fair opportunity to serve on an actual jury, not the right to

\textsuperscript{103} See Taylor v. Louisiana, 419 U.S. 522, 526 (1975). The Court has understood this to require a jury that represents a fair cross-section of the community from which it is drawn. \textit{Id.} at 537–38.
\textsuperscript{104} See Duren v. Missouri, 439 U.S. 357, 370 (1979); Taylor, 419 U.S. at 535–38.
\textsuperscript{105} See supra notes 93–102 and accompanying discussion.
\textsuperscript{106} See id.
\textsuperscript{107} See Duren, 439 U.S. at 371 n.* (Rehnquist, J., dissenting) (arguing that the majority’s fair cross-section analysis was “internally inconsistent”).
\textsuperscript{108} See id. at 373 n* (Rehnquist, J., dissenting) (“If impartiality is not lost because a particular class or group represented in the community is unrepresented on the petit jury, it is certainly not lost because the class or group is underrepresented on the jury venire.”).
\textsuperscript{109} See id. (arguing that the majority’s fair cross-section analysis was more concerned with vindicating excluded jurors’ equal protection rights than the defendant’s right to an impartial jury). This paradox is homologous to that raised by Eric Muller in the Batson context. Muller, supra note 93, at 96 (raising the question of whether the Batson framework is workable given the Justices’ views on the predictive power of race and gender).
\textsuperscript{110} In Taylor v. Louisiana and Duren v. Missouri, for example, the Court permitted male defendants to challenge the exclusion of women from the venire. Duren, 439 U.S. at 360–63; Taylor v. Louisiana, 419 U.S. 522, 524–25 (1975).
be on any particular jury. Requiring that members of protected groups be fairly included in venires creates the possibility that they will be included in petit juries, but does not guarantee that any given petit jury will represent a fair cross-section of the community. That defendants are charged with vindicating this interest makes sense here in the same way that it does in Batson.

The Court has cited excluded jurors’ civic participation rights to justify its Sixth Amendment cross-section holdings. It has also invoked its Equal Protection jurisprudence in Sixth Amendment cases suggesting that the two sources together ensure that jurors are not subject to discrimination throughout the processes of selecting grand and petit juries. All of this indicates that both provisions protect overlapping participation interests that belong to excluded jurors. This, in turn, casts the defendant as a representative actor.

B. Representing Potential Victims of Police Misconduct

The modern exclusionary rule is best understood as a representative device that allows defendants to forestall future constitutional violations against innocent third-party civilians. The vast majority of Fourth Amendment claims are litigated in criminal courts for the remedy of exclusion—the suppression of evidence obtained as a result of the Fourth Amendment violation. The Supreme Court has repeatedly stated that exclusion’s sole purpose is to deter police officers from violating the Fourth Amendment in the future, not to compensate the criminal defendants’ constitutional injury. Rather, exclusion creates an incentive to litigate the constitutional issue. Exclusion’s ultimate beneficiaries are thus the unnamed members of the community who might otherwise be subject to the same unconstitutional police tactics in the future.

111 See Underwood, supra note 79, at 746 (noting that “the Equal Protection Clause applies with special force” to the criteria for jury service eligibility).
112 Taylor, 419 U.S. at 530–31 (emphasizing that the fair cross-section requirement ensures community participation in the criminal justice system).
113 See Duren, 439 U.S. at 365 n.24 (citing Alexander v. Louisiana, 405 U.S. 625, 627 (1972)).
114 See Kenneth W. Starr & Audrey L. Maness, Reasonable Remedies and (or?) the Exclusionary Rule, 43 TEX. TECH L. REV. 373, 375 (2010) (“A quick look at most courts’ dockets each year leaves no doubt that the [exclusionary] rule spawns much litigation.”).
116 The Court has not explicitly spelled this out, but it is the clear implication of its characterization of exclusion as a “windfall” for the defendant designed to deter future police misconduct. See Davis, 564 U.S. at 248 (citing Stone v. Powell, 428 U.S. 465, 490 (1976)).
The Court does insist that the defendant have personally sustained Fourth Amendment injury as a precondition to obtaining exclusion.\footnote{Rakas v. Illinois, 439 U.S. 128, 134 (1978) (“[I]t is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the [exclusionary] rule’s protections.”).} This is to avoid a completely gratuitous reward for the defendant.\footnote{See id. at 139 (noting that the standing inquiry only requires the proponent to factually allege an injury from which they individually have a legal right to relief).} There is no formal requirement that the defendant’s injuries be typical of those sustained by others.\footnote{See id.} The Court has however recently suggested that exclusion may be particularly appropriate where a defendant’s Fourth Amendment injury is the product of systemic police misconduct and thus impacts a multitude.\footnote{See Utah v. Strieff, 136 S. Ct. 2056, 2063 (2016) (emphasizing that there was “no indication that this unlawful stop was part of any systemic or recurrent police misconduct”).} Even though not its original understanding,\footnote{Exclusion was originally conceived as a constitutional analogue for the traditional, common law remedy of restitution. See Morgan Cloud, The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory, 48 STAN. L. REV. 555, 591–92 (1996) (“The Court emphasized the central role played by property law concepts in Fourth Amendment analysis . . .”). The analogy made sense given property rights’ centrality to early Fourth Amendment jurisprudence. For example, in Boyd v. United States, an early and canonical Fourth Amendment case, the Supreme Court simply assumed that the Fourth Amendment required exclusion as a kind of disgorgement of ill-gotten gains. 116 U.S. 616, 638 (1886).} the modern Court has come to view the exclusionary rule as serving deterrence alone. In United States v. Calandra, the Court stated that “[t]he purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim . . . [but rather] ‘to deter—to compel respect for the constitutional guaranty’” in the future.\footnote{United States v. Calandra, 414 U.S. 338, 347 (1974) (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).} The Court has repeated this account of the exclusionary remedy in case after case.\footnote{Hudson v. Michigan, 547 U.S. 586, 591 (2006) (discussing the Court’s consistent view that the exclusionary rule requires deterrence benefits to outweigh the social costs of exclusion).} The Court has however recently suggested that exclusion may be particularly appropriate where a defendant’s Fourth Amendment injury is the product of systemic police misconduct and thus impacts a multitude.\footnote{See Stone v. Powell, 428 U.S. 465, 493–94 (1976) (stating that the exclusionary rule should be implemented at trial and enforced on direct appeal).} Even though not its original understanding,\footnote{See Meltzer, supra note 9, at 267 (noting that the exclusionary rule deters illegal searches by removing the incentive conduct them).} the modern Court has come to view the exclusionary rule as serving deterrence alone. In United States v. Calandra, the Court stated that “[t]he purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim . . . [but rather] ‘to deter—to compel respect for the constitutional guaranty’” in the future.\footnote{See William J. Stuntz, Warrants and Fourth Amendment Remedies, 77 VA. L. REV. 881, 910 (1991) (noting that the exclusionary rule forces officers to give back the gains from their misconduct).}
violation and its consequence, rational police officers will avoid committing the same violation in future interactions with civilians.\footnote{127}{Although there is good empirical reason to question this theory. See Jon B. Gould & Stephen D. Mastrofski, Suspect Searches: Assessing Police Behavior under the U.S. Constitution, 3 CRIMINOLOGY & PUB. POL’Y 315, 316 (2004) (reporting that about one-third of observed police searches were unconstitutional, none of which were reported to a court).}

Not just any defendant can obtain exclusion for a Fourth Amendment violation that produced evidence against them. The Court requires that a defendant have sustained actual injury in order to seek suppression.\footnote{128}{Rakas v. Illinois, 439 U.S. 128, 134 (1978).} In creating this “standing” rule, the Court noted that conceiving of deterrence too broadly would dangerously “enlarg[e] the class of persons who may invoke” the exclusionary rule.\footnote{129}{The Court initially resisted characterization of the injury requirement as a “standing” requirement. See id. at 138 (“[T]he question necessarily arises whether it serves any useful analytical purpose to consider this principle a matter of standing . . . .”).} The chief criticism of the exclusionary remedy has been that it confers a windfall upon guilty defendants.\footnote{130}{Id.} Permitting defendants who have sustained no personal injury to vindicate others’ Fourth Amendment harm was too great a windfall for the Court to countenance.\footnote{131}{See, e.g., Davis v. United States, 564 U.S. 229, 248 (2011) (“Such a result would undoubtedly be a windfall to this one random litigant.”); Stone v. Powell, 428 U.S. 465, 490 (1976) (“The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice.”).} The structure of Fourth Amendment exclusion makes the defendant a kind of anemic class representative.\footnote{132}{It also undercuts claims of “typicality” and “commonality” which define a class representative’s role. See Fed. R. Civ. P. 23(a).} Anemic because there is neither a mechanism for criminal courts to evaluate whether defendants’ injuries actually track those sustained by others nor can criminal courts enjoin the police from engaging in the same constitutional misconduct in the future.\footnote{133}{See Meltzer, supra note 9, at 267 (suggesting that general deterrence from exclusion turns criminal defendants into private attorneys general).} Also unlike a class representative, there is no legal obligation for a defendant to behave in the interests of future victims.\footnote{134}{See id. at 293–94 (discussing the challenge of crafting a deterrent remedy, given the lack of mechanisms for judicial control).} Many defendants will bargain away a prospective Fourth Amendment claim in the interests of obtaining a more favorable plea deal from the prosecutor.\footnote{135}{See id. at 303 (noting that criminal defendants seeking exclusion are motivated by a personalized, individual benefit, rather than pursuing societal interests).} 

Ironically, the Court has laid the rhetorical basis for the defendant’s representative role in opinions denying exclusion to defendants who have
suffered Fourth Amendment harm.\textsuperscript{137} These cases emphasize that deterrence is the only justification for the exclusionary rule and then go on to conclude that granting suppression would not produce any deterrent effect.\textsuperscript{138} In at least some of these cases, the Court seems to deploy the rationale just to avoid rewarding a defendant that it views as particularly unworthy. For example, in \textit{Stone v. Powell}, the Court thought it unlikely that the prospect of exclusion in a habeas proceeding, years after an arrest, would have any impact on police officers.\textsuperscript{139} It is not clear why it would be any less likely to reach the ears of police officers than after a reversal after a particularly lengthy direct appeal or even trial.\textsuperscript{140} More likely, the Court simply thought it unsavory that a defendant convicted of a serious crime should receive the benefit of exclusion.

In more recent cases, the Court has hinted that exclusion is inappropriate where the third-party beneficiaries are likely to be criminals rather than innocent civilians. For example, in \textit{Pennsylvania v. Scott}, the Court held that exclusion is not available in parole revocation proceedings.\textsuperscript{141} In \textit{Hudson v. Michigan}, the Court refused to provide an exclusionary remedy for the police’s unconstitutional failure to heed the “knock-and-announce rule” prior to forcibly entering Hudson’s home pursuant to a search warrant.\textsuperscript{142} \textit{Hudson} involved execution of a validly obtained search warrant for narcotics and drugs.\textsuperscript{143} The

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\textsuperscript{137} See, e.g., \textit{Davis v. United States}, 564 U.S. 299, 240 (2011) (“Police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield ‘meaningful[ ]’ deterrence, and culpable enough to be ‘worth the price paid by the justice system.’”); \textit{Herring v. United States}, 555 U.S. 135, 139, 144, 147–48 (2008) (“To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.”); \textit{Hudson v. Michigan}, 547 U.S. 586, 590 (2006) (discussing the knock-and-announce rule and the police officer as the focus of analysis); \textit{Stone v. Powell}, 428 U.S. 465, 488 (1976) (discussing the “pragmatic” approach of the exclusion precedents, “that the interests safeguarded by the exclusionary rule in that context were outweighed by the need to prevent perjury and to assure the integrity of the trial process”); \textit{United States v. Calandra}, 414 U.S. 338, 342 n.2 (1974) (noting the search of defendant’s business and seizure of his property was lawful).

\textsuperscript{138} See, e.g., \textit{Davis}, 564 U.S. at 241 (“Responsible law enforcement officers will take care to learn ‘what is required of them’ under Fourth Amendment precedent and will conform their conduct to these rules.”); \textit{Herring}, 555 U.S. at 139–40 (“We have stated that this judicially created rule is ‘designed to safeguard rights generally through its deterrent effect.’”); \textit{Hudson}, 547 U.S. at 596 (noting a concern that “without suppression there will be no deterrence of knock-and-announce violations at all”); \textit{Stone}, 428 U.S. at 493 (questioning the assumptions underpinning the deterrence rationale); \textit{Calandra}, 414 U.S. at 351 (discussing the efficacy of deterrence during grand jury proceedings versus trials).

\textsuperscript{139} \textit{Stone}, 428 U.S. at 493–94.

\textsuperscript{140} \textit{Id.} at 493.

\textsuperscript{141} Pa. Bd. of Prob. and Parole v. Scott, 524 U.S. 357, 365 (1998) (citation omitted) (“The costs of allowing a parolee to avoid the consequences of his violation are compounded by the fact that parolees (particularly those who have already committed parole violations) are more likely to commit future criminal offenses than are average citizens.”).

\textsuperscript{142} \textit{Hudson}, 547 U.S. at 594.

\textsuperscript{143} \textit{Id.} at 588.
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case involved only the method used to enter a home that held criminal evidence inside.\footnote{Id.}

The Court has denied exclusion in cases where searches followed unconstitutional arrests based on false database entries showing active arrest warrants for the defendants.\footnote{See Herring v. United States, 555 U.S. 135, 147–48 (2009); Arizona v. Evans, 514 U.S. 1, 4 (1995).} In \textit{Herring} and \textit{Evans}, unconstitutional stops based on quashed warrants (that the officers mistakenly thought valid at the time of the stop) yielded evidence of new criminal misconduct.\footnote{Herring, 555 U.S. at 136–37; Evans, 514 U.S. at 4.} In allowing prosecutors to use the unlawfully seized evidence, the Court treated these cases as isolated instances of mistaken data entry.\footnote{Herring, 555 U.S. at 147–48; Evans, 514 U.S. at 15–16.} This in turn suggested that suppressing evidence would yield little deterrence.\footnote{See Herring, 555 U.S. at 147.} In \textit{Herring}, the Court noted that things would be different if evidence suggested that “systemic errors” in the warrants database made it unreliable and thus reckless to rely on it.\footnote{Herring’s implication is that a defendant acting for the benefit of these unnamed civilians should be entitled to suppression.} An unreliable database would be one that failed to distinguish between wanted and innocent persons, leaving the latter subject to regular stops and searches. \textit{Herring}’s implication is that a defendant acting for the benefit of these unnamed civilians should be entitled to suppression.\footnote{Evans, 514 U.S. at 17 (O’Connor, J., concurring) (emphasis added).}

Most recently, in \textit{Utah v. Strieff}, the Court held that evidence discovered incident to arrest following an unconstitutional stop need not be suppressed if the officer discovers an outstanding bench warrant for the defendant during the stop.\footnote{Utah v. Strieff, 136 S. Ct. 2056, 2063 (2016).} The valid bench warrant is an “intervening circumstance” that interrupts the causal chain linking the constitutional violation to the incriminating evidence.\footnote{Id. at 2061 (noting that evidence obtained through an unconstitutional search is admissible if the connection between the search and the evidence is disrupted by an intervening circumstance).} In the absence of such causal connection, exclusion is unnecessary.\footnote{Id. at 2061 (noting that evidence obtained through an unconstitutional search is admissible if the connection between the search and the evidence is disrupted by an intervening circumstance).} The holding was based in part on the empirical assumption that police officers do not regularly make unconstitutional stops in order to check

\footnotetext[144]{Id.} \footnotetext[145]{See Herring v. United States, 555 U.S. 135, 147–48 (2009); Arizona v. Evans, 514 U.S. 1, 4 (1995).} \footnotetext[146]{Herring, 555 U.S. at 136–37; Evans, 514 U.S. at 4.} \footnotetext[147]{Herring, 555 U.S. at 147–48; Evans, 514 U.S. at 15–16.} \footnotetext[148]{See Herring, 555 U.S. at 147.} \footnotetext[149]{Herring, 555 U.S. at 146 (quoting Evans, 514 U.S. at 17) (O’Connor, J., concurring).} \footnotetext[150]{Evans, 514 U.S. at 17 (O’Connor, J., concurring) (emphasizing that it would be unreasonable for the police to rely on a warrant system that “\textit{routinely} leads to false arrests”) (emphasis added).} \footnotetext[151]{Id.} \footnotetext[152]{Id. at 2061 (noting that evidence obtained through an unconstitutional search is admissible if the connection between the search and the evidence is disrupted by an intervening circumstance).}
for outstanding warrants. The Court, however, echoed the language in *Herring*, stating that the result might have been different if the “stop was part of [some] systemic or recurrent police misconduct.” Of course, unlike in *Herring*, the warrant in *Strieff* was valid. But it was for a traffic offense; existing data suggests that these are the most typical kinds of outstanding warrants. Given how minor the infraction was, the distinction between “wanted” and “innocent” individuals should perhaps not be so terribly significant.

Given the defendant’s representative role, exclusion would seem most urgent in cases where the police violation is representative of widespread and systemic practices indiscriminately impacting the guilty and innocent alike. It is in such cases where a defendant’s experience would seem most representative and where the need for deterrence is greatest. Amici in *Strieff* presented such evidence, but it was based on characteristically spotty data and the Court paid it little heed. Criminal defendants will often have difficulty fulfilling the representative role they are tasked with playing because individual criminal litigation offers only limited opportunities to collect evidence that reveals systemic misconduct in comparison to civil litigation. This suggests that the exclusionary rule’s deterrent function cannot be fully realized without procedural innovations in criminal courts.

**C. Guaranteeing Criminal Justice’s Transparency and Efficacy**

The Sixth Amendment enumerates what is required of “criminal prosecutions,” including that trials be “speedy and public.” The Court has

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154 See id. at 2063 (stating that the stop at issue was an “isolated instance of negligence”). The assumption was fiercely contested by the dissenters. See id. at 2068–69 (Sotomayor, J., dissenting) (characterizing many unconstitutional stops as the product of “institutionalized training procedures”); id. at 2073 (Kagan, J., dissenting) (noting that outstanding warrants are the “run-of-the-mill results of police stops”).

155 Id. at 2058.

156 Id. at 2062 (“[B]ecause we ultimately conclude that the warrant breaks the causal chain, we also have no need to decide whether the warrant’s existence alone would make the initial stop constitutional even if [the officer] was unaware of its existence.”).

157 See Nirej Sekhon, Dangerous Warrants, 93 WASH. L. REV. 967, 987–92 (2018) (“National and state databases contain records of nearly eight million outstanding warrants, more than half of which are for minor crimes, traffic-related offenses, and violations of civil orders like child support obligations.”).

158 See *Strieff*, 136 S. Ct. at 2073 (Sotomayor, J., dissenting) (noting the significant number of outstanding warrants in California, Pennsylvania, and New York City).


160 See infra Part IV.B.

161 U.S. CONST. amend. VI.
stated that these are “rights” that belong to individual defendants. But this characterization is at odds with the Court’s recognition that they are also process values in which the public has an interest separate from, and sometimes even antagonistic to defendants’ interests. This tension is eased by conceptualizing the defendant as a representative actor.

1. Public Trial

The Constitution empowers both criminal defendants and the media to vindicate third-parties’ interests in public trials under the Sixth and First Amendments respectively. The Court has read the two Amendments to protect substantially overlapping interests, citing opinions interpreting one amendment in cases implicating the other and vice versa. Public trial describes a process value that inures to the benefit of the public. Sometimes, defendants’ interests align with the public’s interest. But when they do not, defendants’ rights to waive are curtailed, preventing them from defeating the public’s interests. This underscores the extent to which third-party interests underwrite the Sixth Amendment public trial right.

The Court has insisted that “public trial,” like all other Sixth Amendment rights, “is personal to the accused.” This characterization is born out in cases where secrecy is in the service of judicial vindictiveness or caprice. For example, in In re Oliver, the Court found a Sixth Amendment violation where a state court judge summarily sentenced Oliver to jail for contempt following a secret trial. Citing the Spanish Inquisition and Star Chamber as examples, the Court noted that secrecy allows courts to become “instruments of persecution.” “[C]ontemporaneous review in the forum of public opinion” serves as a check, ensuring fair outcomes for defendants.

163 See Press-Enter. Co. v. Superior Court of Cal., 464 U.S. 501, 508 (1984) (“[H]ow we allocate the ‘right’ to openness [at trial] as between the accused and the public, or whether we view it as a component inherent in the system benefiting both, is not crucial.”).
164 David Sklansky has recognized the extent to which many criminal procedure rights do not fit the mold of traditional negative rights. See David A. Sklansky, Quasi-Affirmative Rights in Constitutional Criminal Procedure, 88 VA. L. REV. 1229, 1244 (2002) (arguing that many criminal procedure rights require “the government to do something affirmative”). He notes that quasi-affirmative rights often have “systemic implications” that courts often try to avoid. Id.
168 In re Oliver, 333 U.S. 257, 258–59 (1948) (trial was conducted off the record in a location not precisely clear without transcription).
169 Id. at 269–70.
170 Id. at 270.
In cases less extreme than Oliver, public trial’s benefit for defendants and third parties are more symmetrical. A defendant may want the presence and support of family, friends, and other members of her community in court.\textsuperscript{171} This will not necessarily have any discernible bearing on the outcome in a specific case but may make the process more dignified and humane for defendants. Generally, defendants’ supporters will have their own interests in the courtroom being open.\textsuperscript{172} But the Court has held that they do not have constitutional standing to compel open court.\textsuperscript{173} Defendants must represent these third-party interests. But defendants do more than just that.

Defendants who bring public trial challenges vindicate the public’s interest in promoting criminal justice systems’ transparency, integrity, and pedagogic benefits. The Court has noted that requiring open courts “ensure[s that] judge[s] and prosecutor[s] carry out their duties responsibly.”\textsuperscript{174} In extending the public trial right to suppression hearings, the Court noted the public’s “strong interest in exposing substantial allegations of police misconduct.”\textsuperscript{175} Witnesses are also more likely to come forward and testify truthfully if subject to the public’s gaze.\textsuperscript{176} All of these public interests speak to criminal justice’s pedagogic function. Access to criminal justice proceedings allows the public to learn of what the State is (and is not) doing in its name.\textsuperscript{177} Such information is the cornerstone of an informed and responsible citizenry.

One might be inclined to view the public as merely an incidental beneficiary of defendants’ right to public trial.\textsuperscript{178} But such an understanding is difficult to reconcile with express language in Court opinions suggesting that the “right” protects interests that do not belong to the defendant.\textsuperscript{179} The Court has understood the Sixth and First Amendment to protect coextensive interests by requiring open courts.\textsuperscript{180} And the Court has understood the media to directly act


\textsuperscript{172} See id. at 2186 (noting the significant effect criminal cases have on audience members, both individually and communally).

\textsuperscript{173} See Gannett Co. v. DePasquale, 443 U.S. 368, 379–80 (1979) (noting that the right to a public trial is guaranteed to the defendant, not the public).


\textsuperscript{175} Id. at 47.

\textsuperscript{176} See id. at 46 (“[A] public trial encourages witnesses to come forward and discourages perjury.”).

\textsuperscript{177} See Simonson, supra note 171, at 2182 (discussing audience members’ democratic power to act on information they learn while observing court proceedings).

\textsuperscript{178} The Sixth Amendment does not confer a direct right on members of the public to be present for court. Gannett Co., 443 U.S. at 379–80.

\textsuperscript{179} See Weaver v. Massachusetts, 137 S. Ct. 1899, 1910 (2017) (“The public-trial right also protects some interests that do not belong to the defendant.”); Waller, 467 U.S. at 45–46 (noting that the press and public have a qualified right to attend court proceedings).

\textsuperscript{180} See Waller, 467 U.S. at 45–46 (“[T]he explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public.”).
in the public’s interest when it exercises its First Amendment right to open
courts. If left to the First Amendment alone, there would be few occasions to
vindicate the public’s interest in open trials. The press will only bring challenges
in high profile case that are newsworthy. For all other cases, the vast majority,
there is only the Sixth Amendment.

If the right to public trial belonged exclusively to defendants, that right
would presumably be theirs to waive as is typically true with other criminal
procedure rights. But that is not the case. Defendants’ right to waive public
trial and close the courtroom is limited. Defendants are sometimes interested in
waiving the right to open court in order to exclude hostile members of the
public. A defendant’s detractors may be even more interested in an open trial
than the defendant’s supporters (if any). Detractors may amplify a defendant’s
humiliation, make conviction more likely, or punishment harsher. The
detractors may be members of the victim’s community or family, or just
fascinated by a crime’s sordid facts. The Court has stated that “although a
defendant can . . . waive his constitutional right to a public trial, he has no
absolute right to compel a private trial.” Where the public’s fascination with
a case threatens to overwhelm fairness to the defendant, its rights to access must
be balanced against due process, fair-trial values. That balancing is carried
out by the judge who is obliged to weigh the public’s countervailing interest.

2. Speedy Trial

As with the right to public trial, the “right” to a “speedy trial” describes a
process value that often inures to the public’s benefit and can be at odds with

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181 See Caren Myers Morrison, Privacy, Accountability, and the Cooperating
Defendant: Towards a New Role for Internet Access to Court Records, 62 VAND. L. REV.
182 Waiving the Miranda right to counsel, for example, means that the police will
ability to waive a constitutional right does not ordinarily carry with it the right to insist upon
the opposite of that right.”).
183 See id. at 35 (“[Defendant] has no absolute right to compel a private trial . . .”).
184 See Akhil Reed Amar, Sixth Amendment First Principles, 84 GEO. L.J. 641, 677–78
(1996) (noting that guilty defendants are generally less enthusiastic about public trials than
innocent defendants).
185 See id. at 661 (noting that harm to the accused’s reputation is inherent in criminal
prosecutions, even when the trial is speedy, public, and fair).
186 Singer, 380 U.S at 35.
187 Gannett Co. v. DePasquale, 443 U.S. 368, 378 (1979) (noting that courts have a
constitutional duty to safeguard defendants’ due process rights by minimizing harm from
“prejudicial pretrial publicity”).
188 See United States v. Cianfrani, 573 F.2d 835, 852 (3d Cir. 1978) (noting that courts
considering motions for private hearings must consider the public’s interest); United States
(noting that courts weigh the public’s interest in an open proceeding against the interests of
the defendant as a matter of “judicial discretion”).
When the latter is true, the defendants’ waiver rights are similarly circumscribed. When the latter is true, the defendants’ waiver rights are similarly circumscribed. The Supreme Court has characterized speedy trial as “generically different” from other constitutional rights. “[T]here is a societal interest in providing a speedy trial which exists separate from, and at time in opposition to, the interest of the accused.” The public has an interest in seeing guilty defendants punished fairly, without extraneous opportunities to commit more crimes (while waiting for trial, and avoiding the costs associated with pre-trial detention). This interest sometimes aligns with a defendant’s interest in avoiding the psychic and physical (if detained) toll of living under the shadow of accusation. Delay may also hamper a defendant’s ability to stage an effective defense should evidence grow stale or disappear. But a defendant may also have an interest in delaying proceedings where, for example, she is out on bail and where delay threatens to undermine the State’s case. The law reconciles these tensions by permitting speedy trial challenges where the defendant’s interests align with the public’s interests. The public has an interest in courts functioning efficiently, but so too does it have an interest in culpable defendants being punished. In Barker v. Wingo, the Court devised four factors for evaluating speedy trial claims. The Barker factors include: the length of delay, the reason for the delay, whether the defendant objected to the delay, and whether the defendant was prejudiced by the delay. The factors allow courts to ensure that a defendant’s interests are sufficiently aligned with the public’s interest. A defendant who satisfies the factors will have endured a harm herself and also represent the public’s interest in an expeditious criminal justice system. The Court has noted the State’s deliberate use of the delay to

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189 See Barker v. Wingo, 407 U.S. 514, 519–20 (1972) (noting that the societal interest in a speedy trial is often in opposition to the interests of the defendant).
190 Id. at 519.
191 Id.
192 See id. (noting that backlogged dockets provide criminal defendants the opportunity to “manipulate the system” and “commit other crimes”).
193 See id.
194 See Barker, 407 U.S. at 533 (“[I]f a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense.”).
195 See id. at 521 (emphasizing that a delayed trial does not per se prejudice the accused’s defense because witnesses for the prosecution may forget details or become unavailable).
196 Id. at 519.
197 See supra notes 137–44 and discussion.
198 Barker, 407 U.S. at 530–32.
199 See United States v. Frye, 372 F.3d 729, 739 (5th Cir. 2004) (emphasizing that the Barker analysis requires consideration of “societal interests in general”).
harm the defendant is particularly offensive to the Sixth Amendment. But so too is negligence and clogged courts.

But what of the public interest where the prosecutor and defense agree to delay? Just as with the right to public trial, a defendant’s waiving the right does not authorize its opposite. Even where the State and defense agree, the court must still approve waiver. For example, in New York courts will not approve speedy trial waivers by plea, expressly noting the importance of protecting the public’s interests in expeditious case processing.

A speedy trial, perhaps more than the other rights discussed above, implicates the dysfunction of our resource-starved and overwhelmed criminal courts. Delay is an endemic feature of the criminal process in the United States. Professional norms in these spaces accept significant delays; judges are thus likely to approve delay where the parties have done so. Both defendants’ and the public’s speedy trial interests are likely under-protected in most places. Given that speedy trial is tied up with other significant institutional design features, it would seem ripe for legislative intervention.

To the extent that has occurred, legislatures have generally entrenched the defendant’s representative role rather than devising alternate means to protect parties’ interests. Statutes typically prescribe specific bright-line cutoffs by which a defendant must receive a trial. For example, the Federal Speedy Trial Act provides that “the trial of a defendant . . . shall commence within seventy days.” The statute, however, contains numerous bases for tolling and

\[200\text{ Barker, 407 U.S. at 531.}\]
\[201\text{ Id. Since Barker, the Court has set a high bar for speedy trial claims based on clogged courts and overwhelmed public defenders, see Vermont v. Brillon, 556 U.S. 81, 85 (2009) (“[T]he [s]tate may bear responsibility if there is ‘a breakdown in the public defender system.’”), and has not rendered a decision that provides an example of what kind of facts would satisfy that standard, see Boyer v. Louisiana, 569 U.S. 238, 241–42 (2013) (Sotomayor, J., dissenting) (denying cert. in case raising issue).}\]
\[202\text{ See Amar, supra note 184, at 662 (noting that the Speedy Trial Clause does not contain a right to an unspeedy trial).}\]
\[203\text{ See People v. Callahan, 604 N.E.2d 108, 113 (N.Y. 1992) (holding that plea bargains cannot impair the defendant’s ability to appeal constitutional speedy trial claims, in part because doing so would compromise the public’s interest in speedy trials); Nancy Jean King, Priceless Process: Nonnegotiable Features of Criminal Litigation, 47 UCLA L. REV. 113, 178–79 (1999) (discussing Callahan). This only applies to speedy trial issues litigated and lost before the plea was entered. See People v. Alexander, 970 N.E.2d 409, 420 (N.Y. 2012) (holding that pending writs and motions need not be decided following a defendant’s guilty plea).}\]
\[204\text{ See MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT 222–24 (1992) (discussing the institutional and strategic reasons for delay in criminal proceedings).}\]
\[205\text{ See id. at 222 (noting that prosecutors and defense attorneys generally agree to a continuance whenever they are unable to resolve calendar differences).}\]
\[206\text{ King, supra note 203, at 179–80 (arguing that liberally allowing defendants to waive their right to a speedy trial does not advance defendants’ interests and reduces the public’s interest to a mere “bargaining chip”).}\]
\[207\text{ 18 U.S.C. § 3161(c)(1) (2012).}\]
extending that clock, and charges the defendant with the burden of moving for and proving a statutory speedy trial violation.

D. Not Harmless

The defendant’s representative role offers a partial cipher for why the Court exempts juror discrimination, speedy trial, and public trial violations from “harmless error” review on appeal. Constitutional errors need not be reversed automatically if they “did not contribute to the” guilty verdict. The Court, however, has held that only trial errors are subject to such “harmless error” review while “structural errors” are not. A “structural error” is one “affecting the framework within which the trial proceeds” as opposed to one that occurs “in the trial process itself” such that it can be evaluated in light of all of the other evidence presented by the state. Discriminatory juror selection along with “speedy and public trial” rights have been treated as “structural.” Were they not, it would usually be impossible to demonstrate that most violations contributed to a guilty verdict.

The distinction between “trial” and “structural” errors is confusing for a number of reasons that commentators have documented. The Court has, for example, defined “structural errors” as ones whose effect on outcome are “hard to measure” or result in “fundamental unfairness” regardless of outcome. A fair cross-section violation is an example of the former and “failure to give a

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208 Id. § 3161(h).
209 Id. § 3162(a)(2).
210 Fourth Amendment suppression motions are subject to harmless error review. See Rose v. Clark, 478 U.S. 570, 576 (1986) (noting that the “harmless-error” standard has been applied to many constitutional errors and citing Fourth Amendment cases). This makes sense since, unlike juror discrimination, speedy trial, and public trial, suppression always involves evidence bearing on the defendant’s guilt.
212 See Weaver v. Massachusetts, 137 S. Ct. 1899, 1907 (2017) (noting that structural errors “should not be deemed harmless beyond a reasonable doubt”).
214 See Weaver, 137 S. Ct. at 1908, 1911 (noting that public trial violations are structural errors and successful claims of discriminatory jury selection receive automatic relief). The Supreme Court has not explicitly called Batson violation “structural,” but lower courts have. See, e.g., Crittenden v. Chappell, 804 F.3d 998, 1003 (9th Cir. 2015) (“It is well established that a Batson violation is structural error.”); Tankleff v. Senkowski, 135 F.3d 235, 248 (2d Cir. 1998) (holding that a Batson claim “is a structural error that is not subject to harmless error review”).
215 See Weaver, 137 S. Ct. at 1908 (“[A]n error has been deemed structural if the effects of the error are simply too hard to measure.”). These values are only loosely tied to the determination of guilt or innocence. See supra Parts III.A. C.
217 See Weaver, 137 S. Ct. at 1908.
reasonable-doubt instruction” an example of the latter. That a constitutional violation’s effect on outcome is difficult to measure implies that it is important for reasons other than its impact on the outcome. Similarly, “fundamental fairness” implies that the right is important beyond its bearing on the result. The two expressions simply re-beg the question of why a particular right is important.

The Court has acknowledged that some structural errors protect interests other than the reliability of a verdict. But the Court has not forthrightly explained why some constitutional interests are more important than others. The analysis in the preceding sections suggests the presence of third-party interests may be significant. Third-party interests will often have had little or no bearing on the question of defendant’s criminal culpability but depend on defendants to be vindicated. If defendants are to vindicate significant third-party interests, it makes little sense to limit that role to the trial court alone. Were defendants not to continue playing that role on appeal, it would effectively undermine their ability to play the role at all. If a constitutional violation were not reversible on appeal, then there would be little (or no) reason for lower courts to be vigilant about those violations. There is, in other words, little practical option but to treat as “structural” those rights implicating third-party interests that defendants are charged with litigating in a representative capacity.

IV. THE REPRESENTATIVE DEFENDANT

The discussion in Part II sought to destabilize our settled understandings of defendants’ role in our criminal justice systems. That, in turn, invites two questions: why have defendants been tasked with playing this role (against the grain of the public’s perception of a defendant’s role, no less) and is it normatively desirable to foist this role upon defendants as opposed to some other entity, if anyone at all? The answers to these two questions are first, representative defendants help overcome some of the same structural impediments to the vindication of public harms that representative plaintiffs do in the civil context. That account goes far in answering the second question. It is normatively desirable for defendants to play this role because there is no other actor available to adequately vindicate these harms. Criminal defendants are also demographically representative of those in poor, minority communities that bear the punitive brunt of American criminal justice policy.

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218 See id. at 1911 (citing Vasquez v. Hillery, 474 U.S. 254, 263 (1986); Sullivan v. Louisiana, 508 U.S. 275, 279 (1993)).
219 See id. at 1908 (noting that one such example is the interest in allowing defendants to decide for themselves how best to protect their liberty).
220 See id. at 1910 (noting that the right to a public trial protects some third-party interests unrelated to protecting defendants from unjust conviction).
A. Representative Plaintiffs and Representative Defendants

Law scholars have spilt considerable ink exploring questions related to representative plaintiffs but have by and large overlooked the question of representative defendants. This is both because of the civil-criminal divide, and the structural differences between the remedies that representative plaintiffs and defendants may seek. Nonetheless, as Daniel Meltzer’s singular treatment suggests, analyzing the parallels can be revealing.

Courts and commentators have noted that representative actions by plaintiffs help overcome structural impediments that prevent individual plaintiffs or the government from vindicating significant harms. The impediments include information deficits, political capture, lack of regulatory/political will, and collective action challenges. In the civil context, there are various representative devices for overcoming these impediments. Rules permitting class actions are one such procedural device. Civil rules allow a plaintiff to litigate on behalf of unnamed parties where many individuals have suffered similar injuries inflicted by a defendant. The representative plaintiff’s injury must typify those suffered by the group at large and implicate legal and factual questions common to the group. The representative plaintiff, if successful, is usually afforded some compensation in excess of that required for make-whole relief. The extra sum is intended to compensate for initiating the suit and seeing it through.

Permitting a representative plaintiff to litigate on behalf of unnamed third parties, at least in theory, solves the related problems of low-value harms and collective action problems. Where an individual’s injury generates loss that is less than the anticipated cost of the injury, the rational plaintiff will not bring an individual suit. Permitting claim aggregation creates incentives for individual plaintiffs who have sustained such injuries to identify one another and coordinate. Allowing such plaintiffs to proceed as a group also promotes

221 See Sklansky & Yeazell, supra note 159, at 683, 688 (noting that although the civil and criminal bars are largely separate today, this was not always the case).
222 Meltzer, supra note 9, at 295, 328 (discussing the role of civil plaintiffs and criminal defendants in obtaining deterrent remedies).
225 See FED. R. CIV. P. 23 (governing class actions).
226 See id. at 23(a).
227 See JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 6:28 (16th ed. 2019) (noting “near-universal recognition that it is appropriate for the court to approve an incentive award payable from the class recovery” for class representatives).
228 See id.
229 See id. §1:1.
230 See id.
judicial efficiency by saving courts from having to decide claims on a piecemeal basis.231

Congress may also empower plaintiffs to enjoin unlawful conduct on behalf of themselves and the general public without having sustained direct harm.232 A “private attorney general” model is commonly included in civil rights and environmental legislation, among others.233 It is supposed to incentivize cause-oriented and profit-oriented plaintiffs to bring suits that serve the public interest.234 Such schemes typically award plaintiffs (and, perhaps more importantly, plaintiffs’ counsel) financial benefit for having successfully litigated a case—for example, fee-shifting statutes compel a defendant to pay plaintiffs’ attorney fees.235 The private attorney general model is supposed to harness the initiative of private individuals and attorneys to supplement or wholly substitute for enforcement action by executive agencies.236 This function is particularly important where no agency exists, and where one does exist but is disinclined to engage in enforcement action because of capture or some other reason.237

Qui tam actions, where a private “whistleblower” litigates on behalf of the government,238 present a final example. The plaintiff/whistleblower is awarded a bounty:239 a portion of the damages the government is entitled to recover following successful litigation.240 For example, a common case pattern involves a former employee of a government contractor blowing the whistle on her employer for having cheated the government.241 The Federal Claims Act’s qui

231 See id.
232 See, e.g., Associated Indus. of N.Y. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943) (holding Congress may “empower[] any person, official or not, to institute a proceeding . . . even if the sole purpose is to vindicate the public interest”); Glover, supra note 223, at 1156, 1158–59 (discussing private enforcement in employment, securities, consumer protection regulations); Pamela S. Karlan, Disarming the Private Attorney General, 2003 U. ILL. L. REV. 183, 186 (“Virtually all modern civil rights statutes rely heavily on private attorneys general.”).
233 See Glover, supra note 223, at 1153–58, 1154 n.57; Karlan, supra note 232, at 186.
235 See id. at 216–18.
236 See id.
238 See Engstrom, supra note 237, at 1914–15 (noting the qui tam provisions of the False Claims Act authorize private individuals, called “relators,” to bring suit).
240 See id.
241 See id. at 1275–77 (summarizing critiques of incentives created for relators).
tam provision creates an incentive for the employee to use her insider knowledge to rectify the wrong perpetrated against the government.\textsuperscript{242}

The policy rationales for authorizing plaintiffs to represent the public interest in civil cases helps elucidate why defendants are tasked with that role in criminal cases. First, defendants and their counsel possess information about the criminal justice system’s operation that members of the public may not be able to readily obtain, even when directly harmed by the State’s conduct. For example, prospective jurors excluded on the basis of race or gender may not realize that fact.\textsuperscript{243} Even with peremptory challenges, excluded jurors may not fully understand why they were excluded. Even if jurors have some intuition that they were discriminated against, excluded jurors may not themselves observe the pattern of exclusion that evinces discriminatory intent.\textsuperscript{244}

Similarly, absent an arrest and prosecution, individuals whose Fourth Amendment rights have been violated have no easy way of discovering the violation.\textsuperscript{245} The victim may leave the encounter with an intuition that her rights were violated, but it may be difficult to say with certainty. For example, the Fourth Amendment authorizes probabilistic judgment on the part of police—the fact that no evidence of crime was discovered (or no arrest made) does not necessarily mean that the police violated the Fourth Amendment.\textsuperscript{246} Police are constitutionally entitled to conduct a search or seizure provided that they have an appropriate quantum of suspicion.\textsuperscript{247}

\begin{itemize}
\item \textsuperscript{242} See id.
\item \textsuperscript{243} See Linda Greenhouse, \textit{The Supreme Court’s Gap on Race and Juries}, N.Y. TIMES (Aug. 6, 2015), https://www.nytimes.com/2015/08/06/opinion/the-supreme-courts-gap-on-race-and-juries.html [https://perma.cc/C2BP-W7S6] (arguing that while \textit{Batson v. Kentucky} prohibited racial discrimination in jury selection by requiring prosecutors to provide race-neutral reasons for their peremptory challenges to strike jurors, prosecutors have learned to “game the system by providing explanations that are accepted as persuasive to judges who appear all too eager to be persuaded”).
\item \textsuperscript{244} See Powers v. Ohio, 499 U.S. 400, 405 (1991) (noting that a pattern of excluding minority jurors can create an inference of discriminatory intent).
\item \textsuperscript{245} See, e.g., Daniel Zwerdling, \textit{Your Digital Trail: Does the Fourth Amendment Protect Us?}, NPR (Oct. 2, 2013), https://www.npr.org/sections/alltechconsidered/2013/10/02/228134269/your-digital-trail-does-the-fourth-amendment-protect-us [https://perma.cc/37BC-5E3Y] (discussing the ease with which the government can acquire information, particularly from computers, and the difficulty in tracking law enforcement’s searches).
\item \textsuperscript{246} See Illinois v. Gates, 462 U.S. 213, 238 (1983) (finding “probable cause” satisfied if observable facts suggest “a fair probability that . . . evidence of a crime will be found in a particular place”) (emphasis added).
\item \textsuperscript{247} See id. at 236.
\item \textsuperscript{248} See id. at 246 (“[P]robable cause does not demand the certainty we associate with formal trials. It is enough that there [is] a fair probability [of finding evidence of wrongdoing].”).
\end{itemize}
Nor must the police articulate the constitutional basis for the stop to the target contemporaneously with its execution. The target, like an excluded juror, may have an intuition that her rights were violated, but have little opportunity to validate the intuition. Officers themselves may not commit to specific Fourth Amendment rationale for the stop and search until well after it occurs, if ever. Officers will assert a rationale when crafting a narrative account of the encounter in an arrest report, but in the absence of an arrest, such a report may never be created.

For most speedy trial violations and many public trial violations, it may be difficult to identify third party beneficiaries specifically. The harm may be diffuse. The public has a general interest in the expeditious processing of criminal cases, but delays in any specific case will only compromise that interest on the margins—no one without a tie to the case will be any wiser for the delay. The same is true for violations of Sixth Amendment public trial. For those who have no tie to a case, but only an informational interest in learning what is going on in criminal courts generally, they will be no wiser for the public trial violation in a specific case.

The second reason why representative defendants are analogous to representative plaintiffs is that both make up for the absence of incentives for individuals to bring civil suits. Even when members of the public are aware that their constitutional rights have been violated, there are prohibitive logistical, legal, and financial barriers to challenging the violations. The Supreme Court noted in *Powers v. Ohio*: “Potential jurors . . . have no opportunity to be heard at the time of their exclusion. Nor can [they] easily obtain declaratory or injunctive relief when discrimination occurs . . .” The excluded juror’s “small financial stake” will not justify the high costs of litigating a violation.

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250 See id. (discussing how DUI checkpoints offer a valid excuse in reports for Fourth Amendment violations).


254 Id. at 415.
The same financial impediments will exist for most Fourth Amendment and public trial violations. The financial loss associated with a brief, unconstitutional street or traffic stop is relatively low in comparison to prospective litigation costs. Even where an individual is confident that she was the victim of a Fourth Amendment violation, civil litigation is unlikely because it is cost prohibitive. The material harm is typically modest, the odds of recovery uncertain, and the costs of litigation high. Most Fourth Amendment violations on the street entail a relatively brief stop or a privacy intrusion that does not significantly harm the target. The odds against winning will also be high absent egregious facts that are easily corroborated. In civil suits, officers enjoy qualified immunity, meaning that they can only be held liable for violations of constitutional rules that were clearly established at the time of the violation.

This coupled with the challenge of overcoming the officer’s factual account makes recovery challenging in Fourth Amendment cases. All of this is to say, that the net present value of any given Fourth Amendment claim is likely low, making litigation an unattractive financial proposition. The same would be true for a defendant’s supporters (and detractors) who were excluded from a part of the criminal proceeding, if they were permitted to challenge the exclusion at all.

Obtaining forward-looking civil relief for Fourth and Fourteenth Amendment violations is also challenging because civil plaintiffs must demonstrate likelihood of a future injury of the same variety that they have sustained in the past. Injunctive relief against future discrimination against jurors or illegal searches and seizures requires that the plaintiffs show that it is likely that they personally will be subjected to such unlawful treatment again.

While similar policy rationales animate representative action by criminal defendants and civil plaintiffs, the remedy available to the former is very different than that available to the latter. Representative plaintiffs are permitted to seek damages on behalf of aggrieved third parties and forward looking 

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255 Nirej Sekhon, Mass Suppression: Aggregation and the Fourth Amendment, 51 GA. L. Rev. 429, 454 (2017). For this reason, many civil cases against the police tend to involve “serious injury or death.” Id.
256 Id.
257 Id.
258 See Balko, supra note 249.
260 See Sekhon, supra note 255, at 454 n.154.
261 See Amar, supra note 184, at 678–81 (discussing how the public trial is a right for defendants and the people generally, as public trials enhance goals of accountability, “truth-seeking, confidence-enhancing, [and] innocence-protecting”).
263 Id.
remedies designed to reshape policy making. When plaintiffs launch structural reform litigation, the point is to prompt large-scale change in an institution’s decision making and behavior. The remedies afforded representative plaintiffs reflect that purpose and can immerse courts in managing an institution’s decision making at a granular level. This has led some commentators to argue that these types of suits should be significantly curtailed or prohibited. In contrast, other commentators suggest we retool our descriptive account of courts, recognizing the extent to which they make policy, not just resolve discrete legal disputes.

In contrast to representative plaintiffs, representative defendants cannot obtain damages or injunctive relief. There are some instances where a third-party beneficiary receives an immediate benefit as a result of a criminal defendant’s representative action. For example, where a defendant successfully challenges juror exclusion in the trial court or prevents a courtroom’s closure to the public, the third party realizes immediate relief. But it will often be true that it is only defendants who benefit directly. For example, where juror exclusion is vindicated on appeal, the defendant will receive a new trial, but the excluded juror will derive no immediate benefit. Similarly, if a defendant successfully excludes highly probative evidence that was obtained in violation of the Fourth Amendment, she might avoid conviction. But there is no direct benefit to any third party who has suffered a similar enforcement tactic in the past. Nor is there any guarantee that police will refrain from engaging the same misconduct in the future.

That criminal defendants’ actions generate deterrent effects presupposes that judicial decisions are internalized by prosecutors and police. Whether they actually do so is another question.


267 See id. at 2–3 (summarizing literature).

268 See id. at 3, 6.


There is, in other words, a disconnection between the representative role defendants are asked to play and the remedy typically made available when they do so successfully. Whether that is a problem in need of solution depends on whether one views representative action by a defendant as normatively desirable.

B. If Nothing Is the Next Best

Relying on representative defendants may not be the ideal way to realize constitutional values, but the absence of regulatory capacity and political will makes ideal enforcement schemes quixotic. And again, literature regarding representative plaintiffs is suggestive. It suggests we should embrace representative defendants more enthusiastically because other regulatory options are unavailable or cost prohibitive. Defendants are also demographically representative of the communities most intensively impacted by criminal justice policy.271

A litany of criticism has been leveled against representative plaintiffs. Critics argue that these suits reward opportunistic lawyers and fail to produce outcomes that legislatures contemplated.272 It is difficult to empirically substantiate these criticisms,273 but if there is any truth to them, one must wonder why Congress and state legislatures have authorized private actors to vindicate public norms. Sean Farhang has offered an account grounded in the political realities of our fragmented State.274

Congress may seek to insulate its legislative choices from shifts in political winds that change future legislative and executive priorities.275 Perhaps more significantly, America’s political culture does not favor creating new administrative agencies.276 Thus, the most obvious alternative to private enforcement of public interests, government enforcement through a dedicated

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271 See David E. Olson & Sema Taheri, Population Dynamics and the Characteristics of Inmates in the Cook County Jail 4 (2012).
272 See Coffee, supra note 234, at 236, 249–50.
273 See Mayer Brown LLP, U.S. Chamber Inst. for Legal Reform, Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions 1 (Dec. 2013), https://www.instituteforlegalreform.com/uploads/sites/1/Class-Action-Study.pdf [https://perma.cc/7E3W-PP7Y] (arguing they provide “far less benefit to individual class members than proponents of class actions assert,” but there have been “few [empirical studies] to examine class action resolutions in any rigorous way”).
275 See id. at 34–42.
276 See id. at 43–44.
bureaucracy, is often politically implausible. The costs of private enforcement must thus be evaluated in light of the actual, next-best option, which may be no enforcement at all.

The biggest cost of relying on representative defendants is lost convictions. The Court has long lamented having to pay this cost for deterring constitutional violations. An increasingly conservative Supreme Court has emphasized that a criminal trial’s purpose is singular: to ascertain the defendant’s guilt or innocence. This undercuts the range of third-party interests discussed in Part II. In each of those contexts, defendants have been empowered to challenge their convictions for fear that the underlying constitutional value will go unprotected otherwise.

It is difficult to imagine alternative regulatory institutions arising to vindicate the constitutional values described in Part II. Debate regarding alternative institutions has been most pitched regarding police regulation. Some commentators argue that more readily accessible civil relief would more effectively deter police than exclusion does. Others have argued that more intensive administrative regulation, whether internal police-managed or external civilian-managed, would be more effective than the exclusionary rule. There appears to be little appetite in any legislature for making civil relief against the police for Fourth Amendment violations more readily available. Despite considerable experimentation with civilian review of police, there is little to

\[277\] See id.
\[278\] See supra note 70.
\[279\] Particularly in the Fourth Amendment context. See supra notes 139–49 and accompanying discussion.
\[281\] See Powers v. Ohio, 499 U.S. 400, 415 (1991) (finding that, without a defendant to vindicate racial discrimination in the exercise of peremptory challenges, the excluded juror would “possess[ ] little incentive to set in motion the arduous process needed to vindicate his own rights”); Gannett Co. v. DePasquale, 443 U.S. 368, 384 (1979) (observing American criminal justice presupposes that public’s interests in speedy and public trial is “fully protected by the participants in the litigation”); Mapp v. Ohio, 367 U.S. 643, 655 (1961) (finding without exclusionary rule, the Fourth Amendment “would be a form of words,” valueless and undeserving of mention in a perpetual charter of inestimable human liberties”).
suggest it has resulted in appreciable deterrence of constitutional (or other) violations. And the police themselves have also proven resistant to self-regulation, at least around searches and seizures that do not implicate excessive force questions. The pervasiveness and strength of police unions also dim the prospect of more vigorous legislative and regulatory approaches materializing anytime soon.

With juror discrimination, open trials, and speedy trials, the constitutional norms directly implicate the work of courts. It is hard to imagine an institution outside the courts playing a regulatory role. Courts depend upon the parties that appear before them to raise issues. The public’s underlying interests in these constitutional values will be best protected if all the parties before the court have significant incentives to raise these issues. For criminal defendants to have incentive to do so, tethering the constitutional norm to the possibility of avoiding conviction is the most obvious carrot. While there is undoubtedly a social cost here, it may not be as dramatic as the Court has often suggested. Most criminal cases are not grisly, headline grabbers. For low-level narcotics crimes, property crimes, and so on, a lost conviction is not such a terrible cost to bear. Indeed, criminal court judges may view such cases as fungible and be prepared to dismiss for all manner of reasons unrelated to innocence, not least of which is simply clearing their dockets.

There is a deep moralistic undercurrent to the Supreme Court’s skepticism of defendants representing third-party interests in criminal cases. In its view, allowing a defendant to avoid conviction for a reason other than acquittal is a “windfall.” This is to take the defendant as morally undeserving simply by virtue of having been accused. This assumption does not sit comfortably with due process notions of innocent until proven guilty. The view that criminal defendants are unrepresentative is also sociologically out of step with the experience of millions of people. Poor men of color are more likely to have been criminal defendants at some point in their lives. A recent study concluded that, as of 2010, nearly one-third of all adult

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287 Peter F. Nardulli, The Societal Cost of the Exclusionary Rule: An Empirical Assessment, 8 AM. B. FOUND. RES. J. 585, 589 (1983) (stating that the Burger Court “questioned whether the costs [of the exclusionary rule] were as great as the critics claimed”).
289 See supra note 116 and accompanying discussion.
male African Americans had a felony conviction. That means that the proportion who had at some point been a criminal defendant in their lives is even higher if one includes both felonies and misdemeanors. The majority of criminal defendants—some 80%—are poor. Extrapolating from these demographic realities suggests that in many poor, minority communities the experience of having been a criminal defendant is broadly representative of at least male experience.

V. IMPLICATIONS

Parts II and III have presented an argument for recognizing the defendant’s representative role without ambivalence. If courts, commentators, defense attorneys, and, most importantly, the public were to do so, that could help make for more balanced criminal justice policy. Greater enthusiasm for representative defendants might also prompt policy changes that enable defendants and their attorneys to better effect that role in response to the third-party harms that regularly arise in criminal courts.

A. Balancing the Public’s Perception of Criminal Justice

Greater awareness of defendants’ representative role might prompt the public to view defendants as an extension of “the people” rather than as antagonistic to them. This in turn could help temper the harshness that has defined American criminal justice. That harshness has been driven in part by two generations worth of political rhetoric that equate “the people” with victimhood. The current political moment is fertile for reframing criminal defendants and criminal justice more generally. The decreased salience of crime in Americans’ perceptions of social problems might make them receptive to

293 For example, in 2011, one-third of admissions to Cook County jail in Chicago were from one African American section of town, the South Side. OLSON & TAHERI, supra note 271, at 4; Race and Ethnicity in South Chicago, Chicago, Illinois (Neighborhood), STAT. ATLAS, https://statisticalatlas.com/neighborhood/Illinois/Chicago/South-Chicago/Race-and-Ethnicity#figure/race-and-ethnicity [on file with Ohio State Law Journal] (finding 78.5% of South Chicago’s population is “Black”). Two-thirds of the total admissions were of African Americans. OLSON & TAHERI, supra note 271, at 4. Arrest does not necessarily mean that one will become a defendant, but it is a pretty good proxy. See id. at 7.
295 See JONATHAN SIMON, GOVERNING THROUGH CRIME 77 (2007).
rereading where “the people” sit in a criminal courtroom.\footnote{Americans’ Concerns About National Crime Abating, GALLUP (Nov. 7, 2018), https://news.gallup.com/poll/244394/americans-concerns-national-crime-abating.aspx [https://perma.cc/SP4Y-D3PC] (finding an 11% drop in Americans viewing crime as a very or extremely serious problem from 2017 to 2018).} Eroding the public’s reflexive association with victims and the State’s prosecutorial function would make the ground even more fertile than it already is for criminal justice reform.\footnote{See Caren Myers Morrison, Foreword: Criminal Justice Responses to the Economic Crisis, 28 Ga. St. U. L. Rev. 953, 958 (2012).}

The representative defendant is a corrective to the victim-centered conception of criminal justice that took hold in the late-twentieth century. That shift had begun to take clear shape by the late 1960s,\footnote{See SIMON, supra note 295, at 91 (describing public anxiety during the 1960s).} and congealed in response to the increased salience of crime in American politics.\footnote{See DAVID GARLAND, THE CULTURE OF CONTROL 90–92 (2001) (attributing the crime rate increase after 1960 to structural factors in American society).} As historians and criminologists have documented, those perceptions were a function of not only increased crime rates,\footnote{See id. at 90.} but broad social and economic dislocations.\footnote{See id. at 81–89; SIMON, supra note 295, at 22–25; WHITMAN, supra note 16, at 49.} De-industrialization, increased physical mobility, foreign wars, and the civil rights movement had destabilized America’s post-war social order.\footnote{See ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME 32 (2016) (arguing that President’s Johnson’s “War on Poverty” and subsequent “War on Crime” shared the same assumptions regarding poor African Americans’ criminality and the same goal of controlling them).}

Many white voters’ anxiety found expression in the language of crime control.\footnote{See id. at 134–40.} President Johnson’s declaration of “war on crime” was a direct response to these anxieties.\footnote{See MICHAEL W. FLAMM, LAW AND ORDER 174–75 (2005); HINTON, supra note 302, at 134–40.} His war on crime quickly collapsed into the thinly racialized “law and order” platform that had emerged on the political right in the 1960s and gained deep traction with President Nixon’s election in 1968.\footnote{See, e.g., SIMON, supra note 295, at 58–59 (describing Bill Clinton’s defeat of George H.W. Bush in 1992 presidential election).} In the decades to follow, being tough on crime became a rhetorical cornerstone of American politics.\footnote{See GARLAND, supra note 299, at 35, 59 (finding the “gap between ‘bark’ and ‘bite’” sustainable so long as public did not notice it); WHITMAN, supra note 16, at 54. The rehabilitative ideal came under attack from the left as well; that critique focused on the

Related was a transparency critique:
leniency was the product of an opaque and clubby culture among criminal justice professionals. A host of reforms were advanced with a strong and steady drift toward greater harshness. Mandatory minimum sentences, the expansion of narcotics offenses, and increased funding for police and prosecutors were hallmarks of tough on crime politics. The notion of “victims’ rights” dovetailed readily with this policy agenda.

The victims’ rights movement arose in the late 1970s as part of America’s shift towards harsher criminal justice policy. Victims’ rights advocates sought to make the criminal justice process more responsive to victims’ interests. These advocates viewed prosecutors as the best positioned and most amenable to advancing their cause. The impetus for the victims’ rights movement came from the perception that criminal justice traded victims’ interest in favor of bureaucratic expediency which worked to the advantage of defendants. The movement spawned a host of legal and policy innovations that reshaped the practice of criminal justice.

The right to make victim impact statements during sentencing, the creation of public victim compensation funds, and the creation of victim outreach professionals in prosecutors’ offices are all examples of victims’ rights reforms.

More than any policy reform however, the victims’ rights movement created a victimological zeitgeist that came to define how the public viewed itself. The unequal distribution of leniency to the disadvantage of socially marginal groups. See Garland, supra note 299, at 56–57; Whitman, supra note 16, at 54.

See Garland, supra note 299, at 56–57.


See Garland, supra note 299, at 11–12.

See Marie Gottschalk, Caught 149 (2015); Whitman, supra note 16, at 54.


See Garland, supra note 299, at 11 (“Any untoward attention to the rights or welfare of the offender is taken to detract from the appropriate measure of respect for victims.”).


figure of the victim came to typify the vulnerability of the average citizen, with the prosecutor and police cast as their representatives.

Jonathan Simon has argued that this broad, public identification with victims accounts for how the American State has “govern[ed] through crime.” By stoking public fear of crime, the State “nudges out other kinds of opportunities” to frame public policy dilemmas in nonpunitive terms. Over generations, the public has come to view a host of social problems in criminal justice terms rather than social welfare, public health, or other terms. In this paradigm, not only does criminal justice grow harsher, its vocabulary comes to dominate how the public conceptualizes a range of others, most of whom are poor and minority. Defendants come to stand in as the antithesis of the people.

An account of the representative defendant is a partial corrective for our criminal justice system’s victim-sided tilt. A victim-centered view of criminal justice cannot adequately reflect criminal justice’s complexity or the plurality of values it serves. As described in Part II, our criminal justice system reflects and reproduces a range of values, many of which have little to do with accurately determining guilt or vindicating harm suffered by a specific victim. Defendants serve an important public function by staving off the State when it is abusively coercive, systematically exclusionary, or just irrational. The defendant should accordingly be viewed as more than just an object of pity or contempt, but rather as a part of the public itself and doing work that is often in its service. By extension, defense counsel should also be imagined as agents of public justice. They are, of course, critical to defendants’ ability to effectively execute their representative role.

B. Enabling the Representative Defendant

The Supreme Court has pinched its nostrils and permitted defendants to act in a representative capacity. Part III above put forth a case for the Court and everyone else un-pinching their nostrils and equipping defendants to more

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317 GARLAND, supra note 299, at 11 (“The victim is now . . . a much more representative character, whose experience is taken to be common and collective, rather than individual and atypical.”); SIMON, supra note 295, at 77 (finding citizenry is classified “into types of actual and potential [crime] victims”).
318 See SIMON, supra note 295, at 33, 76.
319 Id. at 5.
320 Id. at 21.
321 See id. at 76.
323 See GARLAND, supra note 299, at 11 (“A zero-sum policy game is assumed wherein the offender’s gain is the victim’s loss . . . .”).
transparently and vigorously effect their representative role. Effectively executing the defendant’s representative role has implications for how defense counsel is funded and the availability of procedural tools to enable that role. Such changes may in turn prod deeper thinking about the kinds of systemic harms defendants and their counsel should be empowered to challenge in criminal courts.

The following discussion identifies a tentative list of policy and legal reforms that would enable defendants to more effectively perform their representative role.

**Claim Aggregation.** Many of the same kinds of informational/incentive deficits and structural impediments that account for representative plaintiffs in the civil context account for the representative defendant in the defense context.\(^{324}\) The analogy supports making homologous tools like claim aggregation available to the latter. We tend to reductively conceptualize the criminal process as narrowly individualistic, but there is some precedent for claim aggregation in the criminal context.\(^{325}\) Brandon Garrett has described the use of aggregation techniques in the context of right to counsel claims and challenges to forensic evidence, among others.\(^{326}\) While procedural rules governing aggregation are underdeveloped in the criminal context, that need not be true.\(^{327}\) Of course due process would require different constraints on aggregation in the criminal cases in comparison to civil cases. For example, Garrett has noted the importance of bifurcation—only those issues that are actually shared between cases ought to be subject to aggregation.\(^{328}\)

Fourth Amendment suppression in particular lends to aggregation. Given that the remedy of exclusion is designed to further deterrence alone, patterns of unconstitutional search and seizure raise particularly urgent concern.\(^{329}\) When such a practice presents itself in multiple cases, aggregation (for the purposes of suppression alone), would allow for a more thorough and efficient consideration of the constitutional claims.\(^{330}\) Aggregation would allow the parties to construct a more meticulous portrait of police practices and their impact. This would in turn allow courts to make more informed inferences regarding those practices’ third-party impacts.

The deterrent effect of a group-based suppression remedy is also likely to be higher than in an individual case.\(^{331}\) Suppression is supposed to deter through pedagogical effect; the more dramatic the suppression hearing and its effect, the

\(^{324}\) See supra Part III.A.


\(^{326}\) Id.

\(^{327}\) See id. at 425–26.

\(^{328}\) Id.

\(^{329}\) See Sekhon, supra note 255, at 478.

\(^{330}\) See id.

\(^{331}\) See id.
greater the likelihood that police will learn of it and internalize its lesson. As I have discussed at length elsewhere, what constitutes a “pattern” of police misconduct may be different in the criminal context than it would be in civil context and procedural rules ought to reflect those differences.

Representative action in each of the contexts discussed in Part II may be amenable to aggregation.

Challenging Other Systemic Harms. A more robust conception of the representative defendant may support the creation of more robust remedies for constitutional harms in the criminal process.

For example, the Supreme Court has hinted that dismissal might not be an appropriate remedy for a selective enforcement claim brought under the Fourteenth Amendment in a criminal case. Defendants who bring selective enforcement or prosecution claims contend that they would never have been subject to criminal prosecution were it not for the prosecutor’s or police’s racially discriminatory exercise of discretion. The Court is generally loathe to “suppress” the person—in that vein, the Court has held that the Due Process Clause does not compel such a remedy where an individual’s presence in court was brought about unconstitutionally. But equal protection claims implicate unique third-party interests and thus warrant that defendants receive a dismissal remedy.

When a criminal defendant brings an equal protection challenge by virtue of her membership in a protected group, the practice typically inures to the disadvantage of the protected group. First, the challenged practice heaps additional stigma on group members by virtue of their membership. In Batson, the Court noted that “[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.” Similarly, selective enforcement based on race reproduces stereotypical notions of black (or other minority) criminality that stigmatizes the larger group. But community members would not have standing to challenge the selective enforcement without themselves having been enforced against. Nor are those engaged in criminal misconduct likely to reveal themselves in order to...

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332 See Nardulli, supra note 287, at 588 (citing United States v. Calandra, 414 U.S. 338 (1974)) (stating that the “principal rationale for the exclusionary rule was its value in deterring the police from illegal behavior”).

333 See Sekhon, supra note 255, at 478.


335 See Mumphrey, 193 F. Supp. 3d at 1046–47.

336 This is pursuant to the Frisbie-Ker doctrine. See Frisbie v. Collins, 342 U.S. 519, 522 (1952) (citing Ker v. Illinois, 119 U.S. 436, 444 (1886)).


seek injunctive relief. Any deterrent effect must be achieved through litigation in criminal cases. Dismissal should be the remedy.

Systemic Data and Discovery. Effectively bringing systemic challenges in criminal cases requires the availability of data regarding systemic practices. With proper incentives, defense counsel may be more diligent in gathering information regarding police, prosecutor, and court practices that harm defendants as a class and the public. For example, defenders might be able to identify patterns of Fourth Amendment violations by recording and cross-referencing clients’ accounts of stops over time. Defenders might also, over time, track prosecutors’ use of peremptory challenges in different cases along with the overall demographic profile of jury venires. A defender agency that took defendants’ representative role seriously would, in fact, track all information available to it that might give rise to constitutional, or any other systemic, claims.

If defense counsel were to pursue its representative role more aggressively, this could help create incentives for prosecutors and courts to collect systemic data more meticulously. The Constitution, of course, requires prosecutors to produce any evidence that is materially exculpatory. It is undecided whether that obligation extends to evidence that is germane to Fourth Amendment suppression, but it may be. That obligation, however, does not extend to prosecutor and police enforcement and charging practices. Nor does it apply to information generated by courts themselves. To the extent that judicial practices such as selecting jury venires and closing courtrooms have constitutional significance, courts need not collect and analyze this information let alone disclose results to defense counsel in criminal cases. This diserves defendants and the third-party interests they represent. Courts should be more transparent with information regarding their own systemic practices, supplying it liberally to defense counsel and the public.

Restricting Waiver. Waiver is an endemic feature of criminal justice practice. Defendants are routinely asked (or compelled) to waive rights in order to secure benefits of which a plea bargain is the most common example. In most jurisdictions, a plea bargain requires that defendant waive most rights, including those which have significant third party-benefits, like those discussed in Part

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340 See infra notes 349–55 and accompanying discussion.
343 See United States v. Armstrong, 517 U.S. 456, 461 n.2 (1996); Brady, 373 U.S. at 87 (finding that the prosecutor must only turn over exculpatory evidence alone).
344 Brady, 373 U.S. at 87 (stating the obligation placed on the prosecutor).
II. Allowing defendants and prosecutors to bargain those rights away may undermine third parties’ interest in seeing the issue litigated and resolved. Routinely forsaken speedy and public trial rights may contribute to a slow and opaque criminal justice system. Waived suppression claims forgo deterrence. And for pleas entered following jury selection, improperly excluded jurors’ interests will not be vindicated.

Legislatures and courts could restrict defendants’ ability to waive such rights, effectively taking them off the table for plea bargains. New York has already done this in a limited way for speedy trial issues litigated before a plea. Some jurisdictions allow defendants to appeal Fourth Amendment suppression issues following a plea. Limiting waivers should not interfere with either defendants’ or prosecutors’ core incentives to plea bargain in most cases: defendants seek to avoid harsher post-trial punishment and prosecutors seek to avoid expending resources on trial practice. Limiting waiver of course supposes that defense counsel, who are ordinarily resource strapped, will follow through on litigating non-waivable constitutional issues. Additional incentives may be needed to get them to do so.

Defender Funding. The suggestions above would have already-strapped public defenders take on additional advocacy responsibilities. That will require additional financial support for defenders. Public acceptance of the defendant’s representative role could help bolster arguments for that funding. In the civil context, specific financial incentives have been created to induce private attorneys to take up representative actions—fee shifting statutes and contingent fee arrangements are examples. There are, of course, no parallel arrangements for defense counsel. Many public defenders scarcely have the resources necessary to represent their individual clients, let alone to vindicate third-party interests. Specific resources could be made available to defenders who take up specified representative actions. But, in the main, public defenders should simply be funded adequately.

The adequacy of states’ support for public defenders has been a persistent dilemma since the Supreme Court declared a Sixth Amendment right to counsel. Gideon v. Wainwright obliges states to fund public defense, but the Court has left it to states, which have taken very different approaches to

345 See supra Part II.
346 See supra note 203.
349 See supra notes 234–40 and accompanying discussion.
financing criminal defense.\textsuperscript{352} At one end of the spectrum, some states have created defender agencies while at the other, states have left it to private attorneys who are paid piecemeal by the case.\textsuperscript{353} The latter arrangement is widely regarded as the least effective. And that is doubly true for facilitating defendants’ representative role. The attorney who receives a fixed fee per case,\textsuperscript{354} regardless of outcome, has little incentive to do anything but the bare minimum.

Financing for public defense depends substantially on political will. Courts have been reluctant to regulate the financing question, despite the availability of various constitutional grounds for doing so.\textsuperscript{355} And even if they were more willing to do so, it is unlikely that courts would compel states to fund the maximalist version of the defense function suggested here. Educating the public on the defendant’s representative role could help build increased public pressure to support more funding for defenders.

VI. CONCLUSION

The conventional wisdom that defendants are parochial denies the public responsibilities that our Constitution invests in them. It also denies the extent to which being a defendant is demographically representative of those in poor and minority communities. Courts, commentators, and the public need not make heroes of criminal defendants, but all should be clear-eyed about the important role that criminal defendants play in our system. They are critical agents for upholding would-be jurors’ participation rights, regulating police search and seizure practices, and guaranteeing an open and expeditious criminal justice system. The structural and practical impediments that prevent members of the public from vindicating these interests themselves are analogous to those that animate private attorney generals in the civil context. Criminal defendants and their counsel are uniquely positioned to overcome these impediments. Rather than embarrassedly looking askance, we should create more coherent and effective incentives for defendants to energetically perform their representative roles. Doing so will improve both their lot and that of the third parties they so often represent.

\textsuperscript{352} See id. at 1579–80.
\textsuperscript{353} See id. at 1580.
\textsuperscript{354} See id. at 1590.
How Much Is Too Much? 
A Test to Protect Against Excessive Fines

DANIEL S. HARAWA*

Fines are the most common form of punishment in the United States and are disparately imposed against poor people of color. The stories of fines ruining lives abound. Yet until last year, in most state courts, it was not clear whether a person could challenge financial punishment imposed against them as unconstitutional. That changed when the Supreme Court held in Timbs v. Indiana that the Eighth Amendment’s Excessive Fines Clause applies to the states.

Despite the fact that all state and federal courts must now be equipped to decide whether financial punishment violates the Eighth Amendment, the Supreme Court has not provided a concrete test for deciding whether a fine is constitutionally excessive. It has only said that a fine is excessive if it is “grossly disproportional” to the gravity of the offense.

This Article provides the guidance lacking in the Court’s case law by supplementing the “grossly disproportional” test. After examining the Court’s Eighth and Fourteenth Amendment jurisprudence, it offers four factors for courts to consider when deciding whether a fine is excessive: (1) whether the defendant is able to pay the fine; (2) whether fines are a significant revenue source in the sentencing jurisdiction; (3) whether other jurisdictions impose similar fines for similar crimes; and (4) whether the sentencing jurisdiction disproportionately imposes fines against minority defendants.

As many courts decide for the first time whether fines are excessive, this Article serves as a roadmap to help guide the analysis.

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I. INTRODUCTION

Harriet Cleveland, a grandmother from Missouri, was unable to pay her traffic tickets; she was arrested for nonpayment while at home feeding her grandson and spent ten days in jail.1 Megan Sharp, a mother of three from Ohio, was fined hundreds of dollars for driving with a suspended license; when she could not make her monthly payments, she was forced to leave her home and to move in with family members.2 Damian Stinnie, a twenty-four-year-old from


Virginia recently diagnosed with lymphoma, owed $1000 in traffic fines; his debt forced him into homelessness.

Fines are the most common form of punishment levied in the United States. Make no mistake, fines ruin lives. They can create a perpetual cycle of poverty. What starts as a citation for a minor offense can end in jail time, missed medical treatments, joblessness, and even homelessness. Up until February 2019, in most state courts, it was not even clear whether a person could challenge a fine as unconstitutional, no matter how disastrous its effect. That changed when the Supreme Court held in Timbs v. Indiana that states, by virtue of the Fourteenth Amendment’s Due Process Clause, are bound by the Eighth Amendment’s Excessive Fines Clause, which plainly proclaims excessive fines shall not be imposed.

In the 1998 case, United States v. Bajakajian, the Supreme Court for the first time announced a test for deciding whether a fine is excessive in violation of the Eighth Amendment: if a fine is “grossly disproportional to the gravity of the defendant’s offense,” it violates the Eighth Amendment. It is far from clear what it means for a fine to be “grossly disproportional” to an offense, and the Supreme Court has not provided any further guidance.

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6 Id.

7 Id.


9 Timbs v. Indiana, 139 S. Ct. 682, 686–87 (2019). Some Justices have suggested that it is the Privileges or Immunities Clause that incorporates the Bill of Rights against the states. See id. at 691 (Gorsuch, J., concurring) (opining that the Privileges or Immunities Clause may be the appropriate clause for incorporation); id. at 691 (Thomas, J., concurring) (opining that the Privileges or Immunities Clause incorporates the Excessive Fines Clause).

10 U.S. CONST. amend. VIII.


Given the lack of concrete guidance from the Supreme Court, federal courts have been preoccupied with defining gross disproportionality, divining their own Excessive Fines Clause tests by extrapolating from Bajakajian. As a result, there is no uniform measure for deciding whether financial punishment violates the Eighth Amendment.

The need for guidance in this area is more important now than it has ever been before—Timbs made the question of what constitutes an “excessive fine” constitutionally relevant in all fifty states. State courts need to know how to determine the constitutionality of financial punishment because now, in every state across the country, defendants can challenge fines imposed against them as violating the Constitution.

Exacerbating the need for guidance is the fact that today, fines are the most common form of punishment. And there are reasons to be skeptical about whether fines are being constitutionally meted out, given that a number of state and local governments rely on fines to satisfy budgetary needs. Given the fact that jurisdictions are using financial punishment as a way to fund government, there is a real incentive to over-police and over-punish minor crimes.

Not only that, jurisdictions across the country are disproportionality assessing fines against poor people of color. The United States Commission on Civil Rights has had to develop its own version of the Bajakajian . . . multi-factor ‘gross disproportionality’ test, with the ‘gross disproportionality’ determination often characterized as an inherently fact-intensive inquiry.”).

See Timbs, 139 S. Ct. at 686–87.

See id.

See Martin et al., supra note 4, at 472 (noting that “[m]onetary sanctions are the most common form of punishment imposed by criminal justice systems across the United States”).


on Civil Rights found that the one demographic most common among the jurisdictions that frequently impose fines was a large African American population. This phenomenon is the outgrowth of other well-documented racial disparities in the criminal legal system, including racial disparities in who is stopped, arrested, prosecuted, and found guilty. The disparate punishment of minorities raises more constitutional concerns about how fines are imposed today.

In the face of evidence that fines are being overused and abused, this Article provides guidance that has so far been lacking. The Article puts some much needed meat on the Supreme Court’s barebones “grossly disproportional” test, and implores courts to consider, in addition to the gravity of the offense, the following four factors when deciding whether a fine is constitutionally excessive:

1. Whether the defendant is able pay the fine.
2. Whether fines are a significant revenue source in the sentencing jurisdiction.
3. Whether other jurisdictions impose similar fines for similar crimes.
4. Whether the sentencing jurisdiction disproportionately imposes fines against minority defendants.

As the Article explains, these four factors guard against arbitrary and discriminatory sentencing. The factors ensure fines are meted out in furtherance of a legitimate penal purpose, not just to raise revenue. And while the four-factor test is novel, each factor fits squarely within existing Eighth and Fourteenth Amendment jurisprudence and is consistent with the Amendments’ purposes.

The Article unfolds in three parts. First, it briefly lays out the modern-day realities of financial punishment. Second, it examines the Supreme Court’s Excessive Fines Clause jurisprudence, including its decisions in Bajakajian and Timbs, and then discusses how lower courts have grappled with the Court’s Excessive Fines Clause case law. And finally, the Article lays out the four factors and shows how they should be applied.

Forfeiting the American Dream: How Civil Asset Forfeiture Exacerbates Hardship for Low-Income Communities and Communities of Color 5–8 (Apr. 2016), https://cdn.americanprogress.org/wp-content/uploads/2016/03/31133144/032916_CivilAssetForfeiture-report.pdf [https://perma.cc/4HZY-TTAT] (detailing a number of jurisdictions that have marked racial disparities in terms of how forfeiture is used).

20 See TARGETED FINES AND FEES AGAINST COMMUNITIES OF COLOR, supra note 19, at 23.


22 The test uses the word “fine” to track the language of the Eighth Amendment. As explained later, see infra Part III.A, criminal forfeitures are also a “fine” for Eighth Amendment purposes; they are therefore included within the test.
At bottom, the Article argues that courts should consider all four factors when deciding whether a defendant’s financial punishment is constitutional, no matter how trivial the fine may seem at first blush. Whether it be a fifty dollar fine or one million dollar forfeiture, the same multi-faceted analysis should occur. Because, as the stories in the beginning show, what starts off as a “small” fine for a “minor” crime can, without exaggeration, devastate a person’s life.

II. THE MODERN-DAY REALITIES OF FINES AND FORFEITURES

The Eighth Amendment to the United States Constitution forbids three things: “excessive bail,” “excessive fines,” and “cruel and unusual punishments.” The Supreme Court decided that the “cruel and unusual punishments” clause of the Eighth Amendment applies to the states by way of the Fourteenth Amendment over fifty years ago. Since then, especially in the death penalty context, the Court has frequently opined on whether certain punishments are “cruel and unusual” in violation of the Constitution.

This past Term, the Supreme Court ruled in Timbs v. Indiana that the Eighth Amendment’s “excessive fines” clause also applies to the states. This means that a “fine” levied by the state is subject to certain constitutional parameters—it cannot be “excessive.” Before discussing the present lay of the land, it is important to understand what is, what may be, and what is not, covered by the Excessive Fines Clause. First, to fall within the ambit of the Eighth Amendment, any sum of money that a defendant is ordered to pay must be ordered as a form of punishment payable to the government. This covers fines as they are generally understood, i.e., a person violates the law and then they are fined a certain dollar amount as punishment. But it also covers criminal forfeitures, i.e., “[a] governmental proceeding brought against a person to seize property as punishment for the person’s criminal behavior.” And forfeitures can happen as a part of a defendant’s criminal proceedings, meaning the government takes property while charges are pending or after a conviction, or they can be civil, where the government initiates separate proceedings and proves that the

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23 U.S. CONST. amend. VIII.
24 See Robinson v. California, 370 U.S. 660, 667 (1962). In dicta, the Supreme Court said that the Excessive Bail Clause is also incorporated against the states. See Schilb v. Kuebel, 404 U.S. 357, 365 (1971).
27 See id.
29 Criminal Forfeiture, BLACK’S LAW DICTIONARY (10th ed. 2014).
property was used to facilitate a crime.\textsuperscript{31} In both instances, the Excessive Fines Clause applies.\textsuperscript{32}

But there is much criminal justice debt people face that the Supreme Court has not decided one way or another whether it would be covered by the Excessive Fines Clause. This unaccounted for money that defendants are often ordered to pay includes court costs and fees associated with complying with punishment.\textsuperscript{33} For example, the cost to rent an ankle monitor, the price of court-required drug testing, or supervision fees paid to private probation companies.\textsuperscript{34} These costs can run thousands of dollars.\textsuperscript{35} The answer to whether these costs would be covered by the Excessive Fines Clause is murky, because it turns on whether they are considered solely remedial, i.e., only designed to recoup costs, in which case they would not be covered, or whether they are partly punitive, in which case they would be covered.\textsuperscript{36}

Although the law in this area is far from comprehensive, the Supreme Court has left no doubt that criminal fines and forfeitures are covered by the Excessive Fines Clause.\textsuperscript{37} And courts’ ability to determine whether fines and forfeitures are constitutionally excessive is exceedingly important given that, over the past few decades, jurisdictions across the country have increasingly used fines and forfeitures as punishment.\textsuperscript{38}

\textsuperscript{31} See, e.g., \textit{Austin}, 509 U.S. at 602.

\textsuperscript{32} See id. at 609. At least one federal court of appeals has held that mandatory restitution orders are covered by the Excessive Fines Clause. See \textit{United States v. Dubose}, 146 F.3d 1141, 1144 (9th Cir. 1998) (holding that mandatory restitution imposed under the Mandatory Victims Restitution Act is covered under the Eighth Amendment). Restitution is defined as “full or partial compensation paid by a criminal to a victim . . . ordered as part of a criminal sentence.” \textit{Restitution}, BLACK'S LAW DICTIONARY (10th ed. 2014).


\textsuperscript{34} See, e.g., id. For example, one district court has held that probation fees are not covered. See id. On the other hand, a few state courts have held that similar types of costs are sufficiently punitive to bring them within the ambit of the Eighth Amendment. See Colgan, \textit{Lessons from Ferguson}, supra note 17, at 1196 n.120 (collecting cases from Illinois, Louisiana, and Missouri and holding that various fees related to criminal prosecution fall within the ambit of the Eighth Amendment’s Excessive Fines Clause).

\textsuperscript{35} See Brand, \textit{supra} note 5.

\textsuperscript{36} Some circuits have multi-factor tests to determine whether criminal justice costs are at least partly punitive and therefore covered by the Eighth Amendment. See, e.g., \textit{United States v. Mayberry}, 774 F.2d 1018, 1021 (10th Cir. 1985) (considering whether a cost “places an additional burden or penalty upon the defendant”; whether it “can be imposed only following conviction of a crime or offense”; and whether it “imposes a higher assessment on those persons convicted of felonies than on those convicted of misdemeanors”); \textit{accord United States v. King}, 824 F.2d 313, 316–17 (4th Cir. 1987); \textit{United States v. Smith}, 818 F.2d 687, 689–90 (9th Cir. 1987).

\textsuperscript{37} Timbs v. Indiana, 139 S. Ct. 682, 687 (2019).

\textsuperscript{38} See Beth A. Colgan, \textit{Fines, Fees, and Forfeitures}, 18 CRIMINOLOGY, CRIM. JUST. L. & SOC’Y 22, 22 (2017) (“The use of fines, fees, and forfeitures of cash and property are longstanding practices that have boomed in recent years as lawmakers have sought to fund an expanding criminal justice system without raising taxes.” (internal citations omitted)); Kevin R. Reitz, \textit{The Economic Rehabilitation of Offenders: Recommendations of the Model Penal...
expanding justice systems and to make up for budgetary shortfalls, have turned to fines and forfeitures as a significant revenue source. Indeed, a 2019 report found that revenue from fines and forfeitures “account for more than 10 percent of general fund revenue in nearly 600 U.S. jurisdictions,” and these jurisdictions are spread across at least thirty states. Given this reality, courts must be equipped to ensure fines and forfeitures comport with the Constitution.

A. The Ubiquity of Financial Punishment

While much of the recent scholarly dialogue surrounding the criminal legal system has focused on mass incarceration, a 2015 report issued by the United States Department of Justice (DOJ) in the wake of the tragic killing of Michael Brown, an unarmed Black teenager in Ferguson, Missouri, exposed the ways in which financial punishment is being used and abused all over America. The Ferguson Report ignited a critical conversation about the perverse relationship between punishment and profit.

Code (Second), 99 MINN. L. REV. 1735, 1737 (2015) (“Since the Model Penal Code (First) was approved in 1962, there has been steady growth in fine amounts, asset forfeitures, and a congeries of costs, fees, and assessments levied against criminal offenders.”).


40 Id.

41 Other issues relating to criminal justice debt that have received attention both in scholarship and litigation include state practices of jailing people for not paying criminal justice debt and state practices of making wealth-based pretrial detention decisions. See, e.g., Olivia C. Jerjian, The Debtors’ Prison Scheme: Yet Another Bar in the Birdcage of Mass Incarceration of Communities of Color, 41 N.Y.U. REV. L. & SOC. CHANGE 235, 235 (2017); Cynthia E. Jones, Accused and Unconvicted: Fleeing from Wealth-Based Pretrial Detention, 82 ALB. L. REV. 1063, 1064 (2018/2019). Challenges to these systems are often brought under the Fourteenth Amendment’s Due Process Clause, and the Supreme Court’s line of cases holding that it is unconstitutional to jail someone for failure to pay if the failure is not willful. See Bearden v. Georgia, 461 U.S. 660, 668–69 (1983).


43 See FERGUSON REPORT, supra note 21, at 2.

As other scholars have recounted in greater depth, the Ferguson Report revealed how criminal fines and forfeitures were being abused in Ferguson. The Report concluded that “Ferguson’s law enforcement practices [were] shaped on the City’s focus on revenue rather than by public safety needs.” The Report found that Ferguson was generating “a significant and increasing amount of revenue” from fines. For that reason, “[c]ity, police, and court officials for years ha[d] worked in concert to maximize revenue at every stage of the enforcement process.”

The Ferguson Report also concluded that the emphasis on revenue generation shaped the Ferguson Police Department’s approach to policing. It was revealed that “[p]atrol assignments and schedules [were] geared toward aggressive enforcement of Ferguson’s municipal code” with little thought given as to whether the “enforcement strategies promote[d] public safety or unnecessarily undermine[d] community trust and cooperation.” Because Ferguson’s municipal code governed almost every aspect of a person’s life, officers were easily able to find infractions to cite people for violating. And Ferguson’s Black residents bore the brunt of the city’s fining practices; while Ferguson is only sixty-seven percent African American, ninety percent of the citations issued by the Ferguson Police Department were to Black people.

But as then-Attorney General Eric Holder cautioned at the release of the Report, although the Report was focused on Ferguson, its findings were “not confined to any one city, state, or geographic region. They implicate[d] questions about fairness and trust that are national in scope.” Indeed, in September 2017, the United States Commission on Civil Rights released a follow up to the Ferguson Report, and found that although the data at the time was scant, at least thirty-eight cities including Ferguson “received 10 percent or

46 FERGUSON REPORT, supra note 21, at 2.
47 Id.
48 Id. at 9.
49 Id. at 10.
50 Id. at 2.
51 Id.
52 FERGUSON REPORT, supra note 21, at 7 (“Ferguson’s municipal code addresses nearly every aspect of civic life for those who live in Ferguson, and regulates the conduct of all who work, travel through, or otherwise visit the City.”).
53 Id. at 64.
more of [their] revenue from fines and fees.” 55 And Ferguson was not unique in its targeting of African Americans, because, as the update to the Ferguson Report also found, the “one demographic that was most characteristic of cities that levy large amounts of fines on their citizens: a large African American population.” 56 The update concluded that the “[u]nchecked discretion [and] stringent requirements to impose fines or fees can lead [and have led] to discrimination and inequitable access to justice.” 57

The Ferguson Report started a national conversation on how financial punishment is unfairly wielded, often against poor people of color, as a way to fund government. 58 It exposed the underbelly of a justice system that at the time was not often discussed: it revealed that punishment went hand-in-hand with revenue generation, and detailed for the first time on the national stage how such a system can corrupt the administration of justice. 59 The Ferguson Report caused people to contemplate how, and more importantly, why, financial punishment was being imposed in jurisdictions across the country. 60

Much has developed since DOJ released the Ferguson Report. As a start, much more information has been gathered about how and why jurisdictions impose financial punishment. 61 And the picture is bleaker than that painted by the Ferguson Report and its update. 62 A 2019 study found that fines “account for more than 10 percent of general fund revenues in nearly 600 jurisdictions.” 63 “In at least 284 of those governments,” fines account for “more than 20 percent” of general fund revenues. 64 Some jurisdictions are almost exclusively funded by fines revenue; for example, 92 percent of Georgetown, Louisiana’s general fund is comprised of money made from fines. 65 And “[w]hen fine and forfeiture revenues in all funds are considered, more than 720 localities reported annual revenues exceeding $100 for every adult resident.” 66

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55 TARGETED FINES AND FEES AGAINST COMMUNITIES OF COLOR, supra note 19, at 21.

56 Id. at 23 (quoting Dan Kopf, The Fining of Black America, PRICENOMICS (June 24, 2016), https://priceonomics.com/the-fining-of-black-america/ [https://perma.cc/TV58-AUGL]).

57 Id. at 71.


59 Id.

60 See, e.g., id. (“Since the unrest in Ferguson, Missouri, in 2014, public awareness of the harms of fees and fines has grown substantially, along with an understanding of the large scope of the problem.”).

61 See Maciag, supra note 39.

62 See id.

63 See id. The report found some states are particularly bad offenders, including Arkansas, Georgia, Louisiana, Oklahoma, Texas, and New York. Id.

64 Id.

65 Id.

66 Id.
But with exposure has come progress. Since the release of the Ferguson Report, significant steps have been taken to mitigate the overuse and abuse of financial punishment.67 For example, in March 2016, DOJ issued a “Dear Colleague” letter to state administrators and chief justices of each state, emphasizing the need for courts to “safeguard against unconstitutional practices,” including the jailing of defendants for their inability to pay fines.68 DOJ also helped establish a National Task Force on Fines, Fees, and Bail Practices, managed by the Conference of State Court Administrators and the Conference of Chief Justices.69 This task force drafted model statutes and compiled best practices for dealing with financial punishment,70 and has published a bench card to be used in local courtrooms that admonishes courts to consider a defendant’s economic circumstances before imposing a fine and gives guidance on how to calculate a defendant’s ability to pay.71 And lawmakers were prompted to action, including the Missouri legislature, which passed a bill that capped the amount of money cities like Ferguson can collect from fines.72 In short, while there is still much work to be done, there has been


68 See id.


70 Id.; see also NAT’L TASK FORCE ON FINES, FEES, AND BAIL PRACTICES, PRINCIPLES ON FINES, FEES, AND BAIL PRACTICES 1 (Dec. 2017), https://www.ncsc.org/~media/Files/PDF/Topics/Fines%20and%20Fees/Principles-Fines-Fees.pdf [https://perma .cc/5UDG-HV2J].


72 See S.B. 5, 98th Gen. Assemb., Reg. Sess. (Mo. 2015) (enacted) (inserting § 479.359); see also Jo Mannies & Donna Korando, Nixon Signs Bill Mandating Municipal Court Changes and Setting Standards, ST. LOUIS PUB. RADIO (July 9, 2015),
a real effort across the country to examine and change the ways in which financial punishment is imposed.

B. The Consequences of Financial Punishment

When people started examining how fines and forfeitures are being imposed in America, one thing became clear: fines and forfeitures can be incredibly damaging to a person’s life. Assessing a fine that a person cannot pay risks setting off a devastating chain of events. First, if a defendant is late paying a fine, there are often late fees or collections fees that are assessed, and that same person who could not make the payment in the first place may then be charged interest for every day their payment is late, compounding the problem by deepening the debt. Then, in some jurisdictions, courts will issue arrest warrants for failing to pay fines, and people can spend days, if not weeks, in jail, despite the fact that the Supreme Court has held that it is unconstitutional to imprison someone for failing to pay a fine if they are indigent.

While a person is in jail, they obviously cannot report to work, and they thus risk losing their job, which, again, would mean that they cannot pay their debt. And after a person loses their job, that often means they cannot any longer pay the bills they need to pay to keep the water running, the electricity on, or a roof over their head, let alone pay the fine they owe.
But the devastating effects of fines go beyond the fact that people are locked up for not paying and the vicious cycle that then emerges. Beyond being jailed, there are additional collateral consequences that result from the failure to pay a fine that can send someone’s life into a tailspin.\(^{78}\) For example, at least nine states allow for driver’s licenses to be suspended for unpaid fines, hampering employment and childcare options.\(^{79}\) In thirty states, a person loses her right to vote for missing a payment related to a felony conviction, and in eight additional states, a person loses the right to vote for missing payments related to a misdemeanor conviction.\(^{80}\) And people are often reported to credit agencies for unpaid fines, hurting credit scores, which in turn can affect a person’s ability to secure housing, credit cards, cars, and jobs, and to the extent a person can secure credit, they are only able to do so at much higher interest rates, perpetuating the cycle of poverty.\(^{81}\) Wages can be garnished and liens placed on property for nonpayment.\(^{82}\) Some people even face the dilemma of having to forgo necessary medical treatment in order to pay their fines.\(^{83}\) Forfeitures can be equally damaging. As with fines, state forfeiture practices also often “target the poor and other groups least able to defend their interests in forfeiture proceedings,” i.e., communities of color.\(^{84}\) This is why most forfeitures involve small dollar amounts from comparatively less culpable actors (for example, targeting drug users for forfeitures and not drug suppliers).\(^{85}\) And because forfeitures are so important to government funding, states are “edging ever closer to abusing forfeiture laws, confiscating individuals’ property with

\(^{78}\) See Jerjian, supra note 41, at 252 (explaining that criminal justice debt “creates additional barriers . . . in terms of housing, employment, public benefits, and even civil rights”).

\(^{79}\) Martin et al., supra note 4, at 475.

\(^{80}\) Id.

\(^{81}\) Id.; VALLAS ET AL., supra note 19, at 6; see also State v. Blazina, 344 P.3d 680, 684 (Wash. 2015) (explaining the collateral consequences of criminal justice debt).


\(^{84}\) Leonard v. Texas, 137 S. Ct. 847, 848 (2017) (Thomas, J., respecting the denial of certiorari).

\(^{85}\) See Radley Balko, Opinion, Chicago Civil Asset Forfeiture Hits Poor People the Hardest, WASH. POST (June 13, 2017), https://wapo.st/2Pfgyz (on file with Ohio State Law Journal). The Alabama Supreme Court observed that “forfeiture laws are being used more frequently to punish users like [petitioner, who used drugs] rather than to punish those higher up the drug distribution chain.” Ex parte Kelley, 766 So. 2d 837, 839 (Ala. 1999).
no thought or proof of whether the items [they] are taking are actually the fruits of illegal[ity].”86 People are losing objects both big and small in the forfeiture process.87 For example, in a startling report out of Chicago, it was revealed that law enforcement “seized items from residents ranging from a cashier’s check for 34 cents to a 2010 Rolls Royce. They also seized Xbox controllers, televisions, nunchucks, 12 cans of peas, a pair of rhinestone cufflinks, and a bayonet.”88 In the forfeiture process, people can lose all of their worldly belongings, from their food, cash, cars, to even their homes.89

This is why the Excessive Fines Clause must be taken seriously; because fines and forfeitures can dramatically affect people’s lives. And the issues with fines and forfeitures are not confined to a small segment of the population; they are imposed as a criminal sanction for all kinds of crimes, from the most minor infractions to the most serious felonies. Given this fact, along with the evidence that many jurisdictions impose fines and forfeitures against minorities at disparate rates,90 the question of whether a fine or forfeiture violates the Eighth Amendment should be one that is asked often and is contemplated carefully.

This question becomes even more important when one considers the perverse incentives at play. State and local governments, including police departments, which are funded from local coffers, have a vested interest in arresting or ticketing as many people as possible, and in fact, are sometimes expressly directed to do so.91 And courts have an incentive to impose fines or order forfeitures at the greatest rate possible to ensure budgetary needs are met.

Put another way, in many places across the country, the people in charge of administering justice have a personal stake in the punishment. As a thought experiment, if a judge sentenced someone to serve time in a prison in which he had a personal financial stake, the urgency of the problem would be obvious. In fact, there is no need to wonder—we have seen this problem before.

86 Kelley, 766 So. 2d at 839 (quotation marks omitted).
88 Id. (emphases added).
89 CARPENTER ET AL., supra note 17, at 8; see also Note, How Crime Pays: The Unconstitutionality of Modern Civil Asset Forfeiture as a Tool of Criminal Law Enforcement, 131 HARV. L. REV. 2387, 2387 (2018).
In the early 2000s, Mark Ciavarella, a judge on the Luzerne County Court of Common Pleas in Pennsylvania, was sentenced to twenty-eight years in prison after a federal jury found him guilty of a host of crimes relating to a scheme of accepting money in return for imposing harsh sentences on juvenile defendants to increase occupancy at a for-profit juvenile detention center. The scheme came to be known as the “Kids for Cash” scandal. The sensation of this scandal captivated the nation. It has been the subject of a full-length documentary, the centerpiece of a popular podcast, and similar schemes have been featured on numerous hit TV shows.

Most would agree that locking kids up for personal financial gain is monstrous. But it is not all that different from what happens every day in courts across the country. We know that police officers are pressured into arresting poor people of color for minor crimes for financial reasons, and that judges are imposing exorbitant financial punishment for said crimes because they operate in systems in which that financial punishment is critical to a fully funded government—the same government that pays their salaries. One former judge on Fresno, California’s Superior Court explained that he “was under pressure to collect fines and fees. When counties stopped funding the courts and the state took over, the budget was cut and there was a struggle to find revenue sources.” This judge “saw firsthand how excessive fines, fees and penalties can negatively impact peoples’ [sic] lives.” This caused him to be “concerned


93 Ciavarella, 716 F.3d at 713.

94 KIDS FOR CASH (2013).


96 Shows include Law & Order, CSI: New York, The Good Wife, and For the People. See Law & Order: Special Victims Unit: Crush (NBC television broadcast May 5, 2009); CSI: New York: Crossroads (CBS television broadcast Nov. 18, 2011); The Good Wife: Lifeguard (CBS television broadcast Dec. 15, 2009); For the People: One Big Happy Family (ABC television broadcast Apr. 4, 2019).

97 The Kids for Cash scheme violated numerous federal laws, and it is not alleged here that the current system of imposing fines, while rife with conflicts, violates the law in the same way. The point is simply that optically, there are parallels that can be drawn between the two schemes.


99 Id.
about how these charges can harm people and, in [his] opinion, violate the Eighth Amendment to the U.S. Constitution’s ban on excessive fines.”

Yet despite these serious constitutional concerns, the pervasive practice of using fines as a funding source does not garner nearly as much attention as it should. Instead, it is largely accepted as the status quo. While such practices persist, as many states start to grapple with the Excessive Fines Clause for the first time, the fact that in many jurisdictions there is a real incentive for courts to impose fines and forfeitures to generate revenue should be kept in mind.

Given that fines and forfeitures are so frequently used, courts need clear guidelines for determining whether financial punishment is excessive. This is especially so given that defendants do not have a constitutional right to counsel when the only punishment being imposed is financial. Often, when people are being fined exorbitant amounts for minor infractions and risk losing their jobs, homes, and health, there is no lawyer to advocate that the punishment being imposed is unconstitutional. Thus, courts should be vigilant in ensuring financial punishment abides by the Constitution. Unfortunately, it is hard for courts to undertake this task because the Supreme Court has yet to provide a sufficient guide for courts to use when deciding whether a fine comports with the Constitution.

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100 Id.
101 Some jurisdictions are starting to limit courts’ ability to impose financial costs on criminal defendants. See, e.g., Alex Kornya et al., Crimsumerism: Combating Consumer Abuses in the Criminal Legal System, 54 HARV. C.R.-C.L. L. REV. 107, 117 (2019) (noting that “in 2018, San Francisco became the first jurisdiction to proscribe administrative fees in criminal cases”).
103 In Scott v. Illinois, 440 U.S. 367, 373–74 (1979), the Supreme Court held “that counsel need not be appointed when the defendant is fined for the charged crime, but is not sentenced to a term of imprisonment.” Alabama v. Shelton, 535 U.S. 654, 657 (2002).
104 BANNON ET AL., supra note 90, at 12.
III. UNITED STATES V. BAJAKAJIAN AND THE CONFUSION LEFT IN ITS WAKE

The Eighth Amendment was ratified in 1791. It took the Supreme Court 198 years to first opine on the Excessive Fines Clause and, to date, the Supreme Court has discussed the Clause only five times. In those five decisions, the Supreme Court has provided little guidance on what renders a fine constitutionally excessive. In the wake of the Supreme Court’s silence, lower courts have been left to come up with their own tests to decide whether financial punishment violates the Constitution. Unsurprisingly, courts have come up with different tests. Despite the diverging tests, when the Court took up the Excessive Fines Clause last Term in Timbs, it still did not provide further guidance on what factors courts should consider when deciding whether a fine or forfeiture violates of the Eighth Amendment.

A. The Supreme Court’s Excessive Fines Clause Jurisprudence and the Evolution of the “Grossly Disproportional” Standard

The Supreme Court first interpreted the Excessive Fines Clause in its 1989 decision, Browning-Ferris Industries v. Kelco Disposal, Inc. There, the Court held that the Clause does not apply to civil damages awards. The Court gave three reasons for its ruling in light of the “purposes and concerns” of the Eighth Amendment “as illuminated by its history.” First, the Court noted that the “the word ‘fine’ was understood to mean a payment to a sovereign as punishment for some offense.” Second, history showed that the Eighth Amendment clearly was adopted with the particular intent of placing limits on the powers of the new Government. The primary focus of the Eighth Amendment was the potential for governmental abuse of its “prosecutorial” power . . . ” Finally, the Court reasoned that the Eighth Amendment was based on the English Bill of Rights of 1689; the British adopted this provision “to curb the excesses of English judges” at a time when fines were becoming “even more excessive and partisan, and some opponents of the King were forced

107 Browning-Ferris, 492 U.S. at 262.
108 Id. at 264.
109 Id.
110 Id. at 265.
111 Id. at 265–66.
112 The Court had previously noted that “the Eighth Amendment was ‘based directly on Art. I, § 9, of the Virginia Declaration of Rights,’ which ‘adopted verbatim the language of the English Bill of Rights.’” Id. at 266 (quoting Solem v. Helm, 463 U.S. 277, 285 n.10 (1983)).
to remain in prison because they could not pay the huge monetary penalties that had been assessed.”

These facts led the Court to conclude that the “Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government.”

Four years later, the Court handed down two cases dealing with the Excessive Fines Clause: *Alexander v. United States* and *Austin v. United States*. In *Alexander*, the Court held that the Excessive Fines Clause applies to “in personam criminal forfeiture”—where the government indicts “the property used or derived from the crime along with the defendant”—because that is “a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional ‘fine.’” Then, in *Austin*, the Court decided that in rem civil forfeitures—civil actions brought by the government directly against property involved in criminal activity—are also governed by the Eighth Amendment.

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113 *Browning-Ferris*, 492 U.S. at 267.
114 *Id.* at 268.
118 *Alexander*, 509 U.S. at 558–59. In *Alexander*, the Petitioner, who was convicted of violating federal obscenity and racketeering laws in connection with his running more than a dozen adult stores and theaters, argued that the almost nine million dollar forfeiture that was assessed for his crimes was unconstitutionally excessive. *Id.* at 547–49. After finding that the forfeiture was covered by the Eighth Amendment’s Excessive Fines Clause, the Court remanded the case back to the court of appeals to decide in the first instance whether the forfeiture was excessive. *Id.* at 559. The Court said nothing about how the lower court was supposed to undertake this inquiry. See *id.*
119 *Types of Federal Forfeiture*, supra note 117.
120 *Austin*, 509 U.S. at 604. In *Austin*, the federal government commenced forfeiture proceedings in district court, seeking forfeiture of Austin’s mobile home and auto body shop after Austin was convicted of drug-related offenses in state court. *Id.* at 604–06. Austin argued the forfeiture violated the Excessive Fines Clause, whereas the government argued that the Clause does not apply to the civil proceedings. *Id.* at 605–07. The Court found that the forfeiture in question was subject to the Eighth Amendment’s prohibition against excessive fines because historically, government forfeitures were considered punitive, and here, the forfeiture statute was only implicated if the property sought to be seized was “use[d] to facilitate the commission of a drug-related crime punishable by more than one year’s imprisonment.” *Id.* at 618–20. Austin then advocated for the Court to apply a “multifactor test for determining whether a forfeiture is constitutionally ‘excessive,’” but the Court instead sent the case back to the “lower courts to consider that question in the first instance.” *Id.* at 622–23. The “multi-factor” test that Austin proposed was that the Court should consider:

1. Whether the property seized constitutes the owner’s livelihood or means to earn a living.
2. Whether the property seized is the owner’s homestead.
It was not until its 1998 decision in *Bajakajian* that the Supreme Court announced a test for determining whether a fine is constitutionally excessive.\(^{121}\) And in announcing the test, the Court for the first time found that a financial punishment violated the Eighth Amendment.\(^{122}\)

Hosep Bajakajian was at Los Angeles International Airport awaiting his flight when customs agents found $230,000 in his checked luggage; between him and his wife, customs officials found $357,144.\(^{123}\) Mr. Bajakajian did not declare on his customs forms that he had that much money.\(^{124}\) He was therefore charged with and pleaded guilty to the federal crime of failing to report.\(^{125}\) The government thereafter sought forfeiture of the full $357,144.\(^{126}\)

The district court found that the full amount was subject to forfeiture because it “was involved in” the offense, but concluded full forfeiture would be “extraordinarily harsh” and “grossly disproportionate to the offense in question,” and that it would therefore violate the Excessive Fines Clause.\(^{127}\) The court ordered Mr. Bajakajian to forfeit only $15,000.\(^{128}\) The government appealed the forfeiture order all the way to the Supreme Court.\(^{129}\)

Deciding whether forfeiture of the full amount would violate the Excessive Fines Clause, the Court noted that it “had little occasion to interpret, and [it had] never actually applied, the Excessive Fines Clause.”\(^{130}\) Indeed, the only clear rule from the Court’s cases up until that point was that a fine or forfeiture must be “punishment for an offense” to fall within the ambit of the Eighth Amendment.\(^{131}\)

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3. The degree to which the owner’s property has been involved in drug activity, and whether the property has been purchased or obtained through the proceeds of drug activity.

4. Whether or not the owner has been convicted of a crime related to the forfeiture, the severity of the crime, and the severity of the criminal sentence imposed upon the owner of the property—i.e. the total punishment imposed on the owner, including the forfeiture.

5. The extent of the criminal behavior of the owner of the property and the need for deterrence.

6. The extent to which the government necessarily expended its funds to interdict drug activity involving this property.

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\(^{122}\) Id. at 337.

\(^{123}\) Id. at 324–25.

\(^{124}\) Id.

\(^{125}\) Id. at 325.

\(^{126}\) Id.

\(^{127}\) Bajakajian, 524 U.S. at 326.

\(^{128}\) Id. The district court also sentenced Mr. Bajakajian to three years’ probation and ordered him to pay a $5000 fine. Id.

\(^{129}\) Id. at 321. The Ninth Circuit affirmed the district court’s decision. See United States v. Bajakajian, 84 F.3d 334, 335 (9th Cir. 1996), aff’d, 524 U.S. 321 (1998).

\(^{130}\) Bajakajian, 524 U.S. at 327.
Amendment.\textsuperscript{131} Here, the Court had “little trouble concluding that the forfeiture of currency” constituted punishment, thus falling within the Eighth Amendment’s reach, because it was imposed at the “culmination of a criminal proceeding and require[d] conviction of an underlying felony.”\textsuperscript{132}

After finding the forfeiture was subject to the Eighth Amendment’s bar against excessive fines, the Court turned to the question of whether forfeiture of the full $357,144 would be constitutionally excessive.\textsuperscript{133} The Court, recognizing it had “not articulated a standard for determining whether a punitive forfeiture is constitutionally excessive,” began by emphasizing that the “touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.”\textsuperscript{134} The Court then looked to the text and history of the Excessive Fines Clause and found that they provided “little guidance as to how disproportional a punitive forfeiture must be to the gravity of an offense in order to be ‘excessive.’”\textsuperscript{135} This is so, the Court found, because the term “excessive” is a truism—it says nothing about how to measure excessiveness.\textsuperscript{136} And the Excessive Fines Clause was barely discussed in the “debates over the ratification of the Bill of Rights,” so there was nothing that the Court could find there to help guide its analysis.\textsuperscript{137}

The Court was thus left to “rely on other considerations in deriving a constitutional excessiveness standard,” finding two “particularly relevant.”\textsuperscript{138} The first was that the Court drew from its Cruel and Unusual Punishments Clause cases to assert that “judgments about the appropriate punishment for an offense belong in the first instance to the legislature,”\textsuperscript{139} meaning that if a punishment is within the range set by the legislature, there is a presumption of constitutionality.\textsuperscript{140} The second was that the Court believed that any “judicial determination regarding the gravity of a particular criminal offense” was bound to be “inherently imprecise.”\textsuperscript{141} The Court therefore concluded that both of these principles “counsel against requiring strict proportionality between the amount of a punitive forfeiture and the gravity of a criminal offense.”\textsuperscript{142} Instead, the Court adopted “the standard of gross disproportionality articulated in [its] Cruel and Unusual Punishments Clause precedents.”\textsuperscript{143}

\textsuperscript{131} Id. at 328.
\textsuperscript{132} Id.
\textsuperscript{133} Id. at 334.
\textsuperscript{134} Id.
\textsuperscript{135} Id. at 335.
\textsuperscript{136} See Bajakajian, 524 U.S. at 335.
\textsuperscript{137} Id.
\textsuperscript{138} Id. at 336.
\textsuperscript{139} Id.
\textsuperscript{140} See id. (synthesizing from previous decisions, including Solem v. Helm and Gore v. United States, that the legislature deserves substantial deference in the punishment context).
\textsuperscript{141} Id.
\textsuperscript{142} Bajakajian, 524 U.S. at 336.
\textsuperscript{143} Id.
Applying this standard to Mr. Bajakajian’s case, the Court held that the forfeiture of the full $357,144 would be constitutionally excessive.\textsuperscript{144} Two facts compelled the Court’s conclusion. First, the Court noted that the money was the proceeds of legal activity; Mr. Bajakajian was guilty only of a reporting offense, the maximum fine for which was only $5000.\textsuperscript{145} To the Court, this confirmed that the legislature believed this to be a crime that had “a minimal level of culpability.”\textsuperscript{146} Second, the Court looked at the harm caused by Mr. Bajakajian and found it to be “minimal”—his failure to report the full amount of currency affected only the government “in a relatively minor way” in that the government was “deprived only of the information that $357,144 had left the country.”\textsuperscript{147} Thus, said the Court, “[c]omparing the gravity of [Mr. Bajakajian]’s crime with the $357,144 forfeiture the Government seeks, we conclude that such a forfeiture would be grossly disproportional to the gravity of his offense.”\textsuperscript{148}

\textit{Bajakajian} was the first and last time the Supreme Court applied the “grossly disproportional” standard in an Excessive Fines Clause case.\textsuperscript{149} Without further guidance, courts have been left to divine their own tests to determine whether fines are grossly disproportional.\textsuperscript{150} This lack of guidance has created somewhat of a mess.\textsuperscript{151}

\textsuperscript{144} \textit{Id.} at 337.
\textsuperscript{145} \textit{Id.} at 337–38.
\textsuperscript{146} \textit{Id.} at 339.
\textsuperscript{147} \textit{Id.}
\textsuperscript{148} \textit{Bajakajian}, 524 U.S. at 339–40.
\textsuperscript{149} See \textit{id.}
\textsuperscript{150} Professor Barry Johnson provides a robust critique of the \textit{Bajakajian} decision. See \textit{generally} Barry L. Johnson, \textit{Purging the Cruel and Unusual: The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeiture After United States v. Bajakajian}, 2000 U. ILL. L. REV. 461 (2000). Professor Johnson concludes that the “grossly disproportional” standard that the Court announced in \textit{Bajakajian} “is inconsistent with the language, history, and purposes of the Excessive Fines Clause and may serve as a significant barrier to meaningful constitutional limitations on forfeiture.” \textit{Id.} at 465. Professor Beth Colgan has also strongly critiqued the Supreme Court’s Excessive Fines Clause jurisprudence. See \textit{generally} Beth A. Colgan, \textit{Reviving the Excessive Fines Clause}, 102 CALIF. L. REV. 277 (2014) [hereinafter Colgan, \textit{Reviving the Excessive Fines Clause}]. After performing an extensive review of sources contemporaneous to the ratification of the Bill of Rights, Professor Colgan labeled the Court’s “narrow interpretation” of the Excessive Fines Clause as “both methodologically and substantively suspect.” \textit{Id.} at 283.
\textsuperscript{151} One scholar identifies three areas of “doctrinal uncertainty” after \textit{Bajakajian}: “(1) how to conceptualize a penalty’s harshness for constitutional purposes, (2) how to determine the severity of a given offense for the purposes of the disproportionality analysis, and (3) how to determine the point at which the relationship between a given penalty and a given offense becomes unconstitutionally disproportionate.” McLean, \textit{supra} note 13, at 845.
B. The Lower Courts Flesh Out the “Grossly Disproportional” Standard

After Bajakajian, courts began to create tests to determine whether a fine is “grossly disproportional.” Most of the federal courts of appeals, after examining Bajakajian, derived multifactor tests to answer this question. Absent Supreme Court guidance, it is not surprising that different courts have come up with different tests.

Most circuits—the Second, Third, Fourth, Fifth, Sixth, and Seventh Circuits—consider the following four factors when determining whether a fine is constitutionally excessive:

1. the essence of the crime of the defendant and its relation to other criminal activity,
2. whether the defendant fits into the class of persons for whom the statute was principally designed,
3. the maximum sentence and fine that could have been imposed, and
4. the nature of the harm caused by the defendant’s conduct.

152 United States v. Mora, 644 F. App’x 316, 317 (5th Cir. 2016) (considering “(a) the essence of the defendant’s crime and its relationship to other criminal activity; (b) whether the defendant was within the class of people for whom the statute of conviction was principally designed; (c) the maximum sentence, including the fine that could have been imposed; and (d) the nature of the harm resulting from the defendant’s conduct”); see also United States v. Young, 618 F. App’x 96, 97 (3d Cir. 2015) (“In assessing the proportionality of a fine, we consider (1) the nature of the offense or offenses; (2) whether the defendant falls into the class of persons for whom the statute was designed—e.g., money launderers, drug dealers, or tax evaders; (3) the maximum fine authorized by statute and the sentencing guidelines which are associated with the offense or offenses; and (4) the harm caused by the defendant’s conduct.”); United States v. Malewicka, 664 F.3d 1099, 1104 (7th Cir. 2011) (considering: “(1) the essence of the crime and its relation to other criminal activity; (2) whether the defendant fit into the class of persons for whom the statute was principally designed; (3) the maximum sentence and fine that could have been imposed; and (4) the nature of the harm caused by the defendant’s conduct.”); United States v. Zakaria, 418 F. App’x 414, 422 (6th Cir. 2011) (“Relevant factors to consider include the nature of the offense and its relation to other criminal activity, the potential fine under the advisory Guidelines range, the maximum sentence and fine that could have been imposed, and the harm caused by the defendant’s conduct.”); United States v. Jalaram, Inc., 599 F.3d 347, 355–56 (4th Cir. 2010) (considering: “(1) the amount of the forfeiture and its relationship to the authorized penalty. . . .; (2) the nature and extent of the criminal activity. . . .; (3) the relationship between the crime charged and other crimes. . . .; and (4) the harm caused by the charged crime.”); United States v. Varrone, 554 F.3d 327, 331 (2d Cir. 2009). The Tenth Circuit has acknowledged that the Bajakajian Court considered these factors but considered “[o]ne of the most important” factors to be “Congress’s judgment about the appropriate punishment for the owner’s offense.” See United States v. Wagoner Cty. Real Estate, 278 F.3d 1091, 1100 (10th Cir. 2002). The D.C. Circuit has used the factors as articulated by the Second Circuit when conducting an Excessive Fines Clause analysis. See Collins v. SEC, 736 F.3d 521, 526–27 (D.C. Cir. 2013).
The Ninth Circuit considers a similar set of factors, the major difference being that it notes that the list of factors is not exhaustive.153

The Eleventh Circuit does not consider the “essence of the crime,” but considers the other factors most circuits consider.154 And the First Circuit considers the same three factors that the Eleventh Circuit considers, but also expressly considers a defendant’s financial circumstances.155 By contrast, the Eleventh Circuit has said that it will not take into account “the characteristics of the offender” when conducting an Excessive Fines Clause analysis.156

The Eighth Circuit has purposefully avoided announcing a definitive set of factors.157 Instead, that court offered “relevant” considerations to whether a fine is unconstitutional.158 These include: “the extent and duration of the criminal conduct, the gravity of the offense in comparison to the severity of the criminal sanction, and the value of the forfeited property.”159 In addition to these factors, the Eighth Circuit identified “other helpful inquiries such as an assessment of the personal benefit reaped by the defendant, the defendant’s motive and culpability and . . . the extent that the defendant’s interest and the enterprise itself are tainted by criminal conduct.”160 And like the First Circuit, the Eighth Circuit also takes account of “the defendant’s ability to pay.”161

Like the federal courts of appeals, the state courts of last resort that have considered the issue have also derived varying multifactor tests, so there is not

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153 United States v. $132,245.00 in U.S. Currency, 764 F.3d 1055, 1058 (9th Cir. 2014) (considering: “(1) the nature and extent of the crime, (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed for the violation, and (4) the extent of the harm caused”).

154 See United States v. Sperrazza, 804 F.3d 1113, 1127 (11th Cir. 2015) (quoting United States v. Browne, 505 F.3d 1229, 1281 (11th Cir. 2007)) (“We determine whether a fine is ‘grossly disproportional’ by considering ‘(1) whether the defendant falls into the class of persons at whom the criminal statute was principally directed; (2) other penalties authorized by the legislature (or the Sentencing Commission); and (3) the harm caused by the defendant.’”).

155 United States v. Jose, 499 F.3d 105, 113 (1st Cir. 2007) (taking into account whether the forfeiture “would deprive [defendant] of his livelihood”); United States v. Heldeman, 402 F.3d 220, 223 (1st Cir. 2005) (considering: “(1) whether the defendant falls into the class of persons at whom the criminal statute was principally directed; (2) other penalties authorized by the legislature (or the Sentencing Commission); and (3) the harm caused by the defendant”).

156 United States v. 817 N 29th Drive, 175 F.3d 1304, 1311 (11th Cir. 1999); see also United States v. Dicter, 198 F.3d 1284, 1292 n.11 (11th Cir. 1999) (“[W]e do not take into account the personal impact of a forfeiture on the specific defendant in determining whether the forfeiture violates the Eighth Amendment.”).

157 See United States v. Dodge Caravan Grand SE/Sport Van, 387 F.3d 758, 763 (8th Cir. 2004).

158 Id.

159 United States v. $63,530.00 in U.S. Currency, 781 F.3d 949, 957–58 (8th Cir. 2015).

160 Dodge Caravan, 387 F.3d at 763 (internal quotations and brackets omitted). The Eighth Circuit further said that this list is not meant to be exhaustive. Id.

161 United States v. Aleff, 772 F.3d 508, 512 (8th Cir. 2014).
a uniform approach among state courts either for determining whether financial punishment violates the Eighth Amendment.\footnote{For example, West Virginia uses the same test used by most circuits. See, e.g., Dean v. State, 736 S.E.2d 40, 50 (W. Va. 2012) (considering: “(1) the amount of the forfeiture and its relationship to the authorized penalty; (2) the nature and extent of the criminal activity; (3) the relationship between the crime charged and other crimes; and (4) the harm caused by the charged crime”). Minnesota and Utah use the three-factor cruel and unusual punishment test the Supreme Court announced in \textit{Solem} v. \textit{Helm}, 463 U.S. 277 (1983). See, e.g., Miller v. One 2001 Pontiac Aztek, 669 N.W.2d 893, 895 (Minn. 2003) (considering: “(1) the gravity of the offense and the harshness of the penalty; 2) a comparison of the contested fine with fines imposed for the commission of the other crimes in the same jurisdiction; and 3) comparison of the contested fine with fines imposed for commission of the same crime in other jurisdictions”) (citing \textit{Solem}, 463 U.S. at 290–91); State v. Real Prop. a 633 E. 640 N., 994 P.2d 1254, 1258 (Utah 2000) (considering the same). The Illinois multi-factor test focuses on the relationship between the property sought to be seized and the crime in question. See, e.g., People \textit{ex rel. Hartrich} v. 2010 Harley-Davidson, 104 N.E.3d 1179, 1184 (Ill. 2018) (considering: “(1) the gravity of the offense against the harshness of the penalty, (2) how integral the property was in the commission of the offense, and (3) whether the criminal conduct involving the defendant property was extensive in terms of time and/or spatial use” (internal quotation marks omitted)). Georgia uses a multi-factor test with multiple subparts. See, e.g., Howell v. State, 656 S.E.2d 511, 512 (Ga. 2008) (quoting von Hoefe v. United States, 492 F.3d 175, 186 (2d Cir. 2007)) (considering: “(1) the harshness, or gross disproportionality, of the forfeiture in comparison to the gravity of the offense, giving due regard to (a) the offense committed and its relation to other criminal activity, (b) whether the claimant falls within the class of persons for whom the statute was designed, (c) the punishments available, and (d) the harm caused by the claimant’s conduct; (2) the nexus between the property and the criminal offenses, including the deliberate nature of the use and the temporal and spatial extent of the use; and (3) the culpability of each claimant”). New York’s test expressly considers the “economic circumstances of the defendant.” See, e.g., Cty. of Nassau v. Canavan, 802 N.E.2d 616, 622 (N.Y. 2003) (considering “such factors as the seriousness of the offense, the severity of the harm caused and of the potential harm had the defendant not been caught, the relative value of the forfeited property and the maximum punishment to which defendant could have been subject for the crimes charged, and the economic circumstances of the defendant”). And South Dakota’s and Pennsylvania’s tests are different from the above. See, e.g., State v. One 2011 White Forest River XLR Toy Hauler, 857 N.W.2d 427, 430 (S.D. 2014) (considering “the extent and duration of the criminal conduct, the gravity of the offense weighed against the severity of the criminal sanction, and the value of the property forfeited”); Commonwealth v. 1997 Chevrolet & Contents Seized from Young, 160 A.3d 153, 169 (Pa. 2017) (considering “the penalties that the legislature has authorized compared to those to which the defendant was subjected; whether the violation was isolated or part of a pattern of misbehavior; and the nature of the harm caused by the defendant”).}

The problem with the different tests used by these courts is not that they are wrong\footnote{Except, arguably, for the Eleventh Circuit’s refusal to consider a defendant’s economic circumstances. See infra note 206.}—they are useful guides to figuring out just what “grossly disproportional” means. Rather, the issue is that they are incomplete. In (understandably) focusing on formulating a way to decide whether a fine is “grossly disproportional,” courts have lost sight of broader constitutional
principles at play, largely ignoring other areas of the Supreme Court’s Eighth Amendment jurisprudence and the motivations behind the ratification and incorporation of the Excessive Fines Clause. In so doing, the tests do not adequately account for the breadth of protections the Excessive Fines Clause was designed to provide.

In short, although the Bajakajian Court announced a standard for determining whether a fine or forfeiture violates the Excessive Fines Clause, the standard created more questions than it provided answers. The Court had the occasion to clear up the confusion when it took up Timbs v. Indiana—a case that presented the question of whether the Excessive Fines Clause constricts the states.164 Unfortunately, the Court did not take the opportunity to provide the much-needed clarity.

C. The Supreme Court Revisits the Excessive Fines Clause in Timbs

Before the October 2018 Term, the Supreme Court had not considered whether the Fourteenth Amendment incorporates the Excessive Fines Clause against the states.165 The Court finally decided to answer that question in Timbs, after the Indiana Supreme Court held that the Excessive Fines Clause “constrain[ed] only federal action.”166 The facts of Timbs are straightforward: Mr. Timbs pleaded guilty to dealing heroin and conspiracy to commit theft.167 For his crimes, the trial court sentenced Mr. Timbs to “one year of home detention and five years of probation,” and assessed fees and costs against Mr. Timbs in the amount of $1203.168 After Mr. Timbs was sentenced, Indiana initiated civil forfeiture proceedings and sought to seize Mr. Timbs’ 2012 Land Rover that he had recently purchased for $42,000, arguing it was the vehicle Mr. Timbs had “used to facilitate violation of a criminal statute”—i.e., he used the SUV to ferry drugs across the state.169 The trial court held that forfeiture of the Land Rover would be “grossly disproportional to the gravity of Timbs’s offense, [and] hence, unconstitutional under the Eighth Amendment’s Excessive Fines Clause.”170 Indiana’s intermediate appellate court affirmed the trial court’s judgment.171 But the Indiana Supreme Court reversed, refusing to enforce the Excessive Fines Clause against the state given the fact that the Supreme Court

165 See McLean, supra note 13, at 844–45 (noting that the confusion surrounding the Court’s decision in Bajakajian “has been exacerbated by a lack of clarity even on the basic question of whether the Excessive Fines Clause has been incorporated against the states”).
167 Id.
168 Id.
170 Timbs, 139 S. Ct. at 686.
171 Id.
had not “decide[d] the issue authoritatively.” The Supreme Court granted certiorari to decide the incorporation issue once and for all.

The Supreme Court explained that the prohibition against excessive fines is deeply rooted in Anglo-American history. The Court traced the history of the Excessive Fines Clause back to Magna Carta, which required that “economic sanctions be proportioned to the wrong and not be so large as to deprive an offender of his livelihood.”

The Court also explained that the adoption of the Excessive Fines Clause “resonated as well with similar colonial-era provisions” because in 1787, eight states had similar provisions in their constitutions. The Court then fast-forwarded to 1868, when the Fourteenth Amendment was ratified, and noted that thirty-five of thirty-seven states “expressly prohibited excessive fines.” After conducting this historical review, the Court surmised that the “protection against excessive fines has been a constant shield throughout Anglo-American history,” because without such protections, “[e]xcessive fines can be used, for example, to retaliate against or chill the speech of political enemies,” or can be imposed “in a measure out of accord with the penal goals of retribution and deterrence,” for ‘fines are a source of revenue,’ while other forms of punishment ‘cost a State money.’” The Court concluded, “[n] short, the historical and logical case for concluding that the Fourteenth Amendment incorporates the Excessive Fines Clause is overwhelming.”

Having decided that the Excessive Fines Clause is incorporated against the states, rather than deciding the issue itself, the Supreme Court remanded the case back to the Indiana Supreme Court for it to determine whether the state would violate Mr. Timbs’s rights if it seized his Land Rover as punishment for his crimes.

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172 Timbs, 84 N.E.3d at 1183–84.
173 The Court had previously said that the Fourteenth Amendment makes the Excessive Fines Clause applicable to the states. See, e.g., Cooper Indus. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 433–34 (2001) (“[The Fourteenth Amendment] makes the Eighth Amendment’s prohibition against excessive fines and cruel and unusual punishments applicable to the States.”). However, the Court later clarified that this statement was dicta. See McDonald v. City of Chicago, 561 U.S. 742, 765 n.13 (2010) (“We never have decided whether the . . . Eighth Amendment’s prohibition of excessive fines applies to the States through the Due Process Clause.”).
174 Timbs, 139 S. Ct. at 689.
176 Id. at 688.
177 Id.
178 Id. at 689 (quoting Harmelin v. Michigan, 501 U.S. 957, 979 n.9 (1991)).
179 Id.
180 See, e.g., Order Inviting Amicus Curiae Briefing, State v. Timbs, 134 N.E.2d 12 (Ind. 2019) (No. 27S04-1702-MI-70) (noting that the Supreme Court “did not address whether forfeiture of Appellee’s vehicle would violate the Excessive Fines Clause,” and inviting briefing on the question).
In the *Timbs* opinion, the Court made no mention of the prolific use of fines and forfeitures as funding mechanisms. Nor did the Court discuss the fact that fines and forfeitures are disproportionately imposed against people of color. To be clear, that information was before the Court. Amicus briefs from a wide range of groups highlighted these concerns. For example, the NAACP Legal Defense Fund cited data that showed that state and local governments are “increasingly us[ing] fines to punish crime” “to fund local government” while at the same time “disparately imposing [] fines against Black Americans and other people of color.” The Drug Policy Alliance, along with other groups, presented the Court with information showing that state and local governments use forfeiture “proceedings as a mechanism for funding their operations—with assets seized predominantly from the poor and people of color.” And the ACLU, along with other groups, similarly explained that state and local governments use “fines, fees, and forfeitures to raise revenue,” which “disproportionately harm communities of color for reasons that include the longstanding racial and ethnic wealth gap and higher rates of poverty and unemployment.”

Despite being presented with information detailing how fines and forfeitures are being abused across the country, the Supreme Court did not give any guidance on how courts should test whether financial punishment complies with the Eighth Amendment. This is especially troubling given (a) the reality of how fines and forfeitures are imposed today; (b) the fact that, in light of

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181 *See Timbs*, 139 S. Ct. at 682–98.
182 *See id.*
183 *See id.* at 697 (Gorsuch, J., concurring).
185 *Id.*
188 The only time the *Timbs* Court uses the phrase “grossly disproportional” is when discussing the trial court’s holding. *See Timbs*, 139 S. Ct. at 686. Granted, the test for measuring excessiveness was not the precise issue before the Court in *Timbs, Id.* at 687 (determining the incorporation of the Excessive Fines Clause). But in the past, the Supreme Court has given guidance to the lower court as to the analysis that it must perform on remand. *See, e.g.,* United States v. Booker, 543 U.S. 220, 267 (2005) (remanding the case and ordering “the District Court [to] impose a sentence in accordance with today’s opinions”); Nat’l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 678 (1989) (“Upon remand the Court of Appeals should examine the criteria used by the Service in determining what materials are classified and in deciding whom to test under this rubric. In assessing the reasonableness of requiring tests of these employees, the court should also consider pertinent information bearing upon the employees’ privacy expectations, as well as the supervision to which these employees are already subject.”).
Timbs, many courts will for the first time determine whether a fine or forfeiture violates the Eighth Amendment; and (c) the lower courts do not have a singular approach for deciding this important constitutional question. Thus, the Eighth Amendment’s protections against excessive fines vary from jurisdiction to jurisdiction, with each jurisdiction free to apply its own test so long as it includes the phrase “grossly disproportional.” The lack of guidance means that the lower courts have no clear roadmap to check against potential constitutional abuses.

To fill this void, the next section offers four factors, which gel with the Supreme Court’s Eighth Amendment jurisprudence and the animating purpose of the Fourteenth Amendment, for courts to consider when deciding whether a fine or forfeiture is constitutionally excessive.

IV. A FOUR-FACTOR APPROACH TO AN EXCESSIVE FINES CLAUSE ANALYSIS

When announcing the “grossly disproportional” test in Bajakajian, the Supreme Court did not purport to set forward an exhaustive set of factors for lower courts to use when determining whether a fine is constitutionally excessive. This lack of guidance has been a chief criticism of the Bajakajian opinion.

But that does not mean there are not principles that can be gleaned from the Court’s Excessive Fines Clause cases that can be used to craft a more concrete test. There are three defining aspects of the Court’s Excessive Fines Clause jurisprudence that are instructive for determining what courts should consider when deciding whether a fine or forfeiture is constitutionally excessive. First, the Court has made clear that it will look to its Eighth Amendment Cruel and Unusual Punishments Clause jurisprudence when deciding how best to interpret and enforce the Excessive Fines Clause. As evidence, the Court borrowed the “grossly disproportional” standard from its Cruel and Unusual Punishments

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189 See United States v. Bajakajian, 524 U.S. 321, 336 (1998) (explaining that the Court finds two considerations to be “particularly relevant” in a constitutional excessiveness analysis, but not precluding the use of factors; further stating that lower courts must apply the “grossly disproportional” standard de novo).

190 For example, one author lamented that Bajakajian “provokes more questions than it answers about the scope and application of the Excessive Fines Clause.” Solomon, supra note 12, at 875. The article goes on to express frustration that “the Bajakajian Court made broad pronouncements about an emerging constitutional protection, yet issued a narrow holding and rationale that will likely limit the decision’s precedential value to a narrow subset of cases.” Id. Based on this author’s review of the early case law applying Bajakajian, this author came to the conclusion that “the decision’s constitutional import will confuse future parties and the lower courts as to the scope and applicability of the Excessive Fines Clause, and may unwittingly serve to weaken Excessive Fines Clause protections.” Id.

191 See, e.g., Bajakajian, 524 U.S. at 336 (the Court calling its “cases interpreting the Cruel and Unusual Punishments Clause” “particularly relevant” “in deriving a constitutional excessiveness standard”).
Clause cases. Second, the Court has emphasized that the historical motivations behind the ratification of the Eighth and Fourteenth Amendments are important when deciding how best to construe the scope of the Excessive Fines Clause. Third, the Court has reminded throughout its Eighth Amendment cases that any punishment that a government imposes must serve legitimate penological goals.

With these three aspects of the Supreme Court’s Eighth Amendment jurisprudence in mind, in addition to considering whether a fine is grossly disproportional to the gravity of the offense, courts should consider these four factors when deciding whether a fine violates the Constitution:

1. Whether the defendant is able to pay the fine.
2. Whether fines are a significant revenue source in the sentencing jurisdiction.
3. Whether other jurisdictions impose similar fines for similar crimes.
4. Whether the sentencing jurisdiction disproportionately imposes fines against minority defendants.

Each factor is discussed in turn.

A. Whether a Defendant is Able to Pay the Fine

The first factor courts should consider when deciding whether a fine or forfeiture is constitutionally excessive is the effect of the punishment on the defendant considering their personal circumstances. The Supreme Court in Bajakajian expressly left open the question of whether this factor should be considered in an Excessive Fines Clause analysis. The history of the Eighth Amendment compels an answer of “yes.”

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192 See Coker v. Georgia, 433 U.S. 584, 592 (1977) (concluding “that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment”).

193 See, e.g., Timbs, 139 S. Ct. at 687–89 (exploring the “venerable lineage” of the Excessive Fines Clause, including the history around when the Eighth Amendment and Fourteenth Amendments were ratified).

194 See, e.g., Graham v. Florida, 560 U.S. 48, 71 (2010) (explaining that the “penological justifications for the sentencing practice are also relevant to [an Eighth Amendment] analysis”); see also Timbs, 139 S. Ct. at 689 (“[F]ines may be employed in a measure out of accord with the penal goals of retribution and deterrence . . . .” (internal quotation marks omitted)).

195 It is important to recognize that in the Cruel and Unusual Punishments Clause context, scholars have lamented that the “grossly disproportional” test is effectively toothless; it “has not prevented what were on any measure extremely harsh sentences on particular offenders.” Anthony Gray, Mandatory Sentencing Around the World and the Need for Reform, 20 NEW CRIM. L. REV. 391, 406 (2017).

196 See Bajakajian, 524 U.S. at 340. In Timbs, the Court described Bajakajian as “taking no position on the question whether a person’s income and wealth are relevant considerations in judging the excessiveness of a fine.” Timbs, 139 S. Ct. at 688 (citing Bajakajian, 524 U.S. at 340 n.15).
As Timbs explained, since Magna Carta it has been uncontroverted that fines “should be proportioned to the offense and that they should not deprive a wrongdoer of his livelihood.” Thus, since at least 1215, it has been an established Anglo-Saxon legal principle that criminal fines should not be exorbitant to the point of being debilitating.

The Court then noted that the language of the Excessive Fines Clause “was taken verbatim from the English Bill of Rights of 1689.” This provision of the English Bill of Rights was understood to “formalize[] a longstanding prohibition on disproportionate fines.” William Blackstone, in his Commentaries, maintained that English law had a longstanding principle that “no man shall have a larger [fine] imposed upon him, than his circumstances or personal estate will bear.” Thus, the compact from which the Excessive Fines Clause derives its language also was understood to mean that a defendant should not be ruined by a fine.

If a court were to stay true to the Excessive Fines Clause’s history, it would consider a defendant’s economic circumstances when deciding whether a fine or forfeiture is constitutional. Given the fact that the Supreme Court has repeatedly pointed to this history when determining the scope of the Excessive Fines Clause, this history similarly should guide courts to consider whether a fine or forfeiture is excessive in light of the defendant’s personal circumstances.

197 Bajakajian, 524 U.S. at 335; Timbs, 139 S. Ct. at 687–88. The Magna Carta provided that “[a] Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contentment.” Id. (quoting § 20, 9 Hen. III, ch. 14, in 1 Eng. Stat. at Large 5 (1225)). “Amercements were payments to the Crown, and were required of individuals who were ‘in the King’s mercy,’ because of some act offensive to the Crown. Those acts ranged from . . . minor criminal offenses, such as breach of the King’s peace with force and arms, to ‘civil’ wrongs against the King, such as infringing a ‘final concord’ made in the King’s court.” Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 269 (1989) (citing 2 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 519 (2d ed. 1905)).

198 Timbs, 139 S. Ct. at 687.

199 Bajakajian, 524 U.S. at 335.

200 Timbs, 139 S. Ct. at 693. For a longer discussion of the history of the Excessive Fines Clause, see id. at 687–89.


202 Indeed, the Supreme Court’s major Excessive Fines Clause cases all prominently feature a discussion of the history of the Excessive Fines Clause. See Timbs, 139 S. Ct. at 687–89; Bajakajian, 524 U.S. at 335–37; Browning-Ferris, 492 U.S. at 264–68.

203 Beth Colgan, after conducting an exhaustive review of the history of the Excessive Fines Clause, explained that “although the mixed record indicates that the principle that fines should not prevent defendants from securing a livelihood, was inconsistently applied, the idea of saving defendants from persistent impoverishment was a guiding principle reaching back to the days of the Magna Carta and the English Bill of Rights, and enduring through the ratification of the Eighth Amendment.” Colgan, Reviving the Excessive Fines Clause,
Moreover, some courts already consider a defendant’s ability to pay when conducting an Excessive Fines Clause analysis. For example, the First Circuit has said that courts should “consider whether forfeiture would deprive the defendant of his or her livelihood,” calling the consideration “deeply rooted in the history of the Eighth Amendment.” The Eighth Circuit has also held that it is a relevant consideration, and the Ninth Circuit has strongly intimated the same. And even before the Supreme Court decided *Timbs*, several state supreme courts had held that the Excessive Fines Clause applies to the states, and already considered a defendant’s ability to pay as part of an Excessive Fines Clause analysis.

Outside of courts performing Excessive Fines Clause analyses, the Conference of Chief Justices and Conference of State Court Administrators has opined that courts should consider a defendant’s ability to pay when imposing

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*supra* note 150, at 334–35. Nicholas McLean also conducted a thorough review of the Excessive Fines Clause’s history and concluded that “the Excessive Fines Clause of the Eighth Amendment can appropriately be understood as encoding two complementary, but distinct, constitutional principles: (1) a proportionality principle, linking the penalty to the offense, and (2) an additional limiting principle linking the penalty imposed to the offender’s economic status and circumstances.” McLean, *supra* note 13, at 836.

*204* United States v. Levesque, 546 F.3d 78, 83–84 (1st Cir. 2008).

*205* See United States v. Lippert, 148 F.3d 974, 978 (8th Cir. 1998) (“Finally, in the case of fines, as opposed to forfeitures, the defendant’s ability to pay is a factor under the Excessive Fines Clause.”).

*206* See United States v. Hantzis, 403 F. App’x 170, 172 (9th Cir. 2010) (concluding that a criminal fine did not violate the Eighth Amendment because “there was evidence that Hantzis was very wealthy, and as he refused to submit a financial affidavit, there was no evidence that a fine would deprive him of his livelihood” (internal brackets and quotation marks omitted)). There is a circuit split on the issue, however, as the Eleventh Circuit has expressly refused to consider a defendant’s economic circumstances when conducting an excessive fines analysis. See United States v. Dicter, 198 F.3d 1284, 1292 n.11 (11th Cir. 1999) (“More important, we do not take into account the personal impact of a forfeiture on the specific defendant in determining whether the forfeiture violates the Eighth Amendment.”). The Eleventh Circuit reached this conclusion by citing to its decision in *United States v. 817 Ne. 29th Drive, Wilton Manors, Fla.*, 175 F.3d 1304 (11th Cir. 1999), where the court claimed that: “The Supreme Court, however, has made clear that whether a forfeiture is ‘excessive’ is determined by comparing the amount of the forfeiture to the gravity of the offense and not by comparing the amount of the forfeiture to the amount of the owner’s assets.” *Id.* at 1311 (internal citation omitted). However, given that the Supreme Court has since made clear it did not rule one way or the other on whether courts should consider a defendant’s economic circumstances when considering the constitutionality of a fine or forfeiture, see *Timbs*, 139 S. Ct. at 688, the Eleventh Circuit’s decision on this point is therefore misguided.

fines, and a number of courts expressly require this type of assessment.

Moreover, courts already take into account a party’s economic circumstances in various other contexts, including when calculating a sentence under the federal guidelines and when assessing bail, civil penalties, tax liens, and sanctions. To the extent a court is hesitant about considering a defendant’s economic circumstances as part of an Excessive Fines Clause analysis, it has already been done by courts in this context and is routinely done by courts in other contexts.

Finally, consideration of a defendant’s ability to pay is consistent with the “touchstone” principle of proportionality that undergirds the Eighth Amendment. As one scholar observed, taking into account a defendant’s economic circumstances ensures a fine or forfeiture is “tailored to serve the ends of punishment as opposed to one that is unnecessary or gratuitous.” Put differently, it would be grossly disproportional for a court to assess a fine that will have devastating effects for a crime that is relatively benign. For example, if a court imposes a $300 fine against a defendant for jaywalking, and it turns out that the fine would be ruinous for the defendant, a court should find that the fine is grossly disproportional to the crime in light of the defendant’s personal circumstances.

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208 See Dear Colleague Letter, supra note 67, at 3.
209 See, e.g., id. at 4.
210 See U.S. SENTENCING GUIDELINES MANUAL § 5E1.2 (U.S. SENTENCING COMM’N 2018).
211 See, e.g., Caliste v. Cantrell, 329 F. Supp. 3d 296, 312 (E.D. La. 2018) (“To satisfy the Due Process principles articulated by Supreme Court precedent, [a judge] must conduct an inquiry into criminal defendants’ ability to pay prior to pretrial detention.”).
212 See, e.g., United States v. J. B. Williams Co., 498 F.2d 414, 438 (2d Cir. 1974) (noting that in the context of a challenge to a penalties award for violations of the Federal Trade Act, “[a]s the court below recognized, the size of the penalty should be based on a number of factors including the good or bad faith of the defendants, the injury to the public, and the defendants’ ability to pay”).
214 Shales v. Gen. Chauffeurs, Sales Drivers & Helpers Local Union No. 330, 557 F.3d 746, 749 (7th Cir. 2009) (“A district judge therefore should take the sanctioned party’s resources into account when setting the amount of a Rule 11 sanction.”).
217 This is not outside the range of possibilities, as this is an example of a fine that DOJ found was imposed in Ferguson. See FERGUSON REPORT, supra note 21, at 52.
Taken together, these arguments paint a compelling picture for why courts should take stock of a defendant’s economic circumstances when deciding whether a fine is constitutionally excessive.\footnote{Courts around the country have held that money bail systems that don’t take into account a defendant’s ability to pay are unconstitutional under the Fourteenth Amendment. \cite{ODonnell17, Buffin18, Schultz18, Pierce15}.

\cite{Harmelin91} involved an Eighth Amendment challenge to a mandatory life without parole sentence for cocaine possession. \cite{Harmelin91} at 961–62. One of the arguments Harmelin made was that the sentence was “significantly disproportionate” to his crime. \cite{Harmelin91} at 961. The Supreme Court rejected the argument and affirmed his sentence. \cite{Harmelin91} at 996.}

\subsection*{B. Whether Fines and Forfeitures Are a Significant Source of Revenue in the Sentencing Jurisdiction}

The second factor courts should consider when conducting an Excessive Fine Clause analysis is whether the imposing jurisdiction uses fines and forfeitures as a significant revenue source. Consideration of this factor helps guarantee that fines and forfeitures serve a legitimate penal purpose and guards against state and local governments abusing their power, which is especially important considering how widely fines and forfeitures are used today.

In \textit{Harmelin v. Michigan},\footnote{\textit{Harmelin} v. \textit{Michigan}, 501 U.S. 957 (1991).} Justice Scalia cogently explained why courts need to carefully review the imposition of financial punishment: “[F]ines are a source of revenue . . . it makes sense to scrutinize governmental action more closely when the State stands to benefit.”\footnote{\textit{Id.} at 978 n.9.} Justice Scalia elaborated that when a jurisdiction stands to benefit from a punishment, as is the case with fines, there is a much greater risk that it “will be imposed in a measure out of accord with the penal goals of retribution and deterrence.”\footnote{\textit{Id.} The Supreme Court has also recognized that “[r]eformation and rehabilitation of offenders [are] important goals of criminal jurisprudence.” \cite{Williams49} at 248 (1935).} This is different from incarceration and even capital punishment, because those forms of punishment “cost a State money.”\footnote{\textit{See Harmelin}, 501 U.S. at 979 n.9.} And as the Supreme Court recognized in \textit{Timbs}, the concern that fines or forfeitures will be imposed for non-penological purposes “is scarcely hypothetical”—“because they are politically easier to impose

\cite{Timbs19}
than generally applicable taxes, state and local governments nationwide increasingly depend heavily on fines and forfeitures as a source of revenue.”224 Indeed, some states collect hundreds of millions of dollars in fines a year.225 and for some localities, fines revenue comprises over ninety percent of the local budget.226

The well-documented horror stories of jurisdictions (ab)using fines to raise revenue often feature municipal courts.227 Certainly, the incentives for municipal courts to impose exorbitant fines is visceral. But the problems are not limited to municipal courts. State courts too have a financial incentive to impose fines as much as possible.228

The Bureau of Justice Statistics reported that “[a]t least 50% of trial courts received their primary funding . . . from state funding sources.”229 And according to the Council of State Governments, “two-thirds of the state court systems receive funding primarily from the state” and twenty percent are at least partially funded by the state, while only twenty percent of courts are funded primarily from local sources.230 The data shows that fines are financially important to state-funded court systems—over twenty states reported to the

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224 Id. (quoting Brief of American Civil Liberties Union, supra note 187, at 7).
225 As the ACLU noted in its brief, states such as New Jersey and Arizona collected hundreds of millions of dollars in a single year in fines and fees alone from their municipal courts. See id. (citing N.J. COURTS, REPORT OF THE SUPREME COURT COMMITTEE ON MUNICIPAL COURT OPERATIONS, FINES, AND FEES 12 (June 2018), https://www.njcourts.gov/courts/assets/supreme/reports/2018/sccmcoreport.pdf [https://perma.cc/BB36-GFH4]); MARK FLATTEN, GOLDWATER INST., CITY COURT: MONEY, PRESSURE AND POLITICS MAKE IT TOUGH TO BEAT THE RAP 6–7 (Sept. 2017), https://goldwaterinstitute.org/wp-content/uploads/2017/09/City-Court-Policy-Paper-1.pdf [https://perma.cc/3PGY-C4X8]). And “[a]mong the 100 cities in the United States that generated the highest proportion of municipal revenue from fines and fees in 2012, between 7.2% and 30.4% of total municipal revenue was derived from fine and fee collection.” Id. (citing Dan Kopf, The Overlooked Reason Why Some Cities Have Strained Relationships with Cops, BUS. INSIDER (July 11, 2016), https://www.businessinsider.com/reason-for-strained-relationship-with-police-2016-7 [https://perma.cc/KBE5-SBCP]).
226 See, e.g., supra note 40 and accompanying text.
227 See FERGUSON REPORT, supra note 21, at 42; Brief of American Civil Liberties Union, supra note 187, at 4.
National Center for State Courts that fines are a revenue source for their judiciaries, and most of those jurisdictions do not have municipal courts. In light of this, courts must scrutinize fines and forfeitures—imposed by all levels of court—to ensure they are being imposed for a legitimate penal reason and that their primary purpose is not to raise revenue. Because, as the Supreme Court has made clear in the Cruel and Unusual Punishments Clause context, a punishment that goes beyond its penal purpose is constitutionally excessive.

As Justice Breyer, joined by Justice Ginsburg, said relatively recently, for a punishment to be constitutional, it must have a legitimate “rationale,” whether it be “deterrence, incapacitation, retribution, or rehabilitation.” Justice White made this same point decades earlier, asserting a penalty that exceeds its penological purpose is “patently excessive.” Justices Stewart, Powell, and Stevens made the same point in yet another case, averring that a punishment that is untethered to a “penological justification . . . results in the gratuitous infliction of suffering.” In fact, in the Cruel and Unusual Punishments Clause context, it is uncontroversial that punishment is constitutionally “excessive if it

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232 For example, Arkansas, California, Connecticut, Maryland, New Hampshire, and Vermont all reported fines as a revenue source, and none of the states have municipal courts. See id. (listing the states that self-reported using fines as a revenue source); State Court Structure Charts, Ct. STAT. PROJECT, http://www.courtstatistics.org/Other-Pages/State_Court_Structure_Charts.aspx [https://perma.cc/STE3-CQTA] (providing an interactive map of every state’s court structure).

233 See Glossip v. Gross, 135 S. Ct. 2726, 2767 (2015) (Breyer, J., dissenting) (“The rationale for capital punishment, as for any punishment, classically rests upon society’s need to secure deterrence, incapacitation, retribution, or rehabilitation.”). Glossip involved a claim that the drug protocol used by Oklahoma risked severe pain in violation of the Eighth Amendment’s Cruel and Unusual Punishments Clause. See id. at 2731.

234 Furman v. Georgia, 408 U.S. 238, 312 (1972) (White, J., concurring) (“A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.”). Furman involved claims that the death sentences in one murder case and two rape cases were cruel and unusual punishment in violation of the Eighth Amendment. Id. at 239 (per curiam). The Court found that these sentences were unconstitutional. Id. Furman was responsible for a de facto moratorium on the death penalty. See Franklin E. Zimring & Gordon Hawkins, Capital Punishment and the Eighth Amendment: Furman and Gregg in Retrospect, 18 U.C. DAVIS L. REV. 927, 944 (1985) (“Furman was interpreted as having said that capital punishment had been abolished in America.” (quotation marks omitted)).

235 Gregg v. Georgia, 428 U.S. 153, 182–83 (1976) (“Although we cannot invalidate a category of penalties because we deem less severe penalties adequate to serve the ends of penology, the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.”) (brackets and internal citation omitted)). Gregg ended the de facto moratorium on the death penalty established by Furman. See Zimring & Hawkins, supra note 234, at 944 (“[W]hen the Supreme Court announced its decision in Gregg v. Georgia it became clear that executions would indeed be resumed.”).
goes beyond what is necessary to achieve the legitimate penological goals of punishment.”

As Justice Kennedy wrote for the Court in *Graham v. Florida*, “The penological justifications for [a] sentencing practice are also relevant to [an Eighth Amendment] analysis.” Thus, the same principle that the Court has applied in its Cruel and Unusual Punishment cases—that punishment is per se excessive if it goes beyond what’s necessary to serve a legitimate penal purpose—should apply to Excessive Fines Clause cases. Because as *Graham* said, a sentence “lacking any legitimate penological justification is by its nature disproportionate to the offense.”

Additionally, as Justice Scalia explained in *Harmelin* and the Court recognized in *Timbs*, inquiry as to whether a punishment has a legitimate purpose is even more pressing in the Excessive Fines Clause context because there is a financial incentive for courts to impose fines and forfeitures without a legitimate penological purpose, which does not exist in the Cruel and Unusual Punishments Clause context. Given the incentives at play, it is more likely that a fine or forfeiture will be divorced from a legitimate penological purpose because jurisdictions stand to profit. Put differently, jurisdictions may fine more than is penologically necessary as a way to raise revenue. Courts should therefore scrutinize the reasons why fines are being imposed given that “the primary focus of the Eighth Amendment was the potential for governmental abuse of its 'prosecutorial' power.”

Thus, consistent with established Eighth Amendment tenets, when presented with a claim that financial punishment is constitutionally excessive, courts should carefully consider how the jurisdiction in question uses fines and forfeitures to unearth the possibility that the fine or forfeiture was not truly imposed to punish, but was instead intended to fill the local piggybank.

C. Whether Other Jurisdictions Impose Similar Fines for Similar Crimes

In addition to considering whether the sentencing jurisdiction uses fines as a significant revenue source, courts should also consider whether other jurisdictions impose similar fines and forfeitures for similar crimes. This

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237 *Graham v. Florida*, 560 U.S. 48, 71 (2010). *Graham* presented the question of whether the Eighth Amendment permits a juvenile to be sentenced to life without parole for a non-homicide crime. *Id.* at 52–53. The Court held that it does not. *Id.* at 82.
238 *Id.* at 71.
241 Professor Margaret Cordray advocates for the consideration of this factor when determining whether a contempt sanction is constitutionally excessive. See Margaret
inquiry helps guarantee proportionality across the country. It also would help root out any arbitrariness in the imposition of financial punishment, further ensuring fines are being imposed for legitimate penal reasons and not for financial gain.

In the Cruel and Unusual Punishments Clause context, to ensure punishment does not violate the Eighth Amendment’s proportionality principle, the Supreme Court has said that it is appropriate to compare the punishment received by the defendant with the punishments received by defendants in other jurisdictions for similar crimes. Specifically, in *Solem v. Helm*, the Court said that when determining whether a punishment is constitutionally excessive, lower “courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions.” If other jurisdictions do not impose the same level of punishment for the same type of crime, that is an indication that the punishment may be constitutionally excessive.

It would not be a stretch for courts to consider this factor when conducting an Excessive Fines Clause analysis because *Solem v. Helm* is a case from which *Bajakajian* derived the “grossly disproportional” standard. And the Court in *Solem* clearly believed that comparing how the same crimes are punished in different jurisdictions was relevant to whether a punishment is grossly disproportional. In fact, following *Solem*, at least two state supreme courts

Meriwether Cordray, *Contempt Sanctions and the Excessive Fines Clause*, 76 N.C. L. REV. 407, 460 (1998) (explaining that “it would be useful for courts to compare the coercive fine at issue with coercive sanctions threatened or imposed in similar cases”). Professor Cordray believes that “[t]his kind of comparative analysis should prove useful in the coercive contempt setting, because the judge generally has no statutory limit set on his or her sanctioning authority. In this unique context, the comparative analysis can serve as an important means of ferreting out a coercive contempt fine that reflects the distorting effects of an individual judge’s overreaction or bias.” *Id.* at 461.


243 *Solem*, 463 U.S. at 291. *Solem* presented the issue of “whether the Eighth Amendment proscribes a life sentence without possibility of parole for a seventh nonviolent felony.” *Id.* at 279. The Court held that Helm’s sentence was “significantly disproportionate to his crime,” and therefore was “prohibited by the Eighth Amendment.” *Id.* at 303. In *Graham*, the Supreme Court clarified that only after there is “an inference of gross disproportionately” should a court “compare the defendant’s sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions.” 560 U.S. at 60 (quoting Harmelin v. Michigan, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring)) (internal quotation marks omitted). The *Graham* Court continued, “[i]f this comparative analysis validates an initial judgment that the sentence is grossly disproportionate, the sentence is cruel and unusual.” *Id.* (internal quotation marks and brackets omitted).


246 *Solem*, 463 U.S. at 303 (holding that Helm’s life without parole sentence was unconstitutional in part because he had “been treated more harshly than he would have been in any other jurisdiction, with the possible exception of a single State”).
already consider this factor when conducting an Excessive Fines Clause analysis.\footnote{See, e.g., Wilson v. Comm’r of Revenue, 656 N.W.2d 547, 556 (Minn. 2003) (“The third Solem factor invites us to compare the personal assessment with fines imposed for the commission of the same offense in other jurisdictions.”); State v. Real Prop. at 633 E. 640 N., 994 P.2d 1254, 1259 (Utah 2000) (noting that for an Excessive Fines Clause analysis, one factor courts must consider is “the sentences imposed for commission of the same crime in other jurisdictions”). In her dissent in Browning-Ferris, Justice O’Connor, joined by Justice Stevens, explained that under the Solem v. Helm framework, when conducting an Excessive Fines Clause analysis, courts “should compare the civil and criminal penalties imposed in the same jurisdiction for different types of conduct, and the civil and criminal penalties imposed by different jurisdictions for the same or similar conduct.” Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 301 (1898) (O’Connor, J., dissenting). The majority did not opine on this one way or another because it held that the civil jury award in question was not covered by the Eighth Amendment’s prohibition against excessive fines. Id. at 260 (majority opinion).}

Moreover, considering how other jurisdictions punish similar crimes goes together with the consideration of whether the imposing jurisdiction relies on fines as a significant source of revenue. If the imposing jurisdiction is one of the few in the country that imposes a hefty fine for a petty crime (for example, jaywalking), then there is reason to believe that the fine is not being imposed for a legitimate penological reason. This inference grows even stronger if that jurisdiction relies heavily on fines for revenue.

Finally, considering what other jurisdictions do ensures uniformity. If one jurisdiction is wildly out of step with another, that will be accounted for and checked by this factor. For example, in Ferguson, DOJ “found instances in which the court charged $302 for a single Manner of Walking violation; $427 for a single Peace Disturbance violation; $531 for High Grass and Weeds; $777 for Resisting Arrest; and $792 for Failure to Obey, and $527 for Failure to Comply.”\footnote{FERGUSON REPORT, supra note 21, at 52.} If few jurisdictions imposed similarly exorbitant fines for such minor offenses, then that would be an indication that these fines were constitutionally excessive. This factor helps guarantee that the Eighth Amendment’s protections will apply equally across the country, instead of varying from state to state or county to county.

In light of the fact that a case from which the Supreme Court explicitly derived the Excessive Fines Clause “grossly disproportional” test directly admonishes courts to compare the punishment in question to punishments imposed by other jurisdictions under similar circumstances, courts should perform a similar survey when deciding whether a fine is constitutionally excessive.
D. Whether the Sentencing Jurisdiction Disproportionately Imposes Fines Against Minority Defendants

The final factor courts should consider when conducting an Excessive Fines Clause analysis is whether the jurisdiction has a history of disparately imposing fines or forfeitures against minorities. The consideration of this factor is appropriate because it accords with the history and purpose of the Fourteenth Amendment—the Amendment that incorporates the Excessive Fines Clause against the states.

When holding the Fourteenth Amendment’s Due Process Clause incorporates the Excessive Fines Clause against the states, the Court in *Timbs* made sure to discuss the history surrounding the Fourteenth Amendment’s ratification.  

For the Court, this history shed light on which provisions of the Bill of Rights the Framers intended to enforce against the states. A review of this history leaves no doubt that the Fourteenth Amendment’s Framers intended for the Excessive Fines Clause to be incorporated against the states. One reason: to protect against the widespread abuse of formerly enslaved Black people.

One of the animating purposes of the Fourteenth Amendment was to “protect the rights of the former slaves.” While debating the Fourteenth Amendment, members of Congress repeatedly highlighted the concern of states using punishment to suppress Black people with no federal recourse. For example, Representative John Bingham—“The Father” of the Fourteenth Amendment—said when closing the debates: “[C]ruel and unusual punishments have been inflicted under State laws within this Union upon citizens, not only for crimes committed, but for sacred duty done, for which and against which the Government of the United States had provided no remedy and could provide none.”

The concerns of the Fourteenth Amendment’s Framers about states imposing unjust punishment against Black people did not turn on what form the punishment took. In other words, the Framers did not exalt the Eighth Amendment’s protection against “cruel and unusual punishments” over its protections against “excessive bail” or “excessive fines.” Instead, the Framers believed that all unjust punishment—especially punishment targeted at subordinating Black people—was abhorrent. Bingham did not mince words on this point, declaring “[i]t was an opprobrium to the Republic that for fidelity to

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250 See generally id.
254 See U.S. CONST. amend. VIII.
the United States [citizens] could not by national law be protected against the degrading punishment inflicted on slaves and felons by State law.\textsuperscript{255} The Fourteenth Amendment repaired this injustice by “stri[ing] down those State rights and invest[ing] all power in the General Government.”\textsuperscript{256} The Amendment would prohibit all “practices that reduce groups to the position of a lower or disfavored caste.”\textsuperscript{257}

To be sure, financial punishment was a critical tool that white Southerners used to subordinate Black people. “Southern States enacted Black Codes to subjugate newly freed slaves and maintain the prewar racial hierarchy.”\textsuperscript{258} As the Supreme Court highlighted in \textit{Timbs}, these laws included “draconian fines for violating broad proscriptions on ‘vagrancy’ and other dubious offenses.”\textsuperscript{259} Then, when a formerly enslaved Black person could not pay the fine, “[s]tates often demanded involuntary labor instead.”\textsuperscript{260} Thus, southern states used fines, and formerly enslaved Black people’s inability to pay them, to create a “new system of forced labor,” reducing Black people “to a status somewhere between that of slaves (which they no longer were) and full free people (which most white Southerners opposed).”\textsuperscript{261} Debates over the Fourteenth Amendment “repeatedly mentioned the use of fines to coerce involuntary labor.”\textsuperscript{262}

If one of the reasons the Court held the Excessive Fines Clause applies to the states is a history of concern that states would wield financial punishment to subordinate Black people, then that concern should feature in an Excessive Fines Clause analysis. A jurisdiction disproportionately imposing “draconian fines” for “dubious offenses” against Black people (or other minorities)—like those seen in Ferguson—is a chief evil that the Framers of the Fourteenth Amendment wanted to protect against. The Framers guarded against this evil by intending to incorporate the Excessive Fines Clause against the states.\textsuperscript{263}


\textsuperscript{256} \textit{Id.} at 2500 (statement of Rep. George Shanklin).

\textsuperscript{257} Jack M. Balkin & Reva B. Siegel, \textit{The American Civil Rights Tradition: Anticlassification or Antisubordination?}, 58 U. MIAMI L. REV. 9, 9–10, 10 n.5 (2003).

\textsuperscript{258} \textit{Timbs} v. Indiana, 139 S. Ct. 682, 688 (2019); see also \textit{William E. Nelson, The FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE} 43 (1995) (‘‘The Black Codes represented a legalized form of slavery in which each southern state perpetuated the master-slave relationship by passing apprenticeship laws, labor contract laws, vagrancy laws and restrictive travel laws . . . denying African Americans civil rights and due process of law.’’).

\textsuperscript{259} \textit{Timbs}, 139 S. Ct. at 688.

\textsuperscript{260} \textit{Id.} at 689.

\textsuperscript{261} Paul Finkelman, \textit{John Bingham and the Background to the Fourteenth Amendment}, 36 AKRON L. REV. 671, 685 (2003).

\textsuperscript{262} \textit{Timbs}, 139 S. Ct. at 689 (citing \textit{CONG. GLOBE}, 39th Cong., 1st Sess. 443 (1886)).

\textsuperscript{263} The Fourteenth Amendment had a clear purpose: “to enforce the Bill of Rights.” \textit{See} Representative John A. Bingham, Speech in Support of the Proposed Amendment to Enforce
Therefore, whether a jurisdiction discriminatorily imposes fines against minorities should be a key factor that courts consider when deciding whether a fine is constitutionally excessive.

Accounting for whether a jurisdiction has a history of discriminatorily imposing financial punishment takes on special importance today because fines and forfeitures are disproportionately levied against people of color.264 The stark racial disparities should give courts pause, especially when considering the collateral consequences that attend financial punishment.265 The Ferguson Report “highlighted the way that police practices and routine courtroom procedures led African Americans to face higher fines, more warrants for failing to pay criminal justice debt, and greater exposure to the criminal justice system.”266 Essentially, Ferguson’s fining practices led to the widespread subordination of the city’s Black residents.

Given that the Fourteenth Amendment’s Framers were particularly concerned with local and state governments using financial punishment as a means to relegate Black people to second-class citizens, consistent with the intent of the Framers, courts should consider any racial disparities in the imposition of financial punishment when deciding whether a fine or forfeiture is constitutionally excessive.

E. Applying the Four Factors

The four factors are designed to work together. As the Supreme Court said in Solem v. Helm—again, a case from which the Court borrowed the “grossly disproportional” standard—“no single criterion can identify when a sentence is so disproportionate that it violates the Eighth Amendment.”267 The factors inform each other. For example, if there is evidence that a jurisdiction relies heavily on fines as a source of revenue, that evidence undermines the presumption of legitimacy attached to the punishment and instead weighs in favor of the punishment being constitutionally suspect. The more financial importance fines have in a jurisdiction, the less likely it is that the jurisdiction

264 See, e.g., Leonard v. Texas, 137 S. Ct. 847, 848 (2017) (Thomas, J., respecting the denial of certiorari) (noting that forfeiture regimes “frequently target the poor and other groups least able to defend their interests in forfeiture proceedings”); Colgan, Lessons from Ferguson, supra note 17, at 1175 (explaining that “fines were collected at rates more than fifteen times higher in one low-income, majority-black community than in a more affluent neighboring municipality”); Louis S. Rulli, Seizing Family Homes from the Innocent: Can the Eighth Amendment Protect Minorities and the Poor from Excessive Punishment in Civil Forfeiture?, 19 U. Pa. J. CONST. L. 1111, 1141 (2017) (collecting “an array of analyses conducted by media outlets and advocacy organizations [that] suggest[] that people of color are disproportionately impacted by civil asset forfeiture”).

265 See supra pp. 73–77.
266 CONFRONTING CRIMINAL JUSTICE DEBT, supra note 18, at 2.
is imposing fines for legitimate penological reasons. Likewise, comparing how other jurisdictions punish similar crimes is not to say that if two jurisdictions fine differently, punishment imposed in the jurisdiction with the higher fines is unconstitutional. It just means that the reviewing court should again consider this disparity when deciding whether the fine in question is constitutionally excessive; if a jurisdiction is out of step with the rest of the country, then the answer leans towards yes. And if minorities are being disproportionately punished, that suggests at best an arbitrariness in the imposition of fines, and at worst, outright discrimination. A court should therefore take stock of racial disparities in the imposition of punishment when deciding whether a fine or forfeiture is unconstitutional.

It is important to acknowledge some of the limitations of the proposed factors. One is that some of the factors will be less illuminating in certain contexts. For example, if a jurisdiction is majority Black, racial disparities may not be as relevant when deciding whether there has been a constitutional violation. Likewise, there may be anchoring issues—fines may be set too high across the board, thus comparing fines in different jurisdictions may not reveal much. It is also important to acknowledge that some factors require robust data collection—for example, to compare fines across jurisdictions or to

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268 The Supreme Court has held, in the context of the death penalty and the Cruel and Unusual Punishments Clause, that racial disparities alone are not enough to prove an Eighth Amendment violation. See McCleskey v. Kemp, 481 U.S. 279, 313 (1987) (rejecting an Eighth Amendment challenge to a death sentence despite being presented with a “complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations”). The 5-4 decision has been derided by many as a stain on the Supreme Court. E.g., Annika Neklason, The ’Death Penalty’s Dred Scott’ Lives On, ATLANTIC (June 14, 2019), https://www.theatlantic.com/politics/archive/2019/06/legacy-mccleskey-v-kemp/591424/ [https://perma.cc/8PDD-F7U2]. However, that McCleskey was a Cruel and Unusual Punishments Clause case means it is not binding in an Excessive Fines Clause context, and given the criticisms, it should not be extended, especially in light of the recognition by the Court that there are different concerns at play in the Excessive Fines Clause context. See supra p. 37. But even if McCleskey is held to apply in this context, because the proposed test is a multi-factored test, a constitutional violation does not rely on racial disparities alone and thus McCleskey should not be a barrier for relief. Moreover, the current Supreme Court has seemed particularly concerned with racism influencing the administration of justice. In just the past two years, the Supreme Court has found constitutional violations in cases where there was evidence of racial discrimination in jury deliberations, Peña-Rodriguez v. Colorado, 137 S. Ct. 855 (2017); jury selection, Flowers v. Mississippi, 139 S. Ct. 2228, (2019); and when discriminatory race-based evidence was presented to a jury, Buck v. Davis, 137 S. Ct. 759 (2017). The last example prompted Chief Justice Roberts to declare that “[j]ur law punishes people for what they do, not who they are.” Buck, 137 S. Ct. at 778. Therefore, if there is evidence that race influenced punishment, then that should be taken into account when conducting a constitutional analysis.

269 Scholars have written about issues with anchoring in sentencing, and how sentencing guidelines have normalized extreme prison sentences. See, e.g., Melissa Hamilton, Extreme Prison Sentences: Legal and Normative Consequences, 38 CARDOZO L. REV. 59, 106 (2016).
examine racial disparities—and these factors cannot be fully operationalized until that data is collected.\footnote{Some organizations, like the Brennan Center for Justice at NYU School of Law and the Arthur Liman Center for Public Interest at Yale Law School, have already begun doing extensive work collecting data on fines and fees practices across the country.}

That said, here is a sketch of what an analysis would look like using the proposed four factors. As an initial matter, \textit{Bajakajian} cannot be ignored, so a court would consider the “essence” of the crime and the “harm” caused by the defendant when determining whether the fine or forfeiture is “grossly disproportional.”\footnote{See United States v. Bajakajian, 524 U.S. 321, 337 (1998).} For this, a reviewing court can look to tests established by state and federal courts.\footnote{See supra pp. 86–88.} Also following \textit{Bajakajian}, the court would presume a fine or forfeiture within statutory guidelines is constitutional,\footnote{See \textit{Bajakajian}, 524 U.S. at 336 (“[J]udgments about the appropriate punishment for an offense belong in the first instance to the legislature.”).} although the ultimate question of whether a fine violates the Constitution is one that the reviewing court would have to consider \textit{de novo}.\footnote{Id. at 336–37 n.10 (“The factual findings made by the district courts in conducting the excessiveness inquiry, of course, must be accepted unless clearly erroneous. But the question whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context \textit{de novo} review of that question is appropriate.” (internal citation omitted))).} It is here where the proposed factors kick in.

First, the court would consider the defendant’s ability to pay, because while for some people a within-guidelines fine may be financially tolerable, another person may find that same fine ruinous. This would require the court to take full account of the defendant’s economic circumstances to ensure, in the words of Blackstone, that the fine is no larger than “his circumstances or personal estate will bear.”\footnote{BLACKSTONE, supra note 201, at 372.} The National Center for State Courts recommends that judges consider a defendant’s income (if any); whether he receives public assistance; whether he has dependents; whether he has been recently incarcerated or homeless; whether he has any disabilities or mental health issues; and any other outstanding debts or financial obligations.\footnote{NAT’L TASK FORCE ON FINES, FEES, AND BAIL PRACTICES, \textit{supra} note 71. Some scholars have explored a “day-fine model”—“an economic sanction mechanism used in several European and Latin American Countries.” See, e.g., Schierenbeck, \textit{supra} note 216, at 1874–76; Beth A. Colgan, \textit{Graduating Economic Sanctions According to Ability to Pay}, 103 IOWA L. REV. 53, 56 (2017). This model involves a “two-step process”: First, offenses are assigned a penalty “that increase[s] with crime severity and [are] set without any consideration of a defendant’s ability to pay.” \textit{Id.} at 56. Then, the court “establish[es] the defendant’s adjusted daily income, in which income was adjusted downward to account for personal and familial living expenses.” \textit{Id.}} If, after taking a holistic view of the defendant’s circumstances, a court finds that a defendant would be caused
major hardship by a fine for a comparably minor crime, then that fine should be found excessive in violation of the Eighth Amendment.277

Second, when considering whether fines are an important revenue source for the sentencing jurisdiction, the reviewing court should consider how courts in the sentencing jurisdiction are funded. This would include inquiring into whether fines are earmarked as a funding source for courts or their judges, whether the courts in that jurisdiction have experienced budgetary deficits, and whether local law enforcement are directed or expected to issue a certain number of citations over a given period. If fines are a significant source of revenue in the jurisdiction, the reviewing court should view the fines with skepticism. The reviewing court should also consider whether there have been increases in fines that cannot be explained by market factors such as inflation. If there have been, that suggests that the fines are not being set to fit the punishment, but instead are being set to satisfy budgetary needs. And at the point a fine is set above the amount necessary to serve a penological purpose, that fine should be found unconstitutional.

Third, the reviewing court should compare the fine to fines imposed for similar crimes in other jurisdictions. And this comparison should not just be limited to surrounding jurisdictions. Courts should examine whether other jurisdictions across the country, especially those with different demographics and funding structures, impose similar fines. If they do not—for example, if few other jurisdictions are imposing $500 fines for overgrown grass, as was the case in Ferguson—that is a strong indication that the fine is excessive.278

Finally, even if a fine accords with how similar crimes are punished in other places if, in the sentencing jurisdiction, fines are disproportionately imposed against minorities, the fine may still be constitutionally suspect. And in the face of such disparities, the government should be forced to provide a race-neutral reason for why it is that minorities are being disproportionately punished.279

277 Scholars have criticized ability-to-pay inquiries because they are often inaccurate and require the court to make subjective judgments. See, e.g., Mary Fainsod Katzenstein & Mitali Nagrecha, A New Punishment Regime, 10 CRIMINOLOGY & PUB’L’Y 555, 564 (2011). Other scholars have criticized ability-to-pay determinations as legitimizing an inherently discriminatory system. See, e.g., Theresa Zhen, (Color)blind Reform: How Ability-to-Pay Determinations Are Inadequate to Transform a Racialized System of Penal Debt, 43 N.Y.U. REV. L. & SOC. CHANGE 175, 179 (2019). Both points are well taken. But as long as fines are on the books, the history of the Excessive Fines Clause compels the consideration of a defendant’s economic circumstances when assessing monetary punishment. And short of abolishing fines, there are (more) thoughtful ways for courts to perform ability-to-pay determinations.

278 For example, in the Cruel and Unusual Punishments Clause context, the Court found the life without parole sentence for the petitioner’s crime unconstitutional, in part because he had been “treated more harshly than he would have been in any other jurisdiction, with the possible exception of a single State.” Solem v. Helm, 463 U.S. 277, 303 (1983).

279 In other contexts, when faced with evidence of discrimination in the administration of justice, the Supreme Court has required the government to provide race neutral
a jurisdiction cannot provide a satisfactory explanation—for example, if Ferguson could not explain why “African Americans accounted for 95% of Manner of Walking in Roadway charges, and 94% of all Failure to Comply charges” when they comprise only sixty-seven percent of Ferguson’s population—a court should find that race “was operating in the system in such a pervasive manner that it could be fairly said that system was irrational, arbitrary and capricious.” If that’s the case, the reviewing court should sustain any Eighth Amendment challenge.

In the end, the four factors work to serve “the primary focus of the Eighth Amendment” by protecting against “the potential for governmental abuse of its prosecutorial power.”

V. CONCLUSION

As fines and forfeitures continue to be imposed at astonishing rates, and so long as they are disparately imposed against poor people of color, courts must be wary of rubberstamping the constitutionality of this ubiquitous form of punishment. The proposed four factors—(1) whether a defendant is able to pay the fine; (2) whether fines are a significant source of revenue in the sentencing jurisdiction; (3) whether other jurisdictions impose similar fines for similar crimes; and (4) whether the sentencing jurisdiction disproportionately imposes fines against minority defendants—give courts a roadmap to ensuring financial punishment does not violate the Eighth Amendment. Hopefully they will follow it.

280 Ferguson Report, supra note 21, at 4.

281 McCleskey v. Kemp, 753 F.2d 877, 891 (11th Cir. 1985) (“A successful Eighth Amendment challenge would require proof that the race factor was operating in the system in such a pervasive manner that it could fairly be said that the system was irrational, arbitrary and capricious.”), aff’d, 481 U.S. 279, 306–07 (1987) (“[A]bsent a showing that the Georgia capital punishment system operates in an arbitrary and capricious manner, McCleskey cannot prove a constitutional violation . . . .”). This is not to endorse McCleskey. It’s to show that such irrational disparities would not survive constitutional scrutiny even under the standard announced in McCleskey.

Recognizing a Due Process Right to Be Made Aware of Discretionary Relief from Removal for Lawful Permanent Residents

Julia C. Lauritzen

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I. Introduction

Noncitizens who enter the United States without authorization after a prior deportation order are subject to federal prosecution.1 Already at an all-time high,
these prosecutions dramatically increased after former Attorney General Jeff Sessions issued a memorandum in April 2017 instructing federal prosecutors to make entry-related prosecutions a higher priority nationwide. Together, unlawful entry and re-entry prosecutions continue to make up more than half of all federal prosecutions. Concerns that due process violations permeate these prosecutions have been widespread, but another due process issue underlying

dedicated in memory of my mom, Lisa deFilippis, who was always immensely supportive and encouraging.

18 U.S.C. §§ 1326(a)(1)-(2) (2012) (“[A]ny alien who has been denied admission, excluded, deported, or removed . . . and thereafter enters, attempts to enter, or is at any time found in, the United States . . . shall be fined under title 18, or imprisoned not more than 2 years, or both.”).


3Mendez, supra note 2 (“[F]ederal prosecution for unlawful entry, re-entry, and similar offenses . . . constitutes more than half of all federal criminal charges . . . .”); Press Release, U.S. Dep’t of Justice, Department of Justice Prosecuted a Record-Breaking Number of Immigration-Related Cases in Fiscal Year 2019 (Oct. 17, 2019), https://www.justice.gov/opa/pr/department-justice-prosecuted-record-breaking-number-immigration-related-cases-fiscal-year [https://perma.cc/6TDJ-T8HG] (reporting the highest annual number of prosecutions for felony illegal re-entry and misdemeanor improper entry since records on these prosecutions have been kept).

4See Joanna Jacobbi Lydgate, Assembly-Line Justice: A Review of Operation Streamline, 98 CALIF. L. REV. 481, 530 (2010) (arguing that many migrants are being deprived of procedural due process when they are prosecuted in group proceedings with as many as eighty defendants appearing before a magistrate at once); Chad R. Doobay, Operation Streamline—A Failure of Due Process, NAT’L IMMIGRANT JUST. CTR. (Dec. 11, 2015), https://www.immigrantjustice.org/staff/blog/operation-streamline-failure-due-process [https://perma.cc/H2U7-TRT2] (questioning whether pleas taken in mass—for unlawful entry or re-entry—could really adequately comply with Federal Rules of Criminal Procedure, which require that guilty pleas be entered knowingly, voluntarily, and intelligently); The Immigration Prosecution Factory, KINO BORDER INITIATIVE (Nov. 14, 2017), https://www.kinoborderinitiative.org/immigration-prosecution-factory/ [https://


re-entry prosecutions bears consideration—whether many deportation orders on which these prosecutions are based may themselves be invalid.\(^5\) The case of Emilio Estrada serves as a concerning example.

Emilio Estrada was a lawful permanent resident (LPR) for nearly twenty years.\(^6\) He lived with his wife in Tennessee where they were raising four U.S. citizen children.\(^7\) In 2007, Mr. Estrada was stopped by the police on his way home from work.\(^8\) The police found a gun and drugs in Mr. Estrada’s car; he was charged with, and ultimately convicted of, possession of a firearm by an unlawful user of a controlled substance.\(^9\) On the basis of that criminal conviction, he faced removal proceedings and was deported in 2009.\(^10\)

Years later, Mr. Estrada re-entered the United States, and in 2015 he was charged with illegal re-entry.\(^11\) Mr. Estrada moved to dismiss the indictment on the ground that his prior deportation order was invalid because the Immigration Judge (IJ) had failed to inform him of his eligibility for a form of discretionary relief from removal, which, if granted, would have allowed him to remain in the United States.\(^12\) Although there is no guarantee Mr. Estrada would have been granted relief, he was deported without ever being informed that he was eligible to apply for relief from deportation.\(^13\) Nevertheless, in December 2017, the United States Sixth Circuit Court of Appeals denied Mr. Estrada’s claim that his

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\(^5\) This Note uses the phrases “deportation proceeding” and “removal proceeding” interchangeably. Current law uses the terms “removable” and “removal” to refer to what is colloquially known as “deportable” and “deportation.” See Kevin R. Johnson, *An Immigration Gideon for Lawful Permanent Residents*, 122 YALE L.J. 2394, 2399 (2013).


\(^7\) Id.

\(^8\) Brief for Appellant at 5–6, United States v. Estrada, 876 F.3d 885 (6th Cir. 2017) (No. 17-5081).

\(^9\) Id. at 6 (stating that Mr. Estrada was convicted under 18 U.S.C. § 922(g)(3)).

\(^10\) Id. at 9–10.

\(^11\) Petition for Writ of Certiorari, *supra* note 6, at 6 (stating that Mr. Estrada was prosecuted for illegal re-entry in violation of 8 U.S.C. § 1326(a)).

\(^12\) At the time of his removal hearing, Mr. Estrada was statutorily eligible for relief under Section 212(h) of the Immigration and Nationality Act (“INA”), which grants the Attorney General discretion to waive the noncitizen’s inadmissibility if removal “would result in extreme hardship” to their spouse or child, who is a U.S. citizen or LPR. United States v. Estrada, 876 F.3d 885, 888 (6th Cir. 2017), *cert. denied*, 138 S. Ct. 2623 (2018); see INA § 212(h)(1)(B), 8 U.S.C. § 1182(h)(1)(B) (2012). The Attorney General vests IJs with the authority to waive inadmissibility. 8 C.F.R. § 1003.10 (2019).

\(^13\) Most forms of relief from removal in the INA have two components: “(1) statutory eligibility criteria that form the threshold for a grant . . . and (2) a favorable exercise of discretion, after the threshold criteria are met, to determine whether to grant or deny the specific relief.” T. ALEXANDER ALENIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 725–26 (8th ed. 2016).
prior deportation order was invalid.\textsuperscript{14} The court held that noncitizens in removal proceedings have no constitutionally protected right to be informed of discretionary relief from removal.\textsuperscript{15}

In so holding, the Sixth Circuit deepened an existing circuit split. The Sixth Circuit joined the majority of its sister circuits, which have held that noncitizens do not have a due process right to be made aware of eligibility for discretionary relief by an IJ or by counsel in removal proceedings.\textsuperscript{16} In contrast, two federal circuit courts have held that noncitizens in removal proceedings do have a constitutional right to be made aware of discretionary relief from removal.\textsuperscript{17}

Being made aware of relief from removal is essential to avoiding deportation because, as even a cursory look at the Immigration and Nationality Act (INA) demonstrates, immigration law is complex. Noncitizens often are unrepresented in removal proceedings and do not know what forms of relief might be available to them.\textsuperscript{18} IJs play an essential role in filling this void.

The role of an IJ is quite unlike most judges in other judicial settings—their responsibilities extend far beyond fact-finding and adjudicating.\textsuperscript{19} IJs not only determine whether noncitizens are removable,\textsuperscript{20} they also must determine if a noncitizen is statutorily eligible for relief from removal.\textsuperscript{21} And, IJs have the responsibility of deciding whether noncitizens merit favorable grants of discretionary relief.\textsuperscript{22}

\begin{itemize}
\item\textsuperscript{14} Estrada, 876 F.3d at 889.
\item\textsuperscript{15} Id. at 888.
\item\textsuperscript{16} See United States v. Santiago-Ochoa, 447 F.3d 1015, 1020 (7th Cir. 2006); Bonhometre v. Gonzales, 414 F.3d 442, 448 (3d Cir. 2005); United States v. Aguirre-Tello, 353 F.3d 1199, 1205 (10th Cir. 2004); United States v. Lopez-Ortiz, 313 F.3d 225, 231 (5th Cir. 2002); Smith v. Ashcroft, 295 F.3d 425, 430 (4th Cir. 2002); Oguejiofor v. Att’y Gen., 277 F.3d 1305, 1309 (11th Cir. 2002); Escudero-Corona v. INS, 244 F.3d 608, 615 (8th Cir. 2001).
\item\textsuperscript{17} United States v. Lopez-Velasquez, 629 F.3d 894, 897 (9th Cir. 2010); United States v. Copeland, 376 F.3d 61, 71 (2d Cir. 2004). Notably, the Second and Ninth Circuits collectively resolve nearly three-quarters of all immigration appeals. See Petition for Writ of Certiorari, supra note 6, at 9.
\item\textsuperscript{18} Esther Yu Hsi Lee, Only 37 Percent of Immigrants Have Legal Representation, THINKPROGRESS (Sept. 29, 2016), https://thinkprogress.org/immigrants-legal-representation-39a5f7d8d434/ [https://perma.cc/7NT5-DYTG].
\item\textsuperscript{19} See INA § 240(b)(1), 8 U.S.C. § 1229a(b)(1) (2012) (“The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses.”); see also Copeland, 376 F.3d at 71.
\item\textsuperscript{20} See Jennifer Lee Koh, Rethinking Removability, 65 FLA. L. REV. 1803, 1805 (2013) (explaining that removable is a “threshold question of whether the government has legal authority to attempt to deport someone”). If a noncitizen contests removability and succeeds, the IJ must terminate the proceedings. Id. at 1806. However, there are very few grounds on which removal can be contested; for example, noncitizens with colorable claims to U.S. citizenship. See id. at 1810.
\item\textsuperscript{21} 8 C.F.R. § 1240.11(a)(2) (2012) (requiring IJs to inform aliens of “apparent eligibility” for relief and to consider any applications for relief).
\item\textsuperscript{22} Koh, supra note 20, at 1813.
\end{itemize}
Notably, throughout these proceedings, noncitizens are afforded general procedural due process rights. However, the majority of federal circuit courts stop short of recognizing a procedural due process right to be made aware of discretionary relief from removal. This is a critical issue because nearly all forms of relief from removal are discretionary. Essentially, if there is no right to be informed of discretionary relief, effectively there is no right to be informed of any relief. And realistically, the ability of noncitizens to pursue relief from removal and remain in the United States, without a right at least to be made aware of relief, is extremely limited. But, beyond this recognition, evaluating procedural due process jurisprudence in this context leads to the conclusion that deportable LPRs have the right to be made aware of their eligibility for relief from removal.

This Note explores the issue of whether LPRs in removal proceedings have a due process right to be made aware of discretionary relief from removal. Part II provides a general overview of immigration proceedings and procedural due process rights in the immigration context. Part III discusses the circuit split, focusing particularly on the Sixth Circuit’s holding in United States v. Estrada as the most recent case deepening the split. Part IV discusses LPRs’ liberty interests and uses the framework of Mathews v. Eldridge to support the...
argument that LPRs in removal proceedings have a procedural due process right to be made aware of discretionary relief from removal by an IJ and briefly sketches how to protect this right. Part V briefly concludes that following existing procedural due process jurisprudence, LPRs have the right to be made aware of their eligibility for discretionary relief from removal.

II. IMMIGRATION PROCEEDINGS & DUE PROCESS

On the most basic level, when the government wants to deport a noncitizen it must first initiate removal proceedings in an immigration court, a very different setting from an Article III court. Removal proceedings are considered civil (not criminal) proceedings; thus, many of the constitutional safeguards in place in the criminal context for citizens and noncitizens alike do not apply in immigration proceedings. However, it is now well established that removal proceedings must comport with general procedural due process protections.

Part II.A provides a brief general overview of removal proceedings. Part II.B discusses collateral attacks of prior deportation orders based on due process violations.

28 Koh, supra note 20, at 1813; United States v. Copeland, 376 F.3d 61, 71 (2d Cir. 2004) (quoting Yang v. McElroy, 277 F.3d 158, 162 (2d Cir. 2002)) (“[T]he IJ . . . unlike an Article III judge, is not merely the fact finder and adjudicator but also has an obligation to establish the record.”).

29 See Peter L. Markowitz, Deportation Is Different, 13 U. PA. J. CONST. L. 1299, 1311–12 (2011) (describing the explicit application of the civil label to deportation proceedings by the Supreme Court in 1893). Though the civil label has endured, repeatedly being relied upon for a hundred-plus years, Professor Markowitz argues that deportation proceedings are not truly civil, nor criminal. Id. at 1301. He argues, instead, that noncitizens’ rights in deportation proceedings must be determined by evaluating both constitutional protections afforded in criminal proceedings and balancing interests under the Mathews v. Eldridge test used in civil proceedings. Id. at 1307; see also Robert Pauw, A New Look at Deportation as Punishment: Why at Least Some of the Constitution’s Criminal Procedure Protections Must Apply, 52 ADMIN. L. REV. 305, 309–10 (2000) (noting that courts have held that a person facing deportation does not have a constitutionally protected right to the assistance of counsel, the Eighth Amendment’s prohibition against cruel and unusual punishment are irrelevant, and there are no limits to deportation imposed by virtue of the Double Jeopardy Clause). Professor Pauw argues that in many cases, deportation is a punishment as a matter of law; it is not merely a remedial measure. Id. at 307.

30 Pauw, supra note 29, at 310 (citing Yamataya v. Fisher, 189 U.S. 86, 100–01 (1903)) (the Court held in Yamataya that the government may not arbitrarily deport an alien without giving him or her the right to answer why the deportation is improper); see Hiroshi Motomura, The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights, 92 COLUM. L. REV. 1625, 1632–52 (1992) (discussing the evolution of procedural due process rights in immigration proceedings). In 1976, the Supreme Court decided Mathews v. Eldridge, establishing the contemporary standard for procedural due process inquiries. Id. at 1652. In the immigration context, Landon v. Plasencia “marked the arrival of the due process revolution in immigration law.” Id.
A. Removal Proceedings

Immigration removal proceedings involve a two-fold inquiry: (1) whether the noncitizen is removable; and, if so, (2) whether the noncitizen qualifies for any form of relief from removal. First, under the INA, any noncitizen who the government wishes to deport must be found removable by an IJ. Removability is determined through close analysis of various statutory provisions, and the applicable definition of removability depends on whether a noncitizen is subject to grounds of “inadmissibility” or “deportability.” Although the grounds are not identical, they each generally describe categories of behavior that can lead to removal, including immigration-related offenses, criminal conduct, and national security grounds, to name a few.

After the IJ has determined that a noncitizen is removable, the second part of the inquiry is whether the noncitizen qualifies for any form of relief from removal that would allow the noncitizen to remain in the United States. There are varied forms of relief from removal that a noncitizen may be statutorily eligible for, but the forms of relief most relevant for LPRs are cancellation of removal for permanent residents and waivers of inadmissibility—the form of relief at issue in the circuit split.

If, following an IJ’s determination that a noncitizen is removable, no successful applications for relief from removal are filed, the noncitizen is ordered to be removed from the United States. A removal order generally makes a noncitizen inadmissible for a period of ten or twenty years, depending on the circumstances of their removal.

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31 Koh, supra note 20, at 1813–14.
33 See Koh, supra note 20, at 1815. The INA contains the relevant provisions, but they are also located in parallel sections in Title 8 of the U.S. Code. This Note cites to both sources but refers to forms of relief according to their section in the INA.
34 Id. at 1814 (describing “admission” as term of art). A noncitizen is admitted only after inspection by an immigration officer; if a noncitizen was admitted and then put in removal proceedings, deportability grounds apply. Id. However, noncitizens who enter without inspection by an immigration officer and then are put in removal proceedings are generally subject to inadmissibility grounds. Id. Though the grounds for removal are similar, they contain some differences in impermissible conduct that render noncitizens removable. Id. at 1815.
35 Id. at 1813–14.
36 INA § 240(a), 8 U.S.C. § 1229b(a). An alien who has been lawfully admitted for permanent residence for not less than five years, has resided in the United States continuously for seven years after having been admitted, and has not been convicted of any aggravated felony, is eligible for cancellation of removal. Id.
38 INA § 240(c)(1)(A), 8 U.S.C. § 1229a(c)(1)(A) (“At the conclusion of the proceeding the immigration judge shall decide whether an alien is removable from the United States.”).
B. Collateral Attacks Based on Due Process Violations

For some noncitizens, being deported ends their connection to the United States, but many LPRs like Mr. Estrada in particular, leave behind spouses, children, parents, and other loved ones. And, because noncitizens who have been deported generally face at least a ten-year bar on lawful entry to the United States, many noncitizens attempt to re-enter unlawfully. When a noncitizen re-enters after a removal order, they face harsh penalties and have few possible grounds to defend against the charge of illegal re-entry. One of the few available defenses under these circumstances is to collaterally attack the prior removal order on the ground that there was a due process violation in the earlier proceeding. In order to succeed on a collateral attack, the noncitizen must demonstrate that they (1) exhausted administrative remedies, (2) that the underlying proceedings “improperly deprived” them of judicial review, and (3) that “entry of the order was fundamentally unfair.”

40 LPRs are particularly likely to have family members in the United States because many LPRs are eligible for that status on the basis of a family relationship. See ALEINIKOFF ET AL., supra note 13, at 271 (“The highest numbers of immigrant admissions are based on family ties... [They are] based on specified relationships to citizens or lawful permanent residents.”).

41 Under INA § 212(a)(9)(A)(ii)(I), 8 U.S.C. § 1182(a)(9)(A)(ii)(I), a noncitizen who was previously ordered removed, not as an arriving alien, is barred from admission for ten years. INA § 212(a)(9)(A)(ii)(I), 8 U.S.C. § 1182(a)(9)(A)(ii)(I). A noncitizen who has two previous removal orders or was removed on the basis of an aggravated felony conviction is barred from admission for twenty years. Id.; see also Mendez, supra note 2 (discussing the high rate of federal prosecutions for unlawful re-entry).

42 See Doug Keller, Re-Thinking Illegal Entry and Re-Entry, 44 LOY. U. CHI. L.J. 65, 115 (2012). The statutory criminal penalty for unlawful re-entry after a prior removal is two years or less in prison, but if the noncitizen was previously removed due to a criminal conviction, the noncitizen could face between ten to twenty years. 8 U.S.C. §§ 1326(a)(2)–(b)(2) (2012). From an immigration standpoint, unlawful re-entry after a prior removal leads to a permanent bar to admission to the United States. See INA § 212(a)(9)(C), 8 U.S.C. § 1182(a)(9)(C).

43 Keller, supra note 42, at 116; see also Koh, supra note 20, at 1819 (discussing that a noncitizen may seek to collaterally attack a prior removal order not only as a defense to deportation, but also to avoid sentencing enhancements in the illegal re-entry context).

44 8 U.S.C. § 1326(d). The Supreme Court held in United States v. Mendoza-Lopez, 481 U.S. 828, 837–38 (1987), that in a criminal re-entry prosecution, a collateral attack on the earlier deportation order is allowed when the prior proceeding was fundamentally unfair, and the respondent was effectively denied the opportunity for meaningful judicial review. Congress essentially codified Mendoza-Lopez in 1996, establishing the three-factor standard found in 8 U.S.C. § 1326(d). The circuit courts, however, continue to apply varying standards to determine whether the noncitizen was prejudiced or prevented from obtaining meaningful judicial review. For a survey of circuit decisions on this issue, see IRA J. KURZBAN, KURZBAN’S IMMIGRATION LAW SOURCEBOOK 310–19 (2014).
The Supreme Court case, *United States v. Mendoza-Lopez*, which established the three-part test for collateral attacks on prior deportation orders, also provides an example of a due process violation that led to a successful collateral attack. In *Mendoza-Lopez*, the IJ had improperly told Mr. Mendoza-Lopez that no relief was available, leading him to waive his right to seek relief and waive his appeal rights. As a result, Mr. Mendoza-Lopez was able to successfully attack his prior deportation order because the proceedings did not comport with due process. Another example of a due process violation that led to a successful collateral attack was the denial of the right to counsel coupled with the failure to advise a noncitizen of his rights in a language he could understand.

Some noncitizens are deported even though they would have been eligible for relief from removal because they were not made aware of their eligibility for relief. But noncitizens who attack prior deportation orders in a subsequent proceeding on this basis seldom succeed. Collateral attacks under these circumstances have proven to be nearly impossible because the majority of circuit courts do not recognize a due process violation, as will be discussed in Part III. Thus, noncitizens cannot establish that the deportation order was “fundamentally unfair.”

**III. Circuit Split: Due Process & Discretionary Relief from Removal**

The federal circuit courts are split over whether noncitizens in removal proceedings have a due process right to be made aware of discretionary relief from removal. The majority of circuit courts have held that there is no

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46 *Id.*
47 *Id.* at 837.
48 See *United States v. Reyes-Bonilla*, 671 F.3d 1036, 1052 (9th Cir. 2012) (holding that although the noncitizen’s due process rights were violated in his prior removal proceedings, he could not demonstrate actual prejudice resulting from the violations, thus his prior removal order was not fundamentally unfair).
49 See Brent S. Wible, *The Strange Afterlife of Section 212(C) Relief: Collateral Attacks on Deportation Orders in Prosecutions for Illegal Reentry After St. Cyr*, 19 GEO. IMMIGR. L.J. 455, 465–66 (2005) (“[T]he majority of circuits, while allowing collateral attacks in section 1326 prosecutions... find that no due process violation exists in a deportation proceeding if the IJ erroneously failed to consider an alien’s eligibility for discretionary relief.”).
50 See supra Part I. Although the form of discretionary relief at issue in most of the circuit cases, Section 212(c) relief, is different from the discretionary relief at issue in *Estrada*, Section 212(h) relief, the distinction is irrelevant for the purposes of evaluating procedural due process rights because both forms of relief are available only to LPRs, or those applying to be LPRs. See *IMMIGRANT LEGAL RES. CTR., IMMIGRATION RELIEF TOOLKIT FOR CRIMINAL DEFENDERS* 11, 23 (July 2018), https://www.ilrc.org/sites/default/files/resources/relief_toolkit-20180827.pdf [https://perma.cc/G7M6-CYSY]. In contrast, if one of the forms of relief at issue was not available to LPRs, the procedural due process
protectable liberty or property interest in being informed of discretionary relief, because it is discretionary.\textsuperscript{51} Thus, the majority of circuits have rejected that due process violations occur when IJs or counsel fail to inform noncitizens of their eligibility for discretionary relief.\textsuperscript{52} A minority of circuit courts, however, have recognized a due process right to be made aware of discretionary relief from removal.\textsuperscript{53} The right is recognized because these courts have found a protectable liberty or property interest in being made aware of the relief—they distinguish between a right to be granted relief, which is wholly discretionary, from a right to be informed of the relief, which is not.\textsuperscript{54} The circuit courts have long been divided on this issue, but with the Sixth Circuit’s recent holding in United States v. Estrada,\textsuperscript{55} the issue has received renewed attention.\textsuperscript{56} Notably, none of the circuit court decisions distinguish between LPRs and other noncitizens in terms of due process protections.\textsuperscript{57}

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\textsuperscript{51} See infra Part III.

\textsuperscript{52} See United States v. Santiago-Ochoa, 447 F.3d 1015, 1020 (7th Cir. 2006); Bonhometre v. Gonzales, 414 F.3d 442, 448 (3d Cir. 2005); United States v. Aguirre-Tello, 353 F.3d 1199, 1205 (10th Cir. 2004); United States v. Lopez-Ortiz, 313 F.3d 225, 231 (5th Cir. 2002); Smith v. Ashcroft, 295 F.3d 425, 430 (4th Cir. 2002); Oguejiofor v. Att’y Gen., 277 F.3d 1305, 1309 (11th Cir. 2002); Escudero-Corona v. INS, 244 F.3d 608, 615 (8th Cir. 2001).

\textsuperscript{53} See United States v. Copeland, 376 F.3d 61, 71 (2d Cir. 2004); United States v. Lopez-Velasquez, 629 F.3d 894, 897 (9th Cir. 2010).

\textsuperscript{54} See, e.g., Copeland, 376 F.3d at 71.

\textsuperscript{55} United States v. Estrada, 876 F.3d 885 (6th Cir. 2017).


\textsuperscript{57} See Estrada, 876 F.3d 885 (failing to distinguish between LPRs and other noncitizens in terms of procedural due process rights in removal proceedings); Lopez-Velasquez, 629 F.3d 894 (same); Santiago-Ochoa, 447 F.3d 1015 (same); Bonhometre, 414 F.3d 442 (same); Copeland, 376 F.3d 61 (same); Aguirre-Tello, 353 F.3d 1199 (same); Lopez-Ortiz, 313 F.3d
A. The Sixth Circuit Holds There Is No Due Process Right to Be Made Aware of Discretionary Relief: United States v. Estrada

When Mr. Estrada was deported to Mexico, he left behind his wife, four children, and a life he had built for nearly twenty years in the United States.\(^58\)

As a result of his deportation and the criminal conviction it was based on, he was barred from lawfully re-entering the United States for a period of twenty years.\(^59\) When he re-entered unlawfully, he faced charges for illegal re-entry, but he presented a reasonable defense—that the failure of his attorney and the IJ to inform him that he had been eligible for Section 212(h) discretionary relief rendered his prior deportation order invalid.\(^60\) Mr. Estrada argued that the prior deportation order was “fundamentally unfair” because he had been deprived of due process.\(^61\)

The Sixth Circuit rejected Mr. Estrada’s claim that his deportation order had been fundamentally unfair.\(^62\) The court held that no due process violation could be established because there is no cognizable liberty or property interest in being made aware of discretionary relief, because the relief itself is discretionary.\(^63\)

Having concluded there was no liberty or property interest, the court did not evaluate whether Mr. Estrada was denied any process he should have been due.\(^64\) As a result, the failure of counsel or the IJ to inform Mr. Estrada during his removal hearing that he was eligible for relief was condoned as an acceptable proceeding resulting in a valid deportation order.\(^65\) Mr. Estrada was not able to meet the burden of proof required to collaterally attack his prior deportation order; he was left defenseless in his federal prosecution for unlawful re-entry.\(^66\)

The Sixth Circuit’s holding reflects a refusal to distinguish between a grant of relief, which is discretionary, and the right to be made aware of eligibility for

\(^{58}\) Petition for Writ of Certiorari, \textit{supra} note 6, at 1.

\(^{59}\) INA § 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A)(ii)(II) (2012) (outlining that a noncitizen who was removed on the basis of an aggravated felony conviction is barred from seeking admission to the United States for twenty years).

\(^{60}\) Brief for Appellant, \textit{supra} note 8, at 10.

\(^{61}\) In order to attack his prior deportation order, Mr. Estrada needed to satisfy the three requirements of 8 U.S.C. § 1326(d), but the bulk of the problem is in demonstrating that the prior order was fundamentally unfair. \textit{See supra} note 44 and accompanying text.

\(^{62}\) \textit{Estrada}, 876 F.3d at 887 (“To prove the fundamental unfairness of an underlying deportation order, a defendant must show both a due process violation emanating from defects in the underlying deportation proceeding and resulting prejudice.”).

\(^{63}\) \textit{Id.} at 888.

\(^{64}\) Petition for Writ of Certiorari, \textit{supra} note 6, at 8.

\(^{65}\) \textit{See id.}

\(^{66}\) \textit{Estrada}, 876 F.3d at 886.
relief. To contextualize this issue, Mr. Estrada argued he would have qualified in 2009 for a form of discretionary relief that authorizes a waiver of inadmissibility based on criminal convictions, if certain requirements are met. One such requirement is a showing of extreme hardship to a parent, spouse, or child, who is either a U.S. citizen or LPR. To receive Section 212(h) relief, a noncitizen must be statutorily eligible, but that alone is not enough. The IJ must also determine that the noncitizen is deserving of a grant of relief. These two elements are separate inquiries—meeting threshold criteria, on the one hand, and meriting a favorable grant of discretion within the opinion of the IJ, on the other. In contrast to the Sixth Circuit, a minority of circuit courts have found the distinction to be relevant for recognizing a due process right.

B. Minority Circuits Recognize the Right to Be Made Aware of Discretionary Relief from Removal

The minority circuit courts have recognized a cognizable liberty or property interest in being made aware of discretionary relief from removal, which the

67 The Second Circuit, in contrast, distinguished between a grant of discretionary relief and an interest in being made aware of discretionary relief from removal. United States v. Copeland, 376 F.3d 61, 71–72 (2d Cir. 2004).
68 INA § 212(h), 8 U.S.C. § 1182(h) (2012). There was some dispute between the parties as to whether Mr. Estrada would have qualified for Section 212(h) relief at the time of his deportation order. Brief for Appellant, supra note 8, at 17–18; cf. Brief for Appellee at 14–15, United States v. Estrada, 876 F.3d 885 (6th Cir. 2017) (No. 17-5081). Prior to 2008, the consensus among courts was that noncitizens with aggravated felony convictions were generally not eligible for Section 212(h) relief. Brief for Appellant, supra note 8, at 18. However, the Fifth Circuit ruled in Martinez v. Mukasey, 519 F.3d 532, 546 (5th Cir. 2008), that for noncitizens “who adjust post-entry to LPR status, [Section] 212(h)’s plain language demonstrates unambiguously Congress’ intent not to bar them from seeking a waiver of inadmissibility.” This ruling came out about one year prior to Mr. Estrada’s deportation hearing. Thus, Mr. Estrada was eligible for Section 212(h) relief under relevant federal precedent because he had adjusted to LPR status in the United States, and his deportation hearing took place in a Louisiana Immigration Court. Brief for Appellant, supra note 8, at 17–19; see also U.S. DEP’T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: AN AGENCY GUIDE 1 (Dec. 2017), https://www.justice.gov/eoir/page/file/eoir_an_agency_guide/download [https://perma.cc/6KM3-3B63] (“The federal circuit courts may . . . issue precedent decisions on immigration law issues that are then controlling in that particular federal circuit.”).
70 A noncitizen is statutorily eligible for Section 212 relief if they can prove that a parent, spouse, son, or daughter, who is a U.S. citizen or an LPR, would suffer extreme hardship if the waiver were denied. INA § 212(h)(1)(B), 8 U.S.C. § 1182(h)(1)(B).
72 See supra note 31 and accompanying text (discussing the two separate components for most forms of relief in the INA).
73 See infra Part III.B. The Supreme Court has also explicitly distinguished between eligibility for relief and favorable grant of such relief. See INS v. St. Cyr, 533 U.S. 289, 307–08 (2001).
majority circuit courts have refused to recognize. In *United States v. Copeland*, the Second Circuit explained that the majority circuit courts have refused to recognize the existence of a cognizable interest in this context based on reasoning used in Section 1983 cases concerning discretionary actions taken by state actors. Generally these cases hold that if the official action at issue is discretionary under state law, there is no property right that requires procedural due process protection. But, as the Second Circuit noted, this framework is not pertinent in the removal context because, although the granting of relief is discretionary, the right to be considered for the relief is not.

The Ninth Circuit, unlike the Second Circuit, has not explicitly stated that there is a cognizable liberty or property interest at stake with respect to noncitizens’ removal proceedings. Nevertheless, the Ninth Circuit has held that IJs have a duty to inform noncitizens of discretionary relief from removal when there is a reasonable possibility that they are eligible for the relief. And, the court has also held that IJs violate noncitizens’ due process rights when they provide incorrect information about the noncitizens’ right to seek discretionary relief or appeal their deportation order when they were in fact eligible for discretionary relief. Thus, the Ninth Circuit has implicitly recognized the existence of a cognizable liberty or property interest, even when the relief at issue is discretionary.

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74 See, e.g., United States v. Copeland, 376 F.3d 61, 71–72 (2d Cir. 2004); cf. United States v. Estrada, 876 F.3d 885, 888 (6th Cir. 2017) (quoting Appiah v. INS, 202 F.3d 704, 709 (4th Cir. 2000)) (holding that when “suspension of deportation is discretionary, it does not create a protectable liberty or property interest”).

75 Copeland, 376 F.3d at 71 (referring to cases brought under 42 U.S.C. § 1983 against government officials).

76 In Section 1983 cases, courts look at whether government benefits or employment are discretionary to determine whether there is a due process right to a hearing before the benefits or employment can be terminated. Id. at 72. If the official action at issue is discretionary, according to state law, “one’s interest in a favorable decision does not rise to the level of a property right entitled to procedural due process protection.” Id. (citation omitted).

77 Id. (citing 8 C.F.R. § 242.17(a) and 8 C.F.R. § 212.3(e)(1)) (“The decisions holding that a failure to inform an alien about Section 212(c) relief cannot be a fundamental error . . . incorrectly assume that, because the grant of Section 212(c) relief is itself discretionary, the denial of a Section 212(c) hearing cannot be a fundamental procedural error.”).

78 See, e.g., United States v. Lopez-Velasquez, 629 F.3d 894, 901 (9th Cir. 2010) (failing to mention whether there is a liberty or property interest); United States v. Ubaldo-Figueroa, 364 F.3d 1042 (9th Cir. 2004) (same).

79 Lopez-Velasquez, 629 F.3d at 895.

80 Ubaldo-Figueroa, 364 F.3d at 1048 (holding that the noncitizen’s due process rights were violated because the IJ did not inform him that he had a right to appeal his removal order).

81 See infra notes 92–93 and accompanying text (discussing that in procedural due process jurisprudence, the threshold question is whether there is a liberty or property interest under the Due Process Clause, and only if such an interest exists will courts consider what process is due).
Having found a cognizable liberty or property interest that gives rise to a due process right, both the Second and Ninth Circuit courts have held that this right is violated when the IJ fails to make a noncitizen aware of their eligibility for discretionary relief from removal. In *Copeland*, the Second Circuit held that the IJ’s failure to inform a noncitizen of his right to seek discretionary Section 212(c) relief was a procedural error in violation of the noncitizen’s due process rights. The violation would render the deportation order fundamentally unfair so long as the noncitizen was prejudiced by the IJ’s failure. The court recognized that:

Given that IJs have a duty to develop the administrative record, and that many aliens are un counselled, our removal system relies on IJs to explain the law accurately to *pro se* aliens. Otherwise, such aliens would have no way of knowing what information was relevant to their cases and would be practically foreclosed from making a case against removal.

In *United States v. Lopez-Velasquez*, the Ninth Circuit concluded that although the noncitizen’s due process rights were not violated in that case, IJs generally have a duty to inform noncitizens of relief if there is a reasonable possibility that the noncitizen is eligible for relief at the time of the hearing. Instead, on collateral attack, Mr. Lopez-Velasquez argued that had he been made aware of the relief during his removal proceedings, he could have made a colorable claim that he had sufficient residence in the United States to qualify for the relief. Under the circumstances, the court found that the IJ had no duty to inform Mr. Lopez-Velasquez of relief for which he was not eligible. Nevertheless, the court was explicit in stating that, “where the record demonstrates, or at least

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82 *Lopez-Velasquez*, 629 F.3d at 897; *United States v. Copeland*, 376 F.3d 61, 71 (2d Cir. 2004) (holding that failure to advise potential deportee of a right to seek Section 212(c) relief can, if prejudicial, be fundamentally unfair); *United States v. Sosa*, 387 F.3d 131 (2d Cir. 2004) (same); *Ubaldo-Figueroa*, 364 F.3d at 1042 (same).
83 *Copeland*, 376 F.3d at 75.
84 See id. at 62 (remanding the case for further findings on whether the noncitizen had been prejudiced).
85 *Id.* at 71.
86 *Lopez-Velasquez*, 629 F.3d at 895.
87 *See id.* at 897.
88 *Id.* Under the law at the time of Mr. Lopez-Velasquez’s deportation hearing, Section 212(c) had a seven-year domicile requirement, defined as beginning when the noncitizen was granted LPR status. INA § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996). Mr. Lopez-Velasquez had only been an LPR for three years at the time of his hearing, however he contended he would have had a colorable claim based on the timing of an earlier application for status he filed. *Lopez-Velasquez*, 629 F.3d at 896. Nevertheless, he still would not have satisfied the domicile requirement. *Id.*
89 *Id.* at 899.
implies, a factual basis for relief, the IJ’s duty is triggered.\textsuperscript{90} But, when there is no factual basis for relief in the record, the Ninth Circuit has held that there is no due process violation if the IJ does not notify the noncitizen of a right to apply for relief.\textsuperscript{91}

The majority of circuits reject that the failure of an IJ or counsel to inform a noncitizen of their eligibility for discretionary relief from removal constitutes a due process violation. A minority of circuit courts disagree and have concluded that such a failure may violate a noncitizen’s due process rights. The courts on both sides of the split, however, have not adequately addressed the threshold question in procedural due process inquiries—whether there is a cognizable liberty or property interest. Additionally, none of the circuit courts have attempted to draw distinctions between LPRs and other noncitizens in answering this threshold question. Part IV will engage in this analysis and then will balance the relevant interests to determine what process is due, assuming the existence of a cognizable interest.

\textbf{IV. RECOGNIZING A DUE PROCESS RIGHT ON BALANCE: \textit{MATHEWS V. ELDREDGE} AND THE RIGHT TO BE MADE AWARE OF DISCRETIONARY RELIEF}

Procedural due process inquiries begin with the question of whether a claimant possesses a “liberty” or “property” interest under the Fifth Amendment’s Due Process Clause.\textsuperscript{92} The next step is to determine what process is due.\textsuperscript{93} In \textit{Mathews v. Eldridge}, the Supreme Court set forth a balancing test to determine whether administrative adjudications conform to procedural due process protections.\textsuperscript{94} In order to determine what process is due, the Court called for a balancing of private interests, the probable value of additional or substitute safeguards, and the government’s interests, including the burden of imposing the procedural requirement.\textsuperscript{95}

LPRs in removal proceedings, like Mr. Estrada, may never be informed that they are eligible for discretionary relief from removal. This presents a
procedural due process issue that must be addressed. First, Part IV.A argues that LPRs have a cognizable liberty interest at stake because LPRs rely upon the permanency of their statuses, which are reinforced through social and legal expectations. Next, Part IV.B applies the Mathews v. Eldridge test to argue that LPRs in removal proceedings, on balance, are due the process of being made aware of their eligibility for relief. Lastly, Part IV.C argues that the due process right to be made aware of discretionary relief translates to a duty of IJs to personally inform noncitizens of their eligibility for relief. Although one approach would be to recognize this duty as belonging to the attorney-client relationship, this Note argues that in order to fully address the problem, the duty can only properly attach to IJs.

A. Lawful Permanent Residents Have a Cognizable Liberty Interest

Although the circuit courts have not distinguished between LPRs and other noncitizens in deciding whether a cognizable liberty interest exists to be made aware of discretionary relief, such a distinction is significant. To draw this distinction, LPR status must first be defined. In statutory terms, LPRs “have been lawfully accorded the privilege of residing permanently in the United States as . . . immigrant[s] in accordance with the immigration laws, such status not having [been] changed.”96 To obtain this status, a noncitizen must fall within a class of admission designated in the INA—the largest of which is based on a close familial connection to a U.S. citizen or LPR.97 Once LPR status is attained, it confers responsibilities akin to citizenship—the “ability to reside and work in the United States, the responsibility to pay taxes, and the duty to register for selective service under the Military Selective Service Act”—and is, in fact, the status immediately preceding U.S. citizenship.98

Based on this special status, scholars have argued that LPRs have a liberty interest under the Due Process Clause that noncitizens without permanent status do not.99 This argument is based on an understanding of the permanency of LPR

99 See Johnson, supra note 5, at 2397, 2414 (arguing that ordinary due process jurisprudence favors recognizing guaranteed counsel for LPRs because they have the strongest legal entitlement to remain in the United States of all noncitizens in removal
status that the statute itself does not bear out.100 Instead, the argument follows from a social and expectation-based understanding that, as LPRs establish ties that go with permanent residence, “they shift their expectations about where home is,” and “chart out life plans in reliance on enduring rights to remain.”101 But it is not merely a matter of social expectation; this understanding is also based on consistent governmental practices setting LPRs apart from other noncitizens.102 For example, only LPRs are eligible to petition to naturalize and become citizens of the United States.103 Immigration law also favors LPRs in seeking relief from removal.104

The argument follows that the social expectations and government practices treating LPRs as permanent status holders, distinct from other noncitizens, essentially create a reliance interest for LPRs.105 Although the INA establishes offenses that make LPRs removable notwithstanding their permanent status,106 considering this status more fully, a liberty interest based on reliance is cognizable.

The Second Circuit’s analysis in Copeland, without more explanation on why noncitizens have a liberty interest in being informed of their eligibility for discretionary relief from removal, is left wanting.107 Additionally, the majority

proceedings); David A. Martin, Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis, in THE SUPREME COURT REVIEW 47, 49, 105 (Dennis S. Hutchinson et al. eds., 2001) (arguing that LPRs should enjoy due process constitutional protections on par with citizens because of reliance on both legal and social determinations).
100 The INA sets forth express conditions that will terminate permanent residence and render a noncitizen deportable, criminal convictions among them. INA § 237(a), 8 U.S.C. § 1227(a) (2012).
101 Martin, supra note 99, at 102, 104.
102 See id. at 104 (noting that the “permanent” label is placed on official documents and on the very card issued to LPRs by the government).
103 Johnson, supra note 5, at 2405 (“U.S. immigration laws in many respects favor lawful permanent residents over other categories of noncitizens.”).
105 Although arising under different circumstances, not based in statutory authority, the recent lawsuits concerning Deferred Action for Childhood Arrivals (DACA) have considered arguments that deferred action created a reliance interest for beneficiaries. See NAACP v. Trump, 298 F. Supp. 3d 209, 240 (D.D.C. 2018) (stating that the creation of DACA engendered “the reliance of hundreds of thousands of beneficiaries, many of whom had structured their education, employment, and other life activities on the assumption that they would be able to renew their DACA benefits.”).
106 See Koh, supra note 20, at 1815 (discussing that LPRs are generally subject to deportability grounds under Section 237, but may face removal under the Section 212 grounds for inadmissibility “if, for instance, they traveled abroad and sought re-admission at the border”).
107 See supra Part III.B (discussing the Second Circuit’s holding in Copeland that noncitizens have a liberty or property interest under the Due Process Clause).
of circuits deny that such an interest exists without even discussing whether LPRs in particular may have such an interest. But this interest is discernable if lawful permanent residency is understood more fully than its statutory definition. Finding such an interest is, of course, only the first step. Whether proceedings in which the IJ does not make an LPR aware of their eligibility for discretionary relief from removal meet adequate due process must be answered through the Mathews v. Eldridge framework.

**B. Procedural Due Process Balancing Test**

In Mathews v. Eldridge, the Supreme Court set forth a balancing test that is now the dominant approach through which courts evaluate whether federal and state administrative adjudications comport with the Fifth and Fourteenth Amendments’ Due Process Clause guarantees. This balancing test has previously been employed to evaluate due process claims in the immigration context. To determine what process is due, the Mathews test involves an evaluation and balancing of three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function

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108 See supra note 57 and accompanying text.

109 Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Ramanujan Nadadur, Note, Beyond “Crimigration” and the Civil-Criminal Dichotomy—Applying Mathews v. Eldridge in the Immigration Context, 16 YALE HUM. RTS. & DEV. L.J. 141, 148 (2013). Although Mathews v. Eldridge traditionally provides the framework for analyzing due process claims in the context of administrative adjudications, it has also been applied to adjudicate criminal procedural rights. See, e.g., United States v. Ruiz, 536 U.S. 622, 631, 633 (2002) (using Mathews to evaluate whether the state was constitutionally required to disclose material impeachment evidence prior to a plea agreement with a criminal defendant). The Supreme Court has also applied the balancing test in civil proceedings. See, e.g., United States v. James Daniel Good Real Prop., 510 U.S. 43, 53 (1993) (applying the test to a civil case involving the state’s seizure of property under a forfeiture statute). For a further analysis of instances in which courts have applied Mathews, see Nadadur, supra note 109, at 152–53 (surveying other categories of cases where Mathews has been applied).

110 In Landon v. Plasencia, the Supreme Court held that returning LPRs—those who have left the United States and then seek re-admission—have due process rights available to them in exclusion proceedings. 459 U.S. 21, 34–36 (1982). Historically, immigration proceedings consisted of two distinct forms: exclusion—for arriving aliens, with fewer procedural protections available—and, deportation proceedings, which afforded greater procedural protections. Id. at 25. Thus, recognizing procedural protections in exclusion proceedings demonstrated an expansion of due process protections in the immigration context. See, e.g., Johnson, supra note 5, at 2404 (noting that the Supreme Court applied the Mathews v. Eldridge test in a “pathbreaking decision” in Landon v. Plasencia); Motomura, supra note 30, at 1652 (discussing Plasencia as “mark[ing] the arrival of the due process revolution in immigration law”).
involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.\textsuperscript{111}

This section will consider each factor in turn and ultimately argue that on balance, LPRs are due the process of being informed of their eligibility for discretionary relief.

1. \textit{LPRs Have an Individual Interest in Being Informed of Their Eligibility for Relief}

Generally, noncitizens in removal proceedings have considerable individual interests in being informed of their eligibility for discretionary relief because this information directly impacts their ability to remain in the United States. The interest can be cast in different ways—very narrowly, as a right to remain, or more generally, as an interest born out of family ties, property, and the life the noncitizen established in the United States.\textsuperscript{112} Though the relative strength of the individual interest may vary for each noncitizen in removal,\textsuperscript{113} some base level of interest undoubtedly exists given what is at stake—removal from a country where someone seeks to remain.\textsuperscript{114}

In \textit{Landon v. Plasencia}, a groundbreaking decision recognizing due process protections for noncitizens, the Supreme Court identified individual interests for LPRs that include family ties, property, and a life created in the United States.\textsuperscript{115} The Court recognized that Mrs. Plasencia’s interest in staying, living, working, and rejoining her immediate family in the United States were important and high-ranking individual interests.\textsuperscript{116}

Another way of conceptualizing what is at stake, which the Supreme Court has done on several occasions, is the right to be free from banishment.\textsuperscript{117}

\textsuperscript{111} \textit{Mathews}, 424 U.S. at 335.
\textsuperscript{112} Nadadur, supra note 109, at 153 (arguing that the strength of the procedural right may depend on how the individual interest is cast, with the more general conception favoring stronger procedural rights).
\textsuperscript{113} Other lines could be drawn between groups of noncitizens’ varied interests in seeking discretionary relief. For example, certain noncitizens are subject to expedited removal. Aleinikoff et al., supra note 13, at 947 (explaining that arriving aliens and those apprehended within 100 miles of the border within fourteen days of entry are subject to expedited removal proceedings). In theory, noncitizens who are subject to expedited removal have a lesser interest in remaining in the United States due to their short presence in the United States.
\textsuperscript{114} Bridges v. Wixon, 326 U.S. 135, 154 (1945) (“Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom.”).
\textsuperscript{115} Plasencia, 459 U.S. at 34.
\textsuperscript{116} Id. (categorizing Plasencia’s individual interest as a “weighty one”).
\textsuperscript{117} The Supreme Court has recognized that deportation can be “the equivalent of banishment or exile.” Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948); see also INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) (“Deportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject
Though not always the case, many noncitizens who are removed are forced to start over in a country where they have no family, may not speak the language, and may face serious persecution or even death. Understanding the individual interests to be such, the stakes are high, but they are especially “weighty” for LPRs, who have permanent status that they retain indefinitely, unless they commit a removable offense or naturalize.

The first factor of the Mathews test requires a consideration of the private interest that will be affected by the official action. The individual interests in being made aware of eligibility for discretionary relief from removal potentially could take many forms, including the right to be reunited with family or be free from banishment. But, however the individual interests are cast, they are undoubtedly weighty.

2. There Is a High Risk of an Erroneous Deprivation of Individual Interests

The second Mathews v. Eldridge factor that demands analysis in this context is whether the absence of the right to be made aware of discretionary relief will generally, instead of infrequently, affect the outcome of removal proceedings. Without being made aware of eligibility for discretionary relief from removal, there is a serious risk that noncitizens will be erroneously deprived of the legal right to be considered for any relief from removal in deportation proceedings for three reasons: the well-recognized complexity of immigration law, the widespread lack of counsel in removal proceedings, and to death or persecution if forced to return to his or her home country.

Deportation, even when no fear of persecution is present, is recognized as a “particularly severe penalty.” Alina Das, The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law, 86 N.Y.U. L. Rev. 1669, 1671–73 (2011) (summarizing case law on the subject).


See Johnson, supra note 5, at 2405. Family and/or employment ties are likely to be pertinent for LPRs because familial and employment relationships are frequently the basis on which LPRs obtain that status. See supra note 40 and accompanying text.


Id.


and the fact that nearly all relief from removal is discretionary. Additionally, substitute procedural safeguards are inadequate.

Immigration law is notoriously complicated. The INA has been said to be “second only to the Internal Revenue Code in complexity.” Given the complexity, having an attorney to navigate and advise in the process is crucial, yet most noncitizens face removal proceedings without the assistance of counsel. Despite frequent and numerous calls for government-appointed counsel in removal proceedings, such a right remains elusive. Because most noncitizens are unrepresented in removal proceedings, IJs’ responsibilities to consider noncitizens’ eligibility for relief from removal is ever more important.

Additionally, nearly all forms of relief from removal are discretionary. Effectively, if there is no right to be informed of discretionary relief, there is no right to be informed of relief at all. Therefore, not recognizing a right to be made aware of discretionary relief from removal means there is a serious risk that noncitizens will be erroneously deprived of their potential right to remain—they have no other hope for relief.

The second factor in the Mathews test also requires consideration of the probable value, if any, of substitute procedural safeguards. An alternative procedural safeguard—instead of requiring IJs to inform noncitizens of their eligibility for relief—would be to provide noncitizens with written materials

37% of non-detained noncitizens in removal proceedings have counsel, and that only 14% of detained noncitizens have counsel).

124 See, e.g., INA § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A) (2012) (asylum); INA § 212(h), 8 U.S.C. § 1182(h) (2012) (waiver of admissibility); INA § 240A(a), 8 U.S.C. § 1229b(a) (2012) (cancellation of removal). Of course, the right to be made aware of relief is distinct from actually being granted discretionary relief, and the Supreme Court has explicitly separated these notions. See, e.g., INS v. St. Cyr, 533 U.S. 289, 307–08 (2001) (“Traditionally, courts recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand.”). Still, knowing about the potential for relief is surely the first step on the path to a grant of relief.

125 Castro-O’Ryan v. U.S. Dep’t of Immigration & Naturalization, 847 F.2d 1307, 1312 (9th Cir. 1987) (internal citations omitted); see also Padilla v. Kentucky, 559 U.S. 356, 369 (2010) (“Immigration law can be complex, and it is a legal specialty of its own.”).

126 See, e.g., Johnson, supra note 5, at 2403, 2407. The reality remains that most noncitizens face immigration court alone, confused, and vulnerable.

127 See id. at 2401. There is a great deal of scholarship arguing for government-provided counsel in removal proceedings; nevertheless, no change has been made, with the exception of appointed counsel for mentally incompetent immigrant detainees. See Press Release, U.S. Dep’t of Justice, Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions (Apr. 22, 2013), https://www.justice.gov/eoir/pr/department-justice-and-department-homeland-security-announce-safeguards-unrepresented [https://perma.cc/N8VZ-24A6].

128 See supra note 25 and accompanying text.

outlining the forms of relief and statutory eligibility requirements. This approach would relieve IJs of the duty to inform each noncitizen before them of their statutory eligibility for relief, but it would be an inadequate safeguard. As discussed above, immigration law is especially complex, and written notification of statutory requirements would be insufficient to inform noncitizens of their eligibility for relief. Additionally, written notice would be inadequate in light of the recognition that noncitizens must be personally informed of the opportunity to avoid deportation in criminal proceedings. Of course, immigration proceedings are not subject to the same standards as criminal proceedings, but the principle is the same—for information about avoiding deportation to be of any value to noncitizens, they must be personally informed during their proceedings.

Without being made aware of their eligibility for discretionary relief from removal, there is a serious risk that noncitizens who are statutorily eligible for a form of discretionary relief will be deprived of their right to be considered for relief from removal. The erroneous deprivation of their rights is likely due to

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130 For example, noncitizens in removal proceedings are issued a notice identifying free or low-cost legal service providers in their area. See Exec. Office of Immigration Review, If You Are in Removal Proceedings, U.S. Dep’t Just. (July 12, 2018), https://www.justice.gov/eoir/pro-bono-legal-service-providers-if-in-removal-proceedings [https://perma.cc/Q9XX-DP82]. Another possible substitute safeguard would be to place the duty on counsel to inform noncitizens of their eligibility for relief, but that too would be inadequate, as discussed in infra Part IV.C.

131 See supra notes 124–25 and accompanying text.

132 In 2010, the Supreme Court held in Padilla v. Kentucky, 559 U.S. 356, 364 (2010), that noncitizen defendants in criminal proceedings must be informed by defense counsel of possible immigration consequences before entering a guilty plea. The obligation to personally inform noncitizen defendants about immigration consequences was later applied to judges as well. See Fed. R. Crim. P. 11(b)(1)(O) (2014) (requiring that in criminal proceedings, before the court accepts a guilty plea, the court must address the defendant and personally inform him “that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future”). Many states also have statutes requiring judges to advise noncitizen defendants of the potential immigration consequences of a criminal conviction. See Nikki Reisch & Sara Rosell, Immigrant Def. Project & N.Y.U Sch. of Law, Judicial Obligations After Padilla v. Kentucky 12 (Oct. 2011), http://www.immigrantdefenseproject.org/wp-content/uploads/2011/05/postpadillaFINALnew.pdf [https://perma.cc/4E6Y-9GAC].

133 See supra note 29 and accompanying text.

134 The Supreme Court recently ruled on a related issue concerning the notice that initiates removal proceedings. Pereira v. Sessions, 138 S. Ct. 2105, 2111 (2018). At issue in Pereira was whether a noncitizen served with a document labeled “notice to appear,” but which fails to include a time or place of the removal proceedings, was adequate notice. Id. The Court held that such a notice obviously does not adequately inform a noncitizen of the proceedings, as it is necessary to constitute a “notice to appear” under 8 U.S.C. 1229(a). Id. Although Justice Sotomayor concluded that the issue could be resolved on statutory interpretation alone, she also noted that common sense led unambiguously to the conclusion that a “notice to appear,” without a time or place of removal proceedings, was no notice at
the complexity of immigration law, that most noncitizens do not have counsel to assist them in this process, and because nearly all forms of relief from removal are categorized as “discretionary.” As a result, LPRs have no hope of relief without at least being made aware that they are eligible to apply for relief. Additionally, substitute procedural safeguards, such as issuing noncitizens written notice, are inadequate.

3. The Government’s Interest in Accurate Adjudications

The third factor in the Mathews v. Eldridge test is a consideration of the government’s interests, including fiscal and administrative burdens that the procedural requirements would entail.\textsuperscript{135} In Landon v. Plasencia, the government’s interest in controlling immigration matters was identified as “a sovereign prerogative, largely within the control of the Executive and the Legislature.”\textsuperscript{136} The role of the judiciary was identified as limited to “determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy.”\textsuperscript{137} Thus, consideration of both the legislative prerogative and judicial control over discretionary relief are relevant.

The legislature’s imperative, as it relates to this issue, is the creation of forms of discretionary relief enumerated in the INA. Congress has passed legislation providing for various forms of relief from removal for LPRs who, although they are otherwise removable, warrant consideration to remain in the United States.\textsuperscript{138} Noncitizens who are statutorily eligible for relief therefore are deserving of consideration for relief per legislative prerogative, even though they may ultimately not be granted relief.

The government’s interest, more generally, is in accurate adjudications.\textsuperscript{139} To ensure accurate adjudications, the INA vests great power in IJs, including the responsibility of considering noncitizens’ eligibility for relief from removal.\textsuperscript{140} Making noncitizens aware of discretionary relief from removal for

\textsuperscript{135} Mathews v. Eldridge, 424 U.S. 319, 335 (1976).


\textsuperscript{137} Id. at 34–35.

\textsuperscript{138} Several forms of discretionary relief are based on hardship to U.S. citizen or LPR relatives in the United States. See, e.g., INA § 240A(b), 8 U.S.C. § 1229b(b) (2012). Additionally, statutory eligibility for discretionary relief sometimes hinges on length of residence in the United States. For example, cancellation of removal requires seven years of residence for LPRs. INA § 240A(a)(2), 8 U.S.C. § 1229b(a)(2). Creating length of residence requirements signals Congress’s intent that those who have established a life in the United States are worthy of consideration that they may remain.

\textsuperscript{139} Nadadur, \textit{supra} note 109, at 166.

\textsuperscript{140} 8 C.F.R. § 1240.11(a)(2) (2012).
which they are statutorily eligible would seem to follow from a responsibility to consider the noncitizen’s eligibility. Nevertheless, the government’s interest in efficient administration of cases may cut against such a conclusion. IJs face enormous caseloads and the argument could certainly be made that identifying additional procedural safeguards with which they must comply would unacceptably increase the IJs’ burden. However, while this places a burden on already overburdened IJs, it is a burden clearly contemplated by the statutory framework that vests IJs with great responsibility over discretionary relief.

Though recognizing a due process right here may impact efficiency, no additional costs to the government are immediately apparent. Making noncitizens aware of their eligibility for relief from removal would merely require the IJ to personally inform the noncitizen of their eligibility for relief during a proceeding that is already underway.

The government’s interest in removal proceedings includes ensuring that adjudications are accurate. It is in the government’s interest that LPRs who are statutorily eligible for relief—thus fitting within Congress’s priorities for who merits relief—are considered for such relief. Although ensuring procedural safeguards will always come with administrative efficiency concerns, here, where the safeguard involves no additional proceedings nor any significant additional expense to the government, this concern should be minimal.

Analyzing this issue within the framework of the Mathews v. Eldridge balancing test, then, shows that there is, on balance, a due process violation if

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142 IJs must develop the record, consider noncitizens eligibility for relief, and decide whether they merit favorable grants of relief. See infra notes 145–47 and accompanying text. Additionally, some regulations impose additional obligations on IJs. See Moran-Enriquez v. INS, 884 F.2d 420, 423 (9th Cir. 1989) (“We read the ‘apparent eligibility’ standard of 8 C.F.R. § 242.17(a) to mean that where the record, fairly reviewed by an individual who is intimately familiar with the immigration laws—as IJs no doubt are—raises a reasonable possibility that the petitioner may be eligible for relief, the IJ must advise the alien of this possibility and give him the opportunity to develop the issue.”).

143 This procedural safeguard, unlike calls for government-appointed counsel, is not likely to invoke significant concerns for government expense. See Nadadur, supra note 109, at 165–66 (discussing that opponents of heightened safeguards in removal proceedings often cite government expense as a factor weighing against implementation of the procedure, and that appointed counsel would likely be very costly).
an LPR who is eligible for a form of discretionary relief is not made aware of their eligibility in removal proceedings. The individual interests, no matter how they are cast, are undoubtedly weighty. The likelihood of erroneous deprivation of these interests is also weighty, given the complexity of immigration law, widespread lack of counsel, and the reality that discretionary relief is essentially the only relief available. And, the government’s interest supports recognition of this due process right in that the government wants accurate adjudications. Finally, the government factors weighing against this right—primarily administrative efficiency and cost—are not especially pertinent in this instance. Thus, on balance, LPRs in removal proceedings are due the process of being made aware of discretionary relief for which they are eligible.

C. Immigration Judges, as Opposed to Counsel, Have a Duty to Make LPRs Aware of Discretionary Relief from Removal

The role of IJs is a special one, and one that is not easily comprehended from the vantage point of other judicial systems. IJs have the responsibility to develop the record, interrogate, examine, and cross-examine the noncitizen and any witnesses. Most importantly in this context, IJs consider the noncitizen’s eligibility for discretionary relief from removal. The nature of IJs’ responsibilities in removal proceedings is such that they consider the noncitizen’s eligibility for relief and make the ultimate determination of the noncitizen’s fate. This responsibility positions IJs to make noncitizens aware of their eligibility for relief or wholly deny noncitizens this information.

The argument could be made, and has been made, by Mr. Estrada and others, that counsel’s failure to advise them of their eligibility for discretionary relief was a violation of their due process rights. Unquestionably, as a matter of professional responsibility, counsel should always inform and advise clients about their potential eligibility for relief from removal. However, given the nature of immigration proceedings, counsels’ shortcomings under such

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144 IJs certainly differ from Article III judges in a variety of ways, ranging from appointments, tenure, and responsibilities. See Lawrence Baum, Judicial Specialization and the Adjudication of Immigration Cases, 59 DUKE L.J. 1501, 1526, 1542 (2010). But they also differ significantly from Administrative Law Judges both in appointments and responsibilities. See Michele Benedetto, Crisis on the Immigration Bench: An Ethical Perspective, 73 BROOK. L. REV. 467, 472–75 (2008) (discussing the Attorney General’s role in appointments of IJs and the power and control the Attorney General has over IJs).

145 INA § 240(b)(1), 8 U.S.C. § 1229a(b)(1) (2012); see also United States v. Lopez-Velasquez, 629 F.3d 894, 896, 900 (9th Cir. 2010) (discussing the role of IJs).

146 Koh, supra note 20, at 1813.

147 Benedetto, supra note 144, at 475–76.

148 Brief for Appellant, supra note 8, at 11.

149 This should be so as a matter of professional responsibility. See MODEL RULES OF PROF’L CONDUCT r. 2.1 (AM. BAR ASS’N 2018).
circumstances do not necessarily give rise to a due process violation. The issue stems from the lack of a guaranteed right to counsel in removal proceedings.\(^{150}\)

Although noncitizens in removal proceedings have the right to retain counsel for the proceedings,\(^ {151}\) there is no right to appointed counsel.\(^ {152}\) The majority of noncitizens are unrepresented in removal proceedings and thus are without counsel to make any advisement about their eligibility for relief.\(^ {153}\)

But beyond the reality that a lack of representation in effect means there is often no attorney to advise noncitizens of their eligibility for relief from removal, the absence of a right to guaranteed counsel means that a noncitizen’s ability to establish a due process violation based on ineffective assistance of counsel in the immigration context is by no means guaranteed. In the criminal context, the Sixth Amendment guarantees the right to effective assistance of counsel, and when counsel performs deficiently in a prejudicial manner, the defendant can prove a violation of their constitutional right.\(^ {154}\) But, when the Sixth Amendment right to counsel does not apply, the Supreme Court has held that counsel’s errors do not constitute ineffective assistance of counsel.\(^ {155}\)

Imagining this due process issue in the criminal context, where the Sixth Amendment applies, it seems obvious that the duty to inform would properly be one owed from counsel to client; and a failure to make a client aware of relief would properly give way to a claim of ineffective assistance of counsel.\(^ {156}\) The

\(^{150}\) See supra note 29 and accompanying text (discussing that immigration proceedings are not criminal proceedings).


\(^{152}\) See Note, A Second Chance: The Right to Effective Assistance of Counsel in Immigration Removal Proceedings, 120 Harv. L. Rev. 1544, 1548–49 (2007) (stating that because the Supreme Court has long held that immigration proceedings are not criminal proceedings, there is no right to court-appointed counsel in removal proceedings).

\(^{153}\) See supra note 123 (citing statistics on the low levels of representation in removal proceedings). The rate of representation for LPRs specifically is not available; even the most comprehensive source of immigration court data does not break down the numbers by immigration status. See Details on Deportation Proceedings in Immigration Court, TRAC IMMIGR. (Jan. 2019), https://trac.syr.edu/phptools/immigration/nta/ [https://perma.cc/AR3A-ALXX].


\(^{155}\) See, e.g., Coleman v. Thompson, 501 U.S. 722, 752–54 (1991) (holding that because there was no constitutional right to appointed counsel for an appeal of a state trial court habeas judgment, there was no constitutional basis for a claim of ineffective assistance of counsel); see also Wainwright v. Torna, 455 U.S. 586, 587–88 (1982) (holding that “[s]ince respondent had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel by his retained counsel’s failure to file the application timely”). Despite these holdings, the Board of Immigration Appeals and several federal appeals courts established conflicting precedents on whether there was a constitutional right to effective assistance of counsel in removal proceedings. ALENIKOFF ET AL., supra note 13, at 940–41. The right to effective assistance of counsel in removal proceedings remains murky. Id. at 941–42.

\(^{156}\) For example, the Supreme Court held in Padilla v. Kentucky that a criminal defendant was denied effective assistance of counsel when his counsel failed to advise him that his
same simply does not follow in immigration proceedings, in which there is no guaranteed right to effective assistance of counsel.

As a result, attributing the duty to be made aware of discretionary relief from removal to counsel would not adequately protect the due process rights of noncitizens in removal proceedings. But it would also ignore that IJs already have the responsibility to consider noncitizens’ eligibility for relief and play a critical role in guiding unrepresented noncitizens through removal proceedings.

If a due process right to be made aware of relief was recognized only to attach to counsel’s conduct, the majority of noncitizens in removal proceedings would be left without this due process protection. Beyond this recognition, though, the basic structure of removal proceedings and the statutory responsibilities vested in IJs by the INA suggest that this procedural due process right imposes a duty on IJs to inform noncitizens of their eligibility for discretionary relief from removal.

Resolution of this issue by the Supreme Court in the foreseeable future is unlikely. Unfortunately, so too is congressional action. In the meantime, the Department of Justice through the Executive Office for Immigration Review (EOIR)—home of the Immigration Courts—should clarify IJs’ responsibilities to inform deportable LPRs of their eligibility to apply for discretionary relief from removal. This can be accomplished in two ways. First, EOIR should issue a policy memorandum instructing IJs to personally inform LPRs who appear eligible for a form of discretionary relief, of their eligibility and ability to apply for relief, in removal proceedings. Second, EOIR should update the Immigration Judge Benchbook, which serves as a reference guide for IJs on how

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to conduct proceedings, to include this duty. These reforms will provide IJs with clarity as to their responsibilities to LPRs in removal proceedings.

This issue also must be addressed from the perspective of collateral attacks on prior deportation orders that lacked this procedural due process protection. Courts must recognize these orders to be “fundamentally unfair” and allow noncitizens like Mr. Estrada to challenge their prior deportation orders on this basis. Otherwise, due process violations will continue to permeate re-entry prosecutions and removal proceedings alike.

V. CONCLUSION

The number of noncitizens in deportation proceedings is at historic highs. The same is true of prosecutions for unlawful re-entry. Now more than ever, ensuring that noncitizens receive due process protections is critical. Deporting LPRs who are eligible for relief from removal without even informing them of this relief should not pass constitutional muster—such orders are fundamentally unfair. LPRs establish a permanent life in the United States and come to rely upon this status through social and legal expectations. Although LPRs who commit certain offenses are removable, they have a protectable liberty interest in remaining in the United States. Balancing private interests, likelihood of deprivation of rights without such safeguards, and the government’s interests, it is clear that LPRs in removal proceedings are due the process of being made aware of discretionary relief from removal. IJs must inform LPRs of their eligibility for discretionary relief from removal to ensure this protection.


163 See supra Part II.B.