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THE SYSTEMIC-FAILURE DOCTRINE

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INTRODUCTION

The notion of systemic failure in criminal justice is nothing new. For decades, scholars, reformers, and activists have theorized the concept, urging political and judicial focus on how criminal-justice systems might be reformed to work better for the individuals and institutions involved. Disparities at each step of the criminal process have drawn public scrutiny. Whether it is the investigatory tactics of police, the charging decisions of prosecutors, or the caseloads of public defenders, scholars and critics of the criminal-justice system have no shortage of targets. With a panoply of methodologies, ranging from the empirical to the sociological, systemic failure as a concept has also entered the public imagination following the 2020 protests surrounding the death of George Floyd in Minneapolis.[1]

Academic and popular accounts of systemic criminal-justice breakdown have fed off each other. Debates over formerly arcane legal doctrines like qualified immunity have moved from the pages of law reviews to major national newspapers,[2] and public outrage toward and social movements surrounding policing have renewed academic interest in what many might have considered to be off-

[1] Audra D. S. Burch, Amy Harmon, Sabrina Tavernise & Emily Badger, *The Death of George Floyd Reignited a Movement. What Happens Now?*, N.Y. TIMES (Apr. 20, 2021), https://www.nytimes.com/2021/04/20/us/george-floyd-protests-police-reform.html [https://perma.cc/A5HM-HCQ6].

[2] *Compare* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1800 (2018) (arguing that the Supreme Court should move away from its affinity for qualified immunity without fearing a "parade of horribles were qualified immunity eliminated"), *with* Joanna Schwartz, *The Supreme Court is Giving Lower Courts a Subtle Hint to Rein in Police Misconduct*, THE ATLANTIC (Mar. 4, 2021), https://www.theatlantic.com/ideas/archive/2021/03/the-supreme-courts-message-on-police-misconduct-is-changing/618193 [https://perma.cc/H2TB-54T9] (noting that "in the past few months, following a summer of protests against police violence, the Supreme Court seems to be quietly changing its message" on qualified immunity).

the-wall topics like defunding local police departments.[3] And, of course, much of that attention has come as criticism. Many Americans resist the position that American criminal justice is beset by systemic racism or breakdown.[4] Much skepticism about "systemic" breakdown is rooted in a perception that police-involved shootings are infrequent nationwide and a hunch that systemic breakdowns in criminal justice are hard to square with the nation's racial progress since the Civil Rights Movement.[5]

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[3] *See, e.g.*, Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575 (2019); Note, *Prosecuting in the Police-less City: Police Abolition's Impact on Local Prosecutors*, 134 HARV. L. REV. 1859 (2021); Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html [https://perma.cc/H38Y-EAWE]; *New York City Mayor Seeks $1 Billion Police Cut Amid City Hall Protest*, ASSOCIATED PRESS (June 29, 2020, 3:13 PM EDT), https://www.pbs.org/newshour/politics/new-york-city-mayor-seeks-1-billion-police-cut-amid-city-hall-protest [https://perma.cc/VG3B-6YP5]. *But see* Simone Weichselbaum & Nicole Lewis, *Support for Defunding the Police Department Is Growing: Here's Why It's Not a Silver Bullet*, MARSHALL PROJECT (June 9, 2020, 6:00 AM), https://www.themarshallproject.org/2020/06/09/support-for-defunding-the-police-department-is-growing-here-s-why-it-s-not-a-silver-bullet [https://perma.cc/D5RP-7HEM]. Despite this newfound spotlight, some scholars have kept sustained focus on abolition over the years. *See, e.g.*, ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003); RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA (2007).

[4] Glenn C. Loury, *Unspeakable Truths About Racial Inequality in America*, QUILLETTE (Feb. 10, 2021), https://quillette.com/2021/02/10/unspeakable-truths-about-racial-inequality-in-america [https://perma.cc/4QJH-TSX2]; Glenn C. Loury & Peter Winkler, *Racism Is an Empty Thesis*, CITY J. (June 11, 2020), https://www.city-journal.org/racism-is-an-empty-thesis [https://perma.cc/QXD2-ZSJC] ("Every year, more whites than blacks are shot by the police in the U.S. But it is true that the number of blacks killed by police, relative to population, is higher. However, the problem of police violence affects all ethnic groups.").

[5] *See, e.g.*, Robert Verbruggen, *How Much of a Role Does Race Play in Police Killings?*, NAT'L REV. (June 1, 2020, 4:28 PM), https://www.nationalreview.com/corner/how-much-of-a-role-does-race-play-in-police-killings/ [https://perma.cc/AE5M-66RR]; Coleman Hughes, *Stories and Data: Reflections on Race, Riots, and Police*, CITY J. (June 14, 2020) ("[T]he basic premise of Black Lives Matter—that racist cops are killing unarmed black people—is false."), https://www.city-journal.org/reflections-on-race-riots-and-police [https://perma.cc/MXC8-T7BB]. Of course, without solid data collection on the incidence of police-involved shootings, it is difficult to substantiate claims about the incidence of such shootings. For an unofficial attempt to catalog these shootings, see *Police Shootings Database*, WASH. POST (May 29, 2021) [hereinafter *Police Shootings Database*], https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ [https://perma.cc/S5SM-MC6S]. As of May 29, 2021, the *Washington Post* database counts 953 people shot and killed by police in the past year, representing just

Situated against this academic and popular background, this Article turns its attention to the courts, identifying how courts have grappled with the concept of systemic failures in criminal justice. Over the last ten years, the scope of federal courts' remedial powers and litigants' standing to seek remedies have come under scrutiny.[6] In litigation concerning nationwide injunctions, several Justices have reiterated that injunctive relief should bind only the defendant's behavior toward the plaintiff seeking relief and should go no further.[7] The requirement of tailored equitable relief brings to mind the Court's recent reformulation of Article III standing, requiring particularized and tailored injury.[8] Although the Court has confronted the thorny problems of remedies and standing in the civil-litigation context, these themes have echoed in the broader debate on how to best remediate system-wide harms in criminal-justice systems.

In this Article, we identify a series of recent criminal-procedure cases in which the Supreme Court has recognized

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under 5% of the total gun deaths in 2020. *See id.*; Reis Thebault & Danielle Rindler, *Shootings Never Stopped During the Pandemic: 2020 Was the Deadliest Gun Violence Year in Decades*, WASH. POST (Mar. 23, 2021), https://www.washingtonpost.com/nation/2021/03/23/2020-shootings/ [https://perma.cc/D68W-EEYC] (reporting 19,380-gun deaths in 2020).

[6] *Compare* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017) (recasting federal courts' equitable powers in light of the common-law evolution of the chancellery system), *with* Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095 (2017) (advancing the complete-relief principle as a helpful limitation on courts' injunctive powers), *and* Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 924 (2020) (noting that nationwide, or universal, injunctions may have emerged as early as 1913). Since President Trump left office, there has been a downward trend in the issuance of nationwide injunctions. *See* Cristin M. Rodriguez, Foreword: Regime Change, 135 HARV. L. REV. 1, 105 n.397 (2021).

[7] *See* Easyriders Freedom F.I.G.H.T. v. Hannigan, 92 F.3d 1486, 1501 (1996) (noting injunctive relief "should be limited to apply only to the named plaintiffs where there is no class certification"); Califano v. Yamasaki, 444 U.S. 682, 702 (1979) ("[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiff."); Trump v. Hawaii, 138 S. Ct. 2392, 2427 (2018) (Thomas, J., concurring) ("[A]s a general rule, American courts of equity did not provide relief beyond the parties to the case. If their injunctions advantaged nonparties, that benefit was merely incidental); Knick v. Twp. of Scott, 139 S. Ct. 2162, 2180 (2019) (Thomas, J., concurring) ("[E]ven when relief is appropriate for a particular plaintiff, it does not follow that a court may enjoin or invalidate an entire regulatory 'program.'").

[8] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2204 (2021) (quoting Spokeo, Inc. v. Robins, 578 U.S. 330, 340 (2016)).

systemic failures in the criminal-justice system and articulated pathways for defendants subject to those failures to seek individual remedies.[9] We call this the "systemic-failure doctrine." The Court has never identified these systemic-failure remedies as a cohesive doctrine, and in fact, the three pathways of relief we identify are each grounded in different constitutional provisions. In particular, these pathways to relief have arisen in the context of selective-prosecution claims subject to the Fourteenth Amendment's Equal Protection Clause,[10] the good-faith exception to the Fourth Amendment exclusionary rule,[11] and calculations governing a defendant's Sixth Amendment right to a speedy trial.[12]

Even though the systemic-failure doctrine arises in different contexts, the relief molded by the Court follows a common formula.[13] A defendant, often through the presentation of empirical evidence or a study, must demonstrate a systemic failure in prosecution, policing, or public defense and show that that the failure injured him. If the defendant makes that showing, the court will offer tailored relief based on the legal context (e.g., discovery for a selective prosecution claim, exclusion of evidence for a Fourth Amendment violation, or a defendant-friendly speedy-trial calculation). Criminal defendants have become quick adopters of the doctrine after the Supreme Court recognized this new route to relief based on systemic breakdown. Nevertheless, and perhaps unsurprisingly, courts have been parsimonious in granting relief, suggesting that its theoretical availability has limited practical consequences for defendants. Yet defendants persist in raising these defenses.

An essential element of this systemic-failure doctrine is the highly individualized, tailored relief connected with the systemic

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[9] *See infra* Part II.

[10] *See infra* Section II.A.

[11] *See infra* Section II.B.

[12] *See infra* Section II.C.

[13] The notion of systemic injuries and remedies is by no means exclusive to criminal procedure, and arises in a variety of legal contexts. *See, e.g.*, E.E.O.C. v. Waffle House, Inc., 534 U.S. 279 (2002) (employment discrimination); E.E.O.C. v. Shell Oil Co., 466 U.S. 54 (1984) (same); Owen v. City of Independence, 445 U.S. 622 (1980) (municipal liability under Section 1983); *see also* Monell v. Dept. of Soc. Servs., 436 U.S. 658 (1978) (same); Bartlett v. Strickland, 556 U.S. 1 (2009) (election law). Although parallels exist between the considerations involved in these cases and those we examine in this Article, they are beyond its scope.

injury. We juxtapose this characteristic of the systemic-failure doctrine with a similar, though distinct, line of cases alleging systemic breakdowns in criminal justice brought by plaintiffs, often as class actions. In these cases, plaintiffs similarly highlight that they have been injured by a systemic failure in criminal administration, but the only possible relief is system-wide, not individualized. This often arises in the context of prisoners claiming prison conditions violate the Eighth Amendment, though it can also arise in other contexts.[14] In that set of cases, the Supreme Court has generally relied on Article III standing doctrine to withhold systemic-failure relief, suggesting the importance of a limiting principle: the systemic-failure doctrine offers a theoretical pathway to relief that is individualized and does not require system-wide change that may undermine the current operations of the criminal-justice system.[15] As such, the Court has left a state of play where it recognizes the reality of systemic failures in criminal justice but is unwilling to offer a panacea, instead opting to limit equitable relief to individual cases, and declining to order system-wide changes. Of course, any such equitable relief reflects the court's judgment that the criminal-justice system has failed an individual defendant but stops short of holding that a systemic failure necessitates a systemic remedy for all those similarly situated.

This Article begins in Part I by outlining how systemic failure has occupied academic and popular accounts of the criminal-justice system. Scholars approach systemic failure through a diverse set of methodologies that implicate their respective prescriptions. In popular accounts, the notion of "systemic" breakdown has proven divisive but certainly influential in the public imagination. Part II turns its attention to the judiciary and identifies how the Supreme Court has established theoretical avenues of relief for defendants injured by systemic failures in three separate contexts: selective-prosecution claims, good-faith exceptions to the exclusionary rule, and speedy-trial calculations. This Part begins with Supreme Court doctrine and then works down to applications of the doctrine in other courts, highlighting how state and federal courts recognize the availability of systemic-failure relief but only grant such relief

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[14] *See infra* Section III.A.

[15] *See infra* Part III.

on narrow grounds and under indisputably egregious facts. Part III turns to that set of cases that fall just outside the confines of the systemic-failure doctrine where civil plaintiffs seek systemic relief for systemic injury, as opposed to individualized relief. As a general matter, the Court has used Article III standing principles instead of reaching the question of whether theoretical avenues of relief exist. Given the practical shortcomings of the systemic-failure doctrine, Part IV anticipates potential counterarguments to the scope of the systemic-failure doctrine and gestures toward several avenues of reform that would actualize the doctrine for defendants.

I. SYSTEMIC FAILURE AS A CRIMINAL JUSTICE CONCEPT

This Part explains how the concept of systemic failure in criminal justice has found expression in academic and popular discourse. Although ideas from these two spheres are largely aligned with each other, they have developed independent of the Supreme Court's developing view on systemic failures, which Part II introduces and analyzes.

A. Academic Accounts

An enormous quantity of contemporary legal scholarship has recognized, theorized, and proposed solutions for systemic failures in criminal justice. In contrast to scholarship focusing on criminal procedure at the Supreme Court,[16] this Section focuses on how systemic failure is studied outside the strict confines of legal doctrine. While most work in this area focuses on specific types of failures, such as weak systems of public defense or prosecutorial overcharging, three bodies of literature outline the predominant trans-substantive approaches to systemic failure in criminal justice.

The first group of scholars has approached systemic failures in criminal justice through an institutional lens, foregrounding how

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[16] *See, e.g.*, TRACEY MACLIN, THE SUPREME COURT AND THE FOURTH AMENDMENT EXCLUSIONARY RULE (2012); Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT L. REV. 605 (1998); Tracey L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733 (2000).

poor administration both constitutes and contributes to systemic failures in criminal justice. For instance, Rachel E. Barkow draws on administrative law principles to describe how federal prosecutors' offices could be better designed to curb abuses of power.[17] Observing that federal prosecutors exercise enormous power over charging decisions and thus serve as de facto final decisionmakers in the overwhelming majority of criminal cases, Barkow argues that separation-of-functions requirements and greater attention to supervision could help curb prosecutorial abuses of power.[18] In a similar vein, Maria Ponomarenko looks to administrative law principles for solutions to systemic failures, urging the creation of regulatory intermediaries as a way to help the public more effectively regulate a variety of systemic problems with policing, including excessive force, stop and frisk, surveillance, and discretion.[19]

Barry Friedman and Elizabeth Jánszky propose related interventions at a more granular level, offering a set of concrete, information-based solutions to address systemic failures in policing.[20] These include increased use of cost-benefit analysis, sentinel-event review, legislative information-forcing mechanisms, APA-style notice-and-comment rulemaking, the establishment of regulatory intermediaries similar to those proposed by Maria Ponomarenko, and a national college of policing.[21] Each of these scholars has recognized systemic failures in criminal justice as stemming from institutional problems that lie within the competencies of the executive and legislative branches. These solutions seek to intervene at the institutional level and have little to say about how individual subjects, be they defendants,

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[17] *See, e.g.*, Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009).

[18] *Id.* at 874-95.

[19] *See* Maria Ponomarenko, *Rethinking Police Rulemaking*, 114 NW. U. L. REV. 1, 8-12, 45-59 (2019). Here, Ponomarenko defines regulatory intermediaries as "entities within government, such as commissions or inspectors general, which can stand in for the public and help govern the police." *Id.* at 7. Regulatory intermediaries could generate information about law-enforcement agencies to increase transparency, serve as points of contact for those without connections to agency officials, and serve as advocates for underrepresented perspectives. *Id.* at 46.

[20] *See* Barry Friedman & Elizabeth G. Jánszky, *Policing's Information Problem*, 99 TEX. L. REV. 1 (2020).

[21] *Id.* at 45-70.

prosecutors, or officers, interact with the broken systems of criminal justice that the authors seek to rectify. It follows that courts do not play a major role in these administratively focused accounts.

Although Friedman and Jánszky share certain similarities to a second group of scholars, these other scholars examine and urge more and better use of data to improve the administration of criminal justice. Andrew Guthrie Ferguson presents one view of this approach in a paper that reacts to the Supreme Court's ruling in *Herring v. United States*,[22] in which the Court held that the good-faith exception to the Fourth Amendment exclusionary rule does not apply upon a showing of "deliberate, reckless, or grossly negligent conduct" or "recurring or systemic negligence."[23] Ferguson argues that specific forms of "blue data," or quantifiable information on policing practices at both a systemic and individual officer level should be made available in a searchable, sortable, and usable format.[24] Ferguson foresees such databases as essential to raising future "recurring or systemic negligence" claims for the exclusion of evidence.[25]

Highlighting the need for a similar approach to public defense, the ABA Standing Committee on Legal Aid and Indigent Defense has created a blueprint study (the Missouri Project) that public defender systems can implement in other states to assess public defender workloads using a data-driven approach.[26] Based on this model, the Committee has published the results of similar workload studies in Colorado, Indiana, Louisiana, and Rhode Island.[27] Data-

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[22] 555 U.S. 135 (2009).

[23] *Id.* at 144; *see also infra* Section II.B (discussing *Herring* as part of the Court's systemic-failure jurisprudence). Under the good-faith exception to the exclusionary rule, an unreasonable search may not trigger the Fourth Amendment exclusionary rule if police acted "in objectively reasonable reliance" on, for example, a faulty warrant. *Herring*, 555 U.S. at 142.

[24] Andrew Guthrie Ferguson, *The Exclusionary Rule in the Age of Blue Data*, 72 VAND. L. REV. 561, 594-635 (2019).

[25] *Id.* at 591-94.

[26] *See* A.B.A. STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, THE MISSOURI PROJECT: A STUDY OF THE MISSOURI PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS (2014), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_pub_def_mo_workstudies_rept.pdf [https://perma.cc/7L8N-DTN5].

[27] *See Publications*, A.B.A.: STANDING COMM. ON LEGAL AID AND INDIGENT DEFENSE, https://www.americanbar.org/groups/legal_aid_indigent_defense/indigent_defense_systems_improvement/publications [https://perma.cc/4HK5-KWU3].

based approaches have also been recognized as particularly useful in addressing the systemic aspects of prosecutorial misconduct. For instance, the Northern California Innocence Project conducted the largest study of its kind to document the scope of prosecutorial misconduct in the state of California, reviewing more than 4,000 state and federal appellate rulings, media reports, and trial decisions.[28] The empirical findings of the study revealed previously unknown patterns of recidivism, discipline, and adjudication of prosecutorial-misconduct claims.[29] Many of these data-focused approaches reveal important considerations about how Supreme Court doctrine influences the phenomenon of systemic failure in criminal justice, but their conclusions focus primarily on the practical effects of the doctrine, and not the motivations or practices behind it.[30]

A final account of systemic failures in criminal justice emerges from the work of critical legal scholars who focus on people's and communities' experiences of these failures to draw lessons for how the systems must be reformed, reconstructed, or abolished entirely. These legal scholars include, among others, Amna A. Akbar, Monica C. Bell, Paul Butler, Jocelyn Simonson, and K. Sabeel Rahman.[31] For instance, Simonson's recent work examines how movements for police and criminal justice reform across the country have shifted

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[28] *See* KATHLEEN M. RIDOLFI, MAURICE POSSLEY & N. CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997-2009, at 10 (2010), https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1001&context=ncippubs [https://perma.cc/MZ7C-C9BJ].

[29] *See id.* at 16 (summarizing the study's findings).

[30] Notably, the Supreme Court has shown limited solicitude to large-scale empirical studies cited by litigants. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279 (1987) (rejecting the Baldus Study as definitive evidence that Georgia's capital-punishment regime violates the Equal Protection Clause). Although scholars such as Tracey Meares and Bernard Harcourt argue that greater reliance on empirical studies can enhance the transparency of the judiciary's criminal-procedure jurisprudence, they recognize that the Court's current approach is "often marred by spotty or inconsistent application of balancing tests and by pseudo-empirical statements . . . [w]ithout seriously taking account of empirical research." Meares & Harcourt, *supra* note 16, at 735, 739.

[31] *See, e.g.*, Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1782, 1832-39 (2020); Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650 (2020); Paul Butler, *The System Is Working the Way it Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419 (2016); K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679 (2020).

the framing of police reform by empowering local communities to control police governance.[32] Simonson broadly looks to the experiences and recent history of policed communities to understand the system-wide threads that unite their various reform efforts. Bell similarly draws upon sociological research on segregation to put forward a framework for anti-segregation specific to policing.[33] As much as the subjects and normative foci of these scholars' work vary, they are united by how they diagnose and critique the systemic failures from a perspective of people and communities who are themselves subject to failing systems of criminal justice. In comparison to administrative law and data-driven accounts of systemic failure, these studies provide a more internal view of systemic failure in criminal justice.[34] Because they draw more directly from the experiences and narratives of those within the criminal justice system and those fighting against it, these theories have always had a close relationship with non-academic, popular accounts of the criminal justice system. These popular and movement accounts of the phenomenon are discussed in the next Section.

B. Popular Accounts

At the same time that academics have been analyzing and theorizing systemic failure, similar themes have permeated popular discussions of criminal justice.[35] In the summer of 2020,

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[32] Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 803-10 (2021).

[33] Bell, *supra* note 31, at 659-87.

[34] *See, e.g.*, Jocelyn Simonson, Essay, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249 (2019) (critiquing the common notion of "The People" as the prosecution and expounding upon a new approach that allows "The People" to appear on both the prosecution and defense side, casting a new light on "bottom-up resistance to local police actions and prosecutions.").

[35] *See, e.g.*, Craig DeRoche, *A Failing Criminal Justice System*, N.Y. TIMES (Mar. 12, 2012), https://www.nytimes.com/roomfordebate/2012/03/12/young-black-and-male-in-america/a-failing-criminal-justice-system [https://perma.cc/S4UH-T3W8] (noting that evidence documenting the "failure of our [criminal justice] system [is] unrivaled in human history"); Root & Restore St. Paul, *To Grow Real Safety and Liberation, We Must Divest from Police and Invest in Community in St. Paul*, MEDIUM (Nov. 6, 2020), https://rootrestorestp.medium.com/to-grow-real-safety-and-liberation-we-must-divest-from-police-and-invest-incommunity-in-st-paul-7f68ac4ebd4d [https://perma.cc/V5FR-F5K8] (criticizing the St. Paul Police Department for contributing to "systemic degradation . . . . of Black lives").

public outrage over the killing of George Floyd sparked a national, bipartisan conversation on police reform, ranging from improved law enforcement training to radical proposals to disband or defund police departments.[36] These conversations also placed the spotlight on the formerly esoteric legal doctrine of qualified immunity, which bars plaintiffs from suing certain public officials, like police officers, unless plaintiffs can demonstrate that the officials violated "clearly established" constitutional rights.[37] Popular efforts to roll back qualified immunity have culminated in congressional bills and Supreme Court litigation that may serve a death knell to the doctrine.[38] In an unsigned opinion in *Taylor v. Riojas*, the Court reversed a lower court's grant of qualified immunity when a prisoner was kept in a cell "covered, nearly floor to ceiling, in 'massive amounts of feces,'"[39] which represents the second time that the Court has denied qualified immunity in the absence of a precisely on-point precedent.[40]

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[36] Jennifer Calfas & Elizabeth Findell, *Protests Sparked by George Floyd Fuel Moves to Defund Police*, WALL ST. J. (June 7, 2020), https://www.wsj.com/articles/protests-sparked-by-george-floyd-killing-set-to-resume-as-some-leaders-dial-back-enforcement-11591542085 [https://perma.cc/6LTQ-NPNT] (noting that Democratic and Republican elected officials voiced support for police-reform efforts).

[37] Harlow v. Fitzgerald, 457 U.S. 800 (1982).

[38] *See* Hailey Fuchs, *Qualified Immunity Protections for Police Emerges as Flash Point Amid Protests*, N.Y. TIMES (June 23, 2020), https://www.nytimes.com/2020/06/23/us/politics/qualified-immunity.html [https://perma.cc/5M3A-WTXK]; Adam Liptak, *Cracks in a Legal Shield for Officers' Misconduct*, N.Y. TIMES (Mar. 8, 2021), https://www.nytimes.com/2021/03/08/us/supreme-court-qualified-immunity.html [https://perma.cc/TC3A-R5NX] ("[T]he Supreme Court said that it was possible to take qualified immunity too far and that some things were obvious even if there was no precedent on point."); *see also* Joanna Schwartz, *The Supreme Court Is Giving Lower Courts a Subtle Hint to Rein in Police Misconduct*, THE ATLANTIC (Mar. 4, 2021), https://www.theatlantic.com/ideas/archive/2021/03/the-supreme-courts-message-on-police-misconduct-is-changing/618193 [https://perma.cc/J4RL-B5XE] (explaining that "the Court appears to be sending a message that lower courts can deny qualified immunity for clear misconduct, even without a case with identical facts," as required under the traditional qualified immunity doctrine).

[39] Taylor v. Riojas, 141 S. Ct. 52, 53 (2020) (quoting Taylor v. Stevens, 946 F.3d 211, 218 (5th Cir. 2019)).

[40] *See* Schwartz, *supra* note 38. In *McCoy v. Alamu*, the Court granted certiorari, then vacated and remanded the Fifth Circuit's grant of qualified immunity in a case not factually on point with *Taylor v. Riojas*. *Id.*; McCoy v. Alamu, 141 S. Ct. 1364, 1364 (2021).

The dialogue certainly runs the other way too, with scholars influencing the public dialogue. In the context of qualified immunity, for example, scholars such as Joanna Schwartz have for years advocated reforms to the doctrine.[41] Moreover, activists in Oakland and Nashville have sought to change the administrative structure of police departments by creating and shaping the composition of community oversight boards, raising similar themes as those that appear in the work of scholars like Rachel Barkow and Maria Ponomarenko.[42] Data play a prominent role in popular demands for redress of systemic wrongs.[43] Likewise, much of the contemporary scholarship on criminal justice draws upon activists' accounts of systemic failure.[44] While Supreme Court doctrine is occasionally mentioned in popular discourse on criminal justice, it rarely plays a major role in mainstream accounts of systemic failure in criminal justice.[45] Other institutional actors, such as police departments, prisons, and political bodies draw the most attention and criticism.[46]

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[41] *See, e.g.*, Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1791 (2018); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2 (2017); Joanna C. Schwartz, *Qualified Immunity and Federalism All the Way Down*, 109 GEO. L.J. 305 (2020).

[42] *See* Barkow, *supra* note 17, at 911; Ponomarenko, *supra* note 19, at 45-49; Rahman & Simonson, *supra* note 31, at 723-25; *Charter Referendum Petition*, CMTY. OVERSIGHT FOR NASHVILLE, https://communityoversightnashville.wordpress.co/charter-referendum-petition-available-for-download [https://perma.cc/ZC5K-JNRA].

[43] *See, e.g., Police Shootings Database*, *supra* note 5 (documenting detailed data on police shootings in a publicly accessible format).

[44] *See, e.g.*, *Reckoning with Mass Criminalization and Mass Incarceration: A Proposal to Advance a New Vision of Public Safety and Dismantle the 1994 Crime Bill Through a Participatory People's Process*, CTR. FOR POPULAR DEMOCRACY (Sept. 2019), https://secureservercdn.net/198.71.233.150/yjt.eea.myftpupload.com/wp-content/uploads/2020/07/94-Violent-Crime-Act.pdf [https://perma.cc/2DEK-KS82]; Simonson, *supra* note 32, at 824.

[45] Unsurprisingly, the most frequent appearances of Supreme Court doctrine in popular discourse come from legal academia and appear to go mostly unnoticed by popular activists. *See, e.g.*, Barry Friedman (@barryfriedman1), TWITTER (Apr. 12, 2021, 10:59 PM ET), https://twitter.com/barryfriedman1/status/1381804123293691904 [https://perma.cc/FE6Q-STUG].

[46] *See, e.g.*, *Defund & Demilitarize NOPD*, ORLEANS PARISH PRISON REFORM COALITION (Nov. 2020), https://opprcnola.org/defund-demilitarize-nopd [https://perma.cc/7W9N-98LP]; Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES (Apr. 7, 2019), https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html [https://perma.cc/6ZTE-LDLC]; Thomas O'Neil-White, *Statewide*

On the political right, there is great diversity of thought on criminal-justice reform too. Some commentators object to the framing of "systemic" injustice,[47] taking issue with the portrayal of data related to the criminal-justice system.[48] Some legal commentators, like David French, note how the phrase "systemic racism" takes on a life of its own in certain parts of American life: when Americans hear or read that phrase they assume "you're saying our systems (and by implication the people in them) are racist."[49] Commentators with a libertarian bent have also not shied away from using the systemic framing. Jay Schweikert, for

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Campaign Calls for Reform to Parole System in 2021 Legislative Session, WBFO (Jan. 21, 2021), https://news.wbfo.org/post/statewide-campaign-calls-reform-parole-system-2021-legislative-session [https://perma.cc/TR9E-AHF6].

[47] *See, e.g.*, Editorial, *Biden Indicts the Minneapolis Police*, WALL ST. J. (Apr. 21, 2021), https://www.wsj.com/articles/biden-indicts-the-minneapolis-police-11619045332?mod=opinion_lead_pos1 [https://perma.cc/3GR4-RXAU]; David French, *Why I Changed the Way I Write About Police Shootings*, NAT'L REV. (Sept. 12, 2018, 4:09 PM), https://www.nationalreview.com/2018/09/police-shootings-david-french-changed-writing [https://perma.cc/KA3E-J69D] ("The existence of outrageous killings . . . is no more evidence of systemic racist targeting of black men than the existence of hoaxes . . . debunk[ing] claims of comprehensive racial bias."). However, other conservatives have advocated for a more localized approach, which would empower states and localities to address criminal-justice issues instead of the federal government, which is perceived to be under the sway of liberal activists. *See* Jason L. Riley, Opinion, *No, Police Racism Isn't an Epidemic*, WALL ST. J. (June 23, 2020, 6:47 PM ET), https://www.wsj.com/articles/no-police-racism-isnt-an-epidemic-11592952420 [https://perma.cc/955Q-D2MF] ("Yes, cops sometimes abuse their authority, and firing bad ones can be much too difficult. But states and localities can address those issues more effectively than a one-size-fits-all fix from Washington.").

[48] *See, e.g.*, Heather Mac Donald, Opinion, *The Myth of Systemic Police Racism*, WALL ST. J. (June 2, 2020, 1:44 PM ET) (citing David J. Johnson, Trevor Tress, Nicole Burkel, Carley Taylor & Joseph Cesario, *Officer Characteristics and Racial Disparities in Fatal Officer-Involved Shootings*, 116 PROCS. NAT'L ACAD. SCIS. U.S.15877, 15880 (Aug. 6, 2019)), https://www.wsj.com/articles/the-myth-of-systemic-police-racism-11591119883 [https://perma.cc/C8DK-S6D8]; Riley, *supra* note 47 ("Police shootings have fallen precipitously since the 1970s. Upward of 95% of black homicides in the U.S. don't involve law enforcement. Empirical studies have found no racial bias in police use of deadly force, and that the racial disparities that do exist stem from racial differences in criminal behavior."); French, *supra* note 47 ("Shootings of unarmed men dominate headlines, but they (thankfully) represent a small slice of the whole pie. . . . In the vast majority of cases, police were confronting armed men, and while not every shooting of an armed man is justified (just as not every shooting of an unarmed man is *un*justified), it is just not the case that the police have truly declared 'open season' on anyone. . . .").

[49] David French, *American Racism: We've Got So Very Far to Go*, DISPATCH (June 7, 2020), https://frenchpress.thedispatch.com/p/american-racism-weve-got-so-very [https://perma.cc/Y6TB-8ZAP].

example, has documented how qualified immunity "undermin[es] public accountability at a *structural* level" and has called for a "complete abolition of qualified immunity,"[50] and Schweikert has offered testimony to the House Judiciary Committee to that effect.[51] In January 2018, the Cato Institute threw its institutional weight behind a campaign to abolish qualified immunity (a "tragic miscarriage of justice," in its words), hosted conferences on the subject,[52] and has filed numerous amicus briefs challenging qualified immunity.[53] Others have endorsed direct legislative action,[54] such as the Democrat-sponsored George Floyd Justice in Policing Act of 2020[55] or the Republican-sponsored Ending Qualified Immunity Act.[56] Whether qualified immunity is in fact statutorily reversible, however, remains a topic of debate.[57]

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[50] Jay R. Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, CATO (Sept. 14, 2020) (emphasis added), https://www.cato.org/policy-analysis/qualified-immunity-legal-practical-moral-failure [https://perma.cc/NG5S-FZHP] ("Not only does the doctrine [of qualified immunity] routinely deny justice to victims of egregious misconduct, but it also undermines accountability for law enforcement at a structural level.").

[51] *See* Letter from Jay R. Schweikert, Cato Inst., to Reps. Jerrold Nadler & Doug Collins, H. Comm. on the Judiciary (Sept. 18, 2019), https://www.cato.org/sites/cato.org/files/2019-09/schweikert-testimony-9-19-2019.pdf [https://perma.cc/P9BY-ZKMM].

[52] *Cato Leads the National Campaign to Eliminate Qualified Immunity*, CATO INST. (June 22, 2020), https://www.cato.org/publications/publications/cato-campaign-qualified-immunity [https://perma.cc/2Q8Q-BPZ7].

[53] *See, e.g.*, Brief of the Cato Inst. as Amicus Curiae Supporting Petitioners, White v. Pauly, 580 U.S. 73 (2017) (No. 17-1078), 2018 WL 1182773; *see also* Brief of Cross-Ideological Groups Dedicated to Ensuring Official Accountability, Restoring the Public's Trust in Law Enforcement, and Promoting the Rule of Law as Amici Curiae in Support of Petitioner, Corbitt v. Vickers, 141 S. Ct. 110 (2020) (mem.) (No. 19-679), 2019 WL 7584801; Brief of Cross-Ideological Groups as Amici Curiae in Support of Petitioners, Zadeh v. Robinson, 141 S. Ct. 110 (2020) (mem.) (No. 19-676), 2019 WL 7212376.

[54] Jesse Kelley, *Qualified Immunity: Lawmakers Must Do What SCOTUS Declined*, R ST. (June 18, 2020), https://www.rstreet.org/2020/06/18/qualified-immunity-lawmakers-must-do-what-scotus-declined [https://perma.cc/Z7GZ-GBKM] (supporting both Democratic- and Republican-backed police-reform legislation).

[55] H.R. 7120, 116th Cong. (2020).

[56] H.R. 7085, 116th Cong. (2020).

[57] Some scholars, such as Carlos Manuel Vázquez, have interpreted the Supreme Court's Eleventh Amendment jurisprudence as possibly implying that qualified immunity is not merely a prudential doctrine but a constitutional one. *See* Carlos Manuel Vázquez, *Sovereign Immunity, Due Process, and the* Alden *Trilogy*, 109 YALE L.J. 1927, 1949 n. 128 (2000); *cf.* Seminole Tribe v. Florida, 517 U.S. 44, 71 n.15 (1996) (assuming arguendo, but not holding, that "immunity enjoyed by state and federal

Examining these popular and activist accounts of systemic failure alongside academic examinations reveals a complex picture of solutions for criminal justice. Yet, at the same time as activists and scholars have tackled these issues, the Supreme Court has recognized and developed avenues for defendants to obtain redress for systemic failures in criminal justice.

II. THE PRACTICE AND THEORY OF SYSTEMIC-FAILURE DOCTRINE

As scholars and activists imagine new ways to fix systemic failures in criminal justice, the Supreme Court has crafted a doctrine that provides defendants with a means to obtain relief for these systemic failures. In disparate parts of its criminal procedure jurisprudence, the Court has provided theoretical avenues of relief for defendants who can demonstrate some system-wide defect in the criminal justice system. Whether it is systematic discrimination in the exercise of prosecutorial discretion, systemic negligence in policing, or the system-wide breakdown of a public defender's office, the Court has emphasized that individual defendants are not to be held responsible for defects in the process that are attributable to systemic failure.

This Part examines three areas of criminal procedure doctrine where the systemic-failure doctrine has emerged. These areas include selective-prosecution claims, the good-faith exception to the exclusionary rule, and Speedy Trial Clause violations. For each of these areas, we discuss how the doctrine has emerged and highlight how the Supreme Court's opening of a theoretical avenue of relief has, in practice, been met with skepticism in lower courts. While federal and state courts have occasionally granted relief where systemic failures are particularly egregious, these courts frequently share the Supreme Court's reluctance to deploy the systemic-failure doctrine to meaningfully address systemic failures in criminal justice. Generally, defendants remain unable to access the sort of

officials . . . has no constitutional foundation"); Alden v. Maine, 527 U.S. 706, 757 (1999) (noting that sovereign immunity does not bar suit against officers in their personal capacity "for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury," suggesting that qualified immunity may be implied from the Eleventh Amendment's bar against suing the state).

systemic information that courts require in order to grant relief for systemic-failures.

A. Armstrong *Selective-Prosecution Claims*

This Section identifies the earliest signal of the systemic-failure doctrine. In a series of cases starting in the late 1970s and culminating in 1996 in *United States v. Armstrong*,[58] the Supreme Court provided an avenue of relief for a defendant who could demonstrate that prosecutors have systemically not prosecuted individuals who were similarly situated to the defendant except for a protected characteristic, such as race. Defendants' *Armstrong* claims often rise or fall on the strength of their showing that such similarly situated individuals exist on a broad basis and that these individuals closely resemble the defendants. Although the only relief available under *Armstrong* is discovery against the government in a selective-prosecution claim, *Armstrong*'s requirement of a credible showing of a violation of a personal constitutional right based on a system-wide injustice resembles later cases comprising the systemic-failure doctrine.

Judicial review of prosecutorial discretion is limited.[59]In the twentieth century, the Supreme Court recognized some modest constitutional limits on prosecutors' charging power, which the Court grounded in the Due Process and Equal Protection Clauses. In *Blackledge v. Perry*, the Court allowed a presumption of vindictiveness to attach where a defendant showed "a realistic likelihood" that a prosecutor added more serious charges in retaliation for exercising a statutory right to trial de novo.[60] At least in theory, this vindictive-prosecution doctrine protected defendants from charging decisions that retaliated against them for "doing something that the law plainly allowed [them] to do," such as

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[58] 517 U.S. 456 (1996).

[59] *See* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."); Wayte v. United States, 470 U.S. 598, 607 (1985) (noting that "the decision to prosecute is particularly ill-suited to judicial review"); United States v. Goodwin, 457 U.S. 368, 380 n.11 (1982); *see also* Heckler v. Chaney, 470 U.S. 821, 832 (1985) (limiting judicial power over the "special province" of prosecutorial discretion in administrative enforcement actions).

[60] 417 U.S. 21, 27 (1947).

exercising a statutory right to appeal.[61] Although some welcomed the *Blackledge* doctrine as a meaningful constraint on unbridled prosecutorial discretion,[62] the Supreme Court has essentially limited vindictive-prosecution relief to cases that are factually on point with *Blackledge*.[63] The Court has provided only narrow grounds for relief based on malicious prosecutions, where prosecutors' personal animus toward a defendant motivates an otherwise unfounded criminal charge.[64]

In the 1980s and 1990s, the Court developed a selective-prosecution doctrine as an outgrowth of its earlier equal-protection and charge-selection jurisprudence.[65] In *Wayte v. United States*, the

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[61] *See* United States v. Goodwin 457 U.S. 368, 384 (1982). *But see* United States v. LaDeau, 734 F.3d 561, 564 (6th Cir. 2013) (applying a presumption of vindictiveness where the government could have included a more serious charge in the initial indictment but included that charge after the defendant succeeded on a suppression motion).

[62] Donald C. Smaltz, *Due Process Limitations on Prosecutorial Discretion in Re-Charging Defendants:* Pearce *to* Blackledge *to* Bordenkircher, 36 WASH. & LEE L. REV. 347, 349 (1979).

[63] *See* 4 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 13.5(a) (4th ed. 2020) (doubting that a "broad" vindictive-prosecution defense will be "generally accepted" after the *Blackledge* line of cases because "[t]here will likely be considerable resistance" and "a perceived need to impose some limits on the number of criminal prosecutions in which a defendant would be entitled to put the prosecutor's motivations and intentions into issue"); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 736-37 & nn.63-64 (2001); *see also Bordenkircher*, 434 U.S. 357 (holding that prosecutors may freely add or withdraw charges as part of the plea-bargaining process where a defendant rejects a plea bargain); *Goodwin*, 457 U.S. 368 (declining to apply the presumption of vindictiveness before the start of trial under the *Blackledge* test).

[64] *See* Hartman v. Moore, 547 U.S. 250, 257 (2006).

[65] The Court's selective-prosecution doctrine—which regulates prosecutors' decision to selectively charge one individual instead of those similarly situated—resembles the Court's charge-selection doctrine, which regulates prosecutors' decision to charge a particular defendant with one of two statutorily identical violations. In *United States v. Batchelder*, 442 U.S. 114 (1979)—decided a few short years before *Wayte*, *McCleskey*, and *Armstrong*, discussed below—the Court held that where prosecutors have probable cause to believe that a defendant has violated more than one criminal statute, the prosecutor is free to file charges under either statute "so long as it does not discriminate against any class of defendants." *Batchelder*, 442 U.S. at 124. Squeezed in a footnote, but nonetheless foreshadowing the reasoning of the *Armstrong* doctrine, the *Batchelder* Court noted, "The Equal Protection Clause prohibits selective enforcement 'based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" *Id.* at 125 n.9 (citing Oyler v. Boles, 368 U.S. 448, 456 (1962)). The charge-selection doctrine itself was an outgrowth of the Court's early holding in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), pertaining to

Supreme Court heard the appeal of a defendant who was convicted for knowing and willful failure to register for the Selective Service after the FBI and United States Attorney's Office implored the defendant to register under its "beg" policy.[66] The defendant raised a selective-prosecution claim on the ground that he and other "'vocal' opponents of the registration program" were "impermissibly targeted" for the exercise of their First Amendment rights, and the district court granted discovery, requiring the government to release documents and make officials available to testify.[67] Fusing its earlier charge-selection and vindictive-prosecution doctrines and its contemporaneous sex-discrimination framework, the Court committed "to judge selective prosecution claims according to ordinary equal protection standards."[68] The Court nevertheless denied Wayte's claim, noting that all similarly situated non-registrants were treated equally under the FBI's enforcement regime. The Court established the requirements of making a prima facie case of selective-prosecution: a defendant challenging prosecutorial policy must show (1) the prosecution's policy had a discriminatory effect; and (2) the prosecution's policy was motivated by discriminatory purpose.[69] In other words, the defendant first had to make a showing of discriminatory effect by demonstrating empirically an "adverse effect[] upon an identifiable group," and the defendant also had to show that prosecutors took "a particular course of action at least in part 'because of,' not merely 'in spite of'" this discriminatory effect.[70] *Wayte* was the Court's first signal that a finding of a particular type of systemic failure in criminal justice was required: a prosecutorial policy that had a verifiably

administrative agencies and prohibiting public authorities from "mak[ing] unjust and illegal discriminations between persons in similar circumstances." *Id.* at 369.

[66] 470 U.S. 598, 602-03 (1985).

[67] *Id.* at 604.

[68] *Id.* at 608 (citing *Batchelder*, 442 U.S. at 125 (charge-selection case); then citing *Bordenkircher*, 434 U.S. at 364 (vindictive-prosecution case); then citing *Oyler*, 368 U.S. at 456 (selective-prosecution claim); then citing Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) (establishing heightened equal-protection scrutiny for suspect classification on the basis of sex); then citing Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (requiring discriminatory purpose in addition to discriminatory effect to raise an equal-protection claim); and then citing Mayor of Washington, D.C. v. Davis, 426 U.S. 229 (1976) (same)).

[69] *Wayte*, 470 U.S. at 610.

[70] *Id.* at 610 (quoting *Feeney*, 442 U.S. at 279).

discriminatory effect on a group of individuals beyond the defendant himself.

At least in practice, defendants have understood the discriminatory-effect prong to require something akin to a verifiable systemic failure. As Issa Kohler-Haussmann has suggested, litigants subject to this framework will very naturally look to quantitative means of demonstrating discriminatory effect. Litigants must obtain "data on the relevant units indicating raced status (either at the individual or aggregate level depending on the unit of analysis), the outcome of interest . . . , and other variables theoretically germane to the outcome."[71] It may also be necessary to hire a statistical expert "to use some methodologically sophisticated techniques to try to demonstrate that differential outcomes persist between 'similarly situated' units."[72] Even when defendants can make out this kind of equal protection antidiscrimination claim, this antidiscrimination model presents challenges. Requiring a defendant to make out a showing relies on a "counterfactual causal model of discrimination," which assumes that a defendant's race can simply be assumed away at the moment of a prosecutorial charging decision.[73]

In *United States v. Armstrong*, Christopher Lee Armstrong and his codefendant Aaron Hampton were indicted for conspiracy to possess with intent to distribute more than fifty grams of crack cocaine, conspiracy to distribute, and federal firearms offenses.[74] In the months leading up to the indictment, the FBI and local law enforcement had successfully infiltrated a crack-distribution ring and, through informants, were able to track Armstrong and Hampton to a hotel room, where they were found with crack cocaine and loaded firearms.[75] Hampton and Armstrong were indicted and then filed a motion for discovery or for dismissal on the basis of selective race-based prosecution.[76] In support of their motion, Armstrong and Hampton produced an affidavit from a "Paralegal

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[71] Issa Kohler-Hausmann, *Eddie Murphy and the Dangers of Counterfactual Causal Thinking About Detecting Racial Discrimination*, 113 NW. U. L. REV. 1163, 1186 (2019).

[72] *Id.*

[73] *Id.* at 1167-68.

[74] 517 U.S. at 458.

[75] *Id.* at 458-59.

[76] *Id.* at 459.

Specialist" working at the Federal Public Defender's Office, who presented a study that in the year 1991, all twenty-four cases under either § 841 or § 846 had black defendants.[77] The district court granted their motion, but the government opposed the ruling and moved for reconsideration, attaching affidavits and evidence explaining why it prosecuted Armstrong and Hampton.[78] After the government refused further cooperation, the district court dismissed the case. [79] The government unsuccessfully appealed to the Ninth Circuit, which affirmed en banc.[80]

In granting the government's petition for certiorari, the Supreme Court embraced the appropriate standard for granting discovery on the discriminatory-effect prong of a selective-prosecution claim. In explaining the *Wayte* framework's equal-protection roots, the majority opinion emphasized that a selective-prosecution claim amounts to an allegation "that the *system* of prosecution amounts to 'a practical denial' of equal protection of the law," and that without strong evidence of a denial of equal protection, courts will maintain a rebuttable presumption of "[j]udicial deference" to prosecutors' charging decisions.[81] After weighing the costs of discovery (namely, the requirement that "the Government must assemble from its own files documents which might corroborate or refute the defendant's claim"[82]), the majority held that discovery on the question of discriminatory effect was appropriate only where defendants make a "credible showing" with "some evidence" that similarly situated individuals of a different race were not protected.[83] The Court's requirement that defendants make a credible showing that a "system of prosecution" against them rises to the level of an equal-protection violation resembles later systemic-failure cases like *Herring* and *Brillon*, which require

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[77] *Id.*

[78] *Id.* at 459-60.

[79] *Id.* at 460.

[80] *Id.*

[81] *Id.* at 464-65 (emphasis added).

[82] *Id.* at 468.

[83] *Id.* at 457, 470. The Court also extended *Armstrong* protection to classifications based on "religion, or other arbitrary classification." *Id.* at 464 (citing *Oyler v. Boles*, 368 U.S. 448, 456 (1962)).

defendants to credibly show that some flaw in criminal process amounts to a violation of their personal constitutional rights.[84]

As applied to the facts of their case, however, Armstrong and Hampton's study "did not constitute 'some evidence tending to show the existence of the essential elements' of a selective-prosecution claim" because it failed to identify non-black defendants who could have been prosecuted for the offenses for which Armstrong and Hampton were charged but were not in fact charged.[85] The Court rejected the "23-person sample . . . []as 'statistically insignificant'" and insufficient for discovery, without clarifying what sample size was needed to show discriminatory effect.[86] Having rejected Armstrong and Hampton's discovery claim, the majority declined to reach the question of "whether dismissal of the indictment, or some other sanction, is the proper remedy if the court determines that a defendant has been the victim of prosecution on the basis of race."[87]

The Court insisted that defendants present certain kinds of "systemic" evidence. In particular, it outlined two relevant factors that make some types of empirical evidence better than others in identifying equal-protection violations. First, the majority implied that defendants could make out a prima facie case under *Wayte* by presenting evidence of systemic selective prosecution. Writing for the Ninth Circuit en banc, Judge Reinhardt had begun with the "presumption that people of *all* races commit *all* types of crimes."[88] The Ninth Circuit reasoned that defendants do not need to provide evidence that "the government has failed to prosecute others who are similarly situated" but rather "only provide a *colorable basis* for believing that other similarly situated persons have not been prosecuted."[89] As such, the Ninth Circuit would have allowed defendants to make a discovery claim based on "statistical evidence, without reference to the underlying facts of individual cases" and based on intuitions that "throughout our community, at least *some* crack distributors are likely to be non-blacks."[90] In light of the long history before *Armstrong* of defendants failing to raise selective-

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[84] *See infra* Sections II.B, II.C.
[85] *Id.* at 470.
[86] *Id.* at 459 n.1.
[87] *Id.* at 461 n.2.
[88] United States v. Armstrong, 48 F.3d 1508, 1516 (9th Cir. 1995) (en banc).
[89] *Id.* at 1516.
[90] *Id.*

prosecution claims—by one estimate only eight persons between 1886 and 1978 had made the necessary showing—the Ninth Circuit in *Armstrong* provided a glimmer of hope to some defendants.[91]

The Supreme Court snuffed it out. The majority rejected the Ninth Circuit's "presumptions" as "at war with presumably reliable statistics" on the commission of crack-cocaine trafficking, LSD distribution, pornography, and prostitution crimes from the United States Sentencing Commission.[92] The Court opined that Armstrong and Hampton might have been successful had they presented data on "whether similarly situated persons of other races were prosecuted by the State of California and were known to federal law enforcement officers, but were not prosecuted in federal court."[93] The Court left unexplained how future Armstrongs and Hamptons would access law-enforcement systems collecting such individual enforcement records.

The second factor the majority elevated in making out an *Armstrong* claim was the *kind* of evidence that may support a prima facie case for selective-prosecution discovery. To start, the Court approvingly invoked aggregated nationwide statistics from the United States Sentencing Commission to rebut the Ninth Circuit's reasoning.[94] It suggested that Armstrong and Hampton would have had more success by obtaining data from the State of California and federal law-enforcement officers on nonenforcement decisions regarding the same offenses committed by individuals of *different* races.[95] The Court did not opine on whether asking defendants to gather such statistics would be either feasible or realistic. The Court's positive treatment of such nation- or system-wide statistics contrasts with its treatment of Armstrong and Hampton's own twenty-four-person study, which the Court characterized as a "study" that was "statistically insignificant" and not "credible."[96] Receiving even shorter shrift were the newspaper article and affidavit offered up by Armstrong and Hampton, which the Court

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[91] *See* Philip J. Cardinale & Steven Feldman, *The Federal Courts and the Right to Nondiscriminatory Administration of the Criminal Law: A Critical View*, 29 SYRACUSE L. REV. 659, 691 (1978).

[92] *Armstrong*, 517 U.S. at 469-70.

[93] *Id.* at 470.

[94] *Id.* at 469-70.

[95] *Id.* at 470.

[96] *Id.* at 457, 459 n.1.

deemed "not relevant."[97] A public affidavit reported that the Federal Defender's Office had exclusively represented black defendants like Hampton and Armstrong in section 841 and 846 cases; the Court dismissed the affidavit as "hearsay . . . report[ing] personal conclusions based on anecdotal evidence."[98] The majority's differential treatment of evidence sources reveals that a selective-prosecution claim stands on stronger footing, in the Court's view, when it samples the nation or an entire criminal "system" and is supplied by a trusted law-enforcement agency.

Seven years later, the Court in *United States v. Bass* further increased the evidentiary requirements for *Armstrong* claims, requiring disaggregated data for easy comparisons between similarly situated individuals.[99] *Bass* further restricted selective-prosecution discovery, rejecting an *Armstrong* claim resting on nationwide statistics showing that federal prosecutors (a) charge black suspects with a death-eligible offense more than twice as often as white suspects, and (b) plea bargain at a lower rate with black defendants than white defendants.[100] Although the *Armstrong* Court may have approvingly cited aggregated, nationwide sentencing data, the *Bass* Court held that "raw statistics regarding overall charges say nothing about charges brought against *similarly situated defendants*."[101] After *Bass*, *Armstrong* claims require not only data of a systemic sort that are of sufficient sample size and properly sourced from law-enforcement agencies, but the data must also be sufficiently individualized that courts can make proper comparisons to persons who are similarly situated to the defendant but differ in a protected characteristic. This doctrine has generated scholarly criticism,[102] but it remains the law.

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[97] *Id.* at 470.

[98] *Id.*

[99] 536 U.S. 862 (2002).

[100] *Id.* at 862-64.

[101] *Id.* at 864.

[102] *See, e.g.*, McAdams, *supra* note 17, at 618-23 (arguing that *Armstrong* renders many selective-prosecution claims "impossible to prove"); *cf.* Tracey L. Meares, *Three Objections to the Use of Empiricism in Criminal Law and Procedure-and Three Answers*, 2002 U. ILL. L. REV. 851, 866 (2002) (arguing for the importance of empirical information in the creation of criminal procedure while acknowledging courts'

In the wake of *Armstrong* and *Bass*, selective-prosecution discovery is difficult to achieve. Courts scrutinize *Armstrong* claims both to ensure that any statistical showings are methodologically sound and to guarantee that comparisons to similarly situated non-prosecutions are apples-to-apples.

Courts presented with an *Armstrong* claim will scrutinize whether a defendant's showing of non-prosecutions of similarly situated individuals is in fact systemic. One court rejected an *Armstrong* claim where a defendant's statistical strategy relied on an erroneous extrapolation made by a professional statistician.[103] Another rejected an *Armstrong* claim that was premised upon a study of all prosecutions under the same statute that were available on LexisNexis because the defendant assigned ethnicity and religion based on other defendants' last names.[104] In addition to scrutinizing the underlying methodology of an *Armstrong* claim, courts zero in on the precision of a "similarly situated" comparison. At the outset, *Armstrong* claims must compare non-prosecutions of individuals outside the defendant's protected class who are suspected of having violated exactly the same statutory provision.[105]

But even where defendants can satisfy that basic burden, the question of who constitutes a "similarly situated" person outside the

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reluctance to employ it); Meares & Harcourt, *supra* note 17, at 735 (calling "for a new generation of criminal procedure jurisprudence, one that places empirical and social scientific evidence at the very heart of constitutional adjudication").

[103] In *United States v. Arenas-Ortiz*, the Ninth Circuit rejected Arenas-Ortiz's *Armstrong* claim where he provided statistics on the Federal Public Defender Office's caseload rates for the exact statute under which he was indicted. *See* 339 F.3d 1066 (9th Cir. 2003). Arenas-Ortiz hired a statistician, who argued that the rate of indictment for Hispanic men far outpaced their share of the population, but the court rejected these statistics as relying on fatally flawed extrapolation. *Id.*

[104] United States v. Alameh, 341 F.3d 167 (2d Cir. 2003) (rejecting a defendant's 400-defendant survey based on a LexisNexis study showing that after 9/11 the rate of fraudulent-citizenship prosecutions for those with "Arab or Muslim sounding surnames" increased from 15% of the sample to 85%). The Second Circuit found that the defendant's flawed assignment of ethnicity and religion to individual defendants undermined his *Armstrong* claim. *Id.*

[105] *See* United States v. Thorpe, 471 F.3d 652 (6th Cir. 2006) (rejecting an *Armstrong* challenge to the Eastern District of Michigan U.S. Attorney's Office "Project Safe Neighborhoods," a firearm-prosecution initiative, because the defendant did not show that non-prosecutions were under the same statutory provision of the indictment even if they were within the scope of Project Safe Neighborhoods).

defendant's protected class remains disputed.[106] In *United States v. Lewis*, where the defendant brought a selective-prosecution claim based on his dual status as black and Muslim, the First Circuit rejected Lewis's putative pool of "similarly situated" suspects as "non-African American, non-Muslim persons" suspected of the same offense.[107] The First Circuit reasoned, the pool must be conscribed to those "outside the protected class who ha[ve] committed roughly the same crime *under roughly the same circumstances*."[108] The First Circuit remanded, requiring that Lewis present evidence of non-prosecutions of "non-African-Americans and/or non-Muslims who had committed multiple misrepresentation offenses in connection with firearms paperwork, who posed a danger of violence, and who may have had links to terrorism" in order to sustain his claim.[109]

Even the contextualized apples-to-apples comparison of "similarly situated" individuals that the First Circuit envisioned in *Lewis* is no guarantee of success for an *Armstrong* claim. In *United States v. Hare*, black codefendants in a "crew" challenged an ATF sting operation on *Armstrong* selective-enforcement grounds by pointing to a "white crew" in the same neighborhood similarly "involved in robberies and drug distribution" who were not subject to an ATF sting.[110] The Fourth Circuit rejected this comparison because the *Hare* defendants failed to suggest the white crew's "criminal histories indicated that they would be receptive to a stash house robbery scenario, or whether ATF had the means of infiltrating this crew undercover." At worst, the Fourth Circuit reasoned, this was an "isolated example."[111] Whereas Lewis failed to provide comparison that was sufficiently specific to persons likely to commit the same crime, Hare's crew made a comparison that was

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[106] *See Kohler-Hausmann*, *supra* note 70, at 1184-87 and accompanying text (describing a theoretical objection to the counterfactual-style requirements of *Wayte* and *Armstrong* as fashioning an unrealistic "similarly situated" person).

[107] 517 F.3d 20, 26 (1st Cir. 2008).

[108] *Id.* at 27 (emphasis added).

[109] *Id.* at 26.

[110] 820 F.3d 93, 99-100 (4th Cir. 2016). In the police sting operation in *Hare*, members of the crew planned to rob a cocaine "stash house" that did not actually exist but was "fabricated by undercover federal agents as part of [the] sting operation." *Id.* at 95.

[111] *Id.*

too idiosyncratic and too specific for the court's liking to grant *Armstrong* discovery.

Armstrong discovery has not been entirely unworkable, however, and the rare cases granting *Armstrong* relief reflect a watered-down version of *Armstrong*'s demanding evidentiary standard. Although *Armstrong* discussed affidavits supported by anecdotal evidence only briefly,[112] a California appellate court in *People v. Superior Court (Baez)* granted *Armstrong* relief based on affidavits. Peter Baez, indicted for grand theft of housing assistance, provided two affidavits from attorneys claiming they had collectively represented twenty-five unindicted clients who were suspected of the same offense as Baez but were of different races.[113] Two years after *Armstrong*, the Sixth Circuit granted Climmie Jones and his codefendant Donnie Billings *Armstrong* discovery when they presented evidence that federal authorities arrested but did not charge eight similarly situated non-black suspects suspected of crack-cocaine offenses.[114] At first glance, *Jones* appeared to be a classic example of an *Armstrong* discovery claim, but it had one wrinkle: Jones was black and Billings was White.

Although under *Armstrong*'s "similarly situated" test, the evidence presented should have benefitted only Jones and not Billings, the Sixth Circuit relented on this requirement: "It would have been beyond foolish" for law enforcement to be so brazen in racial discrimination.[115] Furthermore, the Third Circuit has also shown solicitude for a relaxed *Armstrong* showing when the issue at stake was selective enforcement as opposed to selective prosecution. In *United States v. Washington*, the Third Circuit followed the Seventh Circuit in drawing a distinction between selective-prosecution claims (i.e., prosecutors' charging decisions are scrutinized) and selective-enforcement claims (i.e., law-enforcement personnel's actions are scrutinized).[116] Whereas

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[112] *Armstrong*, 517 U.S. at 459.

[113] People v. Superior Court (Baez), 94 Cal. Rptr. 2d 706, 707-10 (App. 6th Dist. 2000).

[114] United States v. Jones, 159 F.3d 969, 977-78 (6th Cir. 1998).

[115] *Id.* at 978.

[116] United States v. Washington, 869 F.3d 193, 218-20 (3d Cir. 2017) (citing United States v. Davis, 793 F.3d 712 (7th Cir. 2015)).

Armstrong's "strict discovery standard" applied to selective-prosecution claims, this "collision between equal protection principles and the criminal justice system" ought not apply to selective-enforcement claims: defendants need only show "some evidence" of discriminatory effect, not also intent, to win selective-enforcement discovery.[117]

These cases capture how *Armstrong* relief has become meaningfully available to defendants only as courts have relaxed, narrowed, and distinguished *Armstrong*'s strict two-part test. This phenomenon casts doubt on whether the "pure" *Armstrong* claim based on a system-wide showing of non-prosecutions of similarly situated individuals remains a practical avenue of relief; yet, even where *Armstrong* relief is granted, it still only entitles a defendant to more expansive discovery in pursuing an equal-protection claim.

B. An Exception to the Exception: Herring's Systemic-Negligence Exception

In *Mapp v. Ohio*, the Supreme Court extended to the states the exclusionary rule announced in *Weeks v. United States*—"that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible."[118] As the *Mapp* Court reiterated, the exclusionary rule serves as a "deterrent safeguard" against law enforcement officers violating the Fourth Amendment.[119] After *Mapp*, Justices seeking to limit the exclusionary rule suggested that such limits would not necessarily undermine the deterrent objective of the rule, and questioned whether the rule in fact deters police misconduct.[120] One such effort related to police officers acting in good faith who nevertheless ran afoul of the Fourth Amendment's dictates. In *Stone v. Powell*, for example, Justice White's dissent advocated for a "substantial[] modifi[cation]" to the exclusionary rule "to prevent its application

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[117] *Id.* at 213-14.

[118] Mapp v. Ohio, 367 U.S. 643, 655 (1961) (citing Weeks v. United States, 232 U.S. 383 (1914)).

[119] *Id.* at 648.

[120] *See, e.g.*, United States v. Leon, 468 U.S. 897, 906-13 (1984); United States v. Janis, 428 U.S. 433, 446-54 (1976); United States v. Calandra, 414 U.S. 338, 348-52 (1974); Coolidge v. New Hampshire, 403 U.S. 443, 491 (1971) (Harlan, J., concurring); Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 415 (1971) (Burger, J., dissenting).

in those many circumstances where the evidence at issue was seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this belief."[121]

In 1984, five other Justices joined Justice White and announced a "good faith" exception to the Fourth Amendment exclusionary rule. In *United States v. Leon*, officers relied on a facially valid warrant to search the defendants' residence and cars, where they discovered large amounts of drugs.[122] After their indictment, the defendants filed a motion to suppress on the ground that the warrant lacked probable cause.[123] The district court granted the motion in part, finding that although the officers relied in good faith on the valid search warrant, the affidavit underlying the search warrant did not give rise to probable cause because the officers relied on an informant who was neither credible nor reliable.[124] Although the evidence should have been excluded under *Mapp* because it was obtained without a valid warrant, the Supreme Court reversed and established the "good faith exception" to the exclusionary rule: an objective test of "whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization."[125]

The Court explained that "suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause."[126] It reasoned that suppression of the evidence would serve as a windfall for defendants and would have a limited deterrent effect on judges issuing warrants and officers acting under "the objectively reasonable belief that their conduct did not violate the Fourth Amendment."[127] Writing for the majority, Justice White articulated limits to the good-faith exception so it

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121 428 U.S. 465, 538 (1976).

122 *See* 468 U.S. 897, 902 (1984).

123 *Id.* at 903.

124 *Id.* at 903 & n.2.

125 *Id.* at 922 n.23.

126 *Id.* at 926.

127 *Id.* at 918; *see also* 1 JOSHUA DRESSLER, ALAN C. MICHAELS & RIC SIMONS, UNDERSTANDING CRIMINAL PROCEDURE: INVESTIGATION 362 (7th ed. 2017) (noting that this reasoning in "*Leon* could be used to support the outright abolition of the exclusionary rule").

would not swallow the exclusionary rule,[128] but he also recognized the importance of establishing the exception as the result of the Court's decades-long "question[ing]" of the exclusionary rule's "balancing approach."[129]

In later cases, the Court extended the good-faith exception. When officers conducted a warrantless administrative search authorized by a statute that was then subsequently invalidated, the Court in *Illinois v. Krull* expanded *Leon* so as not to require exclusion.[130] In *Arizona v. Evans*, officers made a routine traffic stop at which point they arrested the defendant on the basis of an outstanding arrest warrant found in an electronic court-managed database; in a search incident to arrest, the officers found marijuana.[131] It later emerged that the arrest warrant had been quashed but had not been removed from the court-managed system because of a clerical error. After reiterating the deterrence values undergirding *Leon*, the Court held that the exclusionary rule should not apply for several reasons, including: the exclusionary rule applies to *police* conduct, rather than that of judicial staff; court employees had "no stake in the outcome of particular criminal prosecutions" or Fourth Amendment protections; and there was no basis for believing that "application of the exclusionary rule" would have any deterrent effect.[132] Moreover, the once-in-a-blue-moon nature of clerical errors—approximately "on[c]e every three or four

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[128] Justice White noted four scenarios where the new good-faith exception does not apply. First, the good-faith exception does not apply where a magistrate's probable-cause finding was based on "the knowing or reckless falsity of the affidavit" of an officer. *Leon*, 468 U.S. at 914. Second, the exception cannot apply where a magistrate acts as "an adjunct law enforcement officer" who is neither "neutral [nor] detached" but rather "a rubber stamp for the police." *Id.* (citing Aguilar v. Texas, 378 U.S. 108, 111 (1964)). Third, an officer may not request a warrant based on an affidavit that lacks "a substantial basis for determining the existence of probable cause," meaning the warrant application must be supported by "more than a 'bare bones' affidavit." *Id.* at 915 (quoting Illinois v. Gates, 462 U.S. 213, 238-39 (1983)). Finally, where a warrant is "so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid," the good-faith exception does not apply. *Id.* at 923.

[129] *Id.* at 908-09.

[130] 480 U.S. 340 (1987).

[131] 514 U.S. 1, 4 (1995).

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

years" according to one officer's testimony—was too infrequent to provoke worry for the Court.[133]

But the Court's holding in *Evans* left open two interrelated questions: (1) what if it is *law enforcement*, not courts, that manage an error-filled database and (2) what if those errors recur systematically, not just "every three or four years"? The Court squarely answered these questions in *Herring v. United States*.[134] Bennie Dean Herring went to the Coffee County, Alabama Sheriff's Department to obtain some of his belongings from his impounded truck.[135] At the station, an officer asked a clerk to check for outstanding arrest warrants; finding none, the clerk, at the officer's behest, sent a request to adjacent Dale County.[136] The Dale County database returned an active arrest warrant for Herring due to his failure to appear in court on a felony charge. Herring was then arrested, and during a search incident to arrest, officers found methamphetamine and a firearm in his possession.[137] But the Dale County warrant had been recalled months earlier and the police database was in error.[138]

Herring moved to suppress the drugs and firearm, arguing that without a valid warrant, his arrest was unlawful and so too was the search incident to that unlawful arrest. The trial and appellate courts, invoking *Leon*, denied his motion on the ground that the officers acted on a good-faith belief that there was a valid outstanding warrant and that any exclusionary remedy would have limited deterrent effect.[139] The Supreme Court affirmed, extending the good-faith exception of *Leon* and *Evans* to errors in law-enforcement databases. The majority reiterated deterrence as the cornerstone of all exclusionary-rule inquiries and noted that "the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence."[140] Whereas "deliberate, reckless, or grossly negligent conduct" likely constitutes officer bad faith that is ineligible for

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133 *Id.* at 15.
134 555 U.S. 135 (2009).
135 *Id.* at 137.
136 *Id.*
137 *Id.*
138 *Id.* at 137-38.
139 *Id.* at 138-39.
140 *Id.* at 144.

Leon's good-faith exception, the majority's discussion of police "recurring or systemic negligence" raised an eyebrow.

This rearticulation of *Leon* broke new ground by suggesting that even *good-faith* police negligence could justify an exclusionary remedy if that negligence rises to a systemic level. The majority held that officers "might be reckless" when they rely on an "unreliable warrant system" characterized by "systemic errors."[141] In Herring's case, there was no widespread pattern of errors in the Dale County warrant system. Compared to *Evans*, where errors in the judicially managed system cropped up every three or four years, officers in *Herring* testified that this error was sui generis.[142] The majority reasoned that an exclusionary remedy for such isolated incidents of police negligence would have only "marginal deterrence [that] does not 'pay its way.'"[143]

Defendants have had limited success in seeking *Herring* remedies. Courts have identified systemic negligence only under egregious circumstances. For instance, in *United States v. Song Ja Cha*, officers made a mistake of law by seizing Song Ja Cha's home for an "unreasonably long" period of time, approximately 26.5 hours, preventing Cha from retrieving his diabetes medication for four hours in the early morning.[144] The officers seized Cha's home at 1:00 a.m., but they had until noon that day to prepare the warrant application; the officers were slated to finish their reports by 3:00 p.m. that day but were over three hours late, submitting the report to the supervising officer at 6:30 p.m.[145] It was not until Sunday evening that the supervising officer started the warrant application, and the chief prosecutor did not read the application until Monday morning.[146] This "nonchalant attitude" was "pervasive in the Guam law enforcement apparatus," which was sufficient for the court to find *Herring*'s systemic-negligence

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[141] *Id.* at 146 (citing Arizona v. Evans, 514 U.S. 1, 17 (1995) (O'Connor, J., concurring) ("Surely it would *not* be reasonable for the police to rely . . . on a recordkeeping system . . . that *routinely* leads to false arrests." (second emphasis added)); Hudson v. Michigan, 547 U.S. 586, 604 (2006) (Kennedy, J., concurring in part and concurring in judgment) ("If a *widespread pattern* of violations were shown . . . there would be reason for grave concern." (emphasis added)).

[142] *Id.* at 137-38.

[143] *Id.*

[144] 597 F.3d 995, 1005-06 (9th Cir. 2010).

[145] *Id.*

[146] *Id.*

exception satisfied.[147] Multiple officers' willingness to leave Cha in the lurch without any demonstrated care was sufficiently egregious for the Ninth Circuit to affirm the district court's suppression order under *Herring*'s systemic-negligence exception to the good-faith exception.[148] The court expressed particular concern that "there was no departmental training or protocol instructing the officers that a warrant must be secured reasonably quickly after a premises has been seized."[149]

The Sixth Circuit granted *Herring* relief under similar circumstances in *United States v. Booker*. When officers suspected that Felix Booker (who was detained at the time for marijuana possession) was concealing drugs in his rectum, they brought him to a hospital where one Dr. LaPaglia performed a digital rectal examination.[150] This was the third time that these officers had sought LaPaglia's help with such an examination.[151] Booker arrived at the hospital, and was intubated for an hour, rendering him unconscious for twenty to thirty minutes. With LaPaglia's help, the officers retrieved crack rock from Booker's rectum.[152] Booker moved to suppress the crack cocaine on the ground that the digital rectal examination was an unreasonable search under the Fourth Amendment.[153] The Sixth Circuit found that "the evidence that this was the third time in three years that LaPaglia assisted the police suggests recurring behavior," as proscribed by *Herring*.[154] This was "not a situation in which the officers relied in good faith on the mistake of a magistrate or judge" like in *Leon* or "an erroneous entry in a warrant database" like in *Herring* or *Evans*.[155] The court held not only that this recurring negligence was an exception to the good-faith doctrine under *Herring*, but also that under *Leon*'s objective good-faith test, "a reasonably well-trained officer and

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147 *Id*.

148 *See id*. The Ninth Circuit further held that the seizure was also "deliberate [and] culpable," providing another basis for suppression in addition to systemic negligence. *Id*. at 1004-06.

149 *Id*. at 1006.

150 United States v. Booker, 728 F.3d 535, 536-37 (6th Cir. 2013).

151 *Id*. at 538.

152 *Id*. at 537.

153 *Id*. at 540.

154 *Id*. at 548.

155 *Id*.

physician would have known that the search was unlawful," suggesting that the officers would not even have been eligible for the good-faith exception in the first place.[156] The Sixth Circuit also invoked *Rochin v. California* and the fundamental-fairness doctrine under which police intrusions that "shock[] the conscience," such as stomach pumping in *Rochin*, are found to violate due process.[157] Retrofitting the fundamental-fairness doctrine from the mid-twentieth century to modern-day reasonableness analysis, the court held that the rectal exam in *Booker* "shocks the conscience" and so violates fundamental fairness under the Due Process Clause, which necessarily rendered the rectal exam an unreasonable search for Fourth Amendment purposes.[158]

The Arizona Supreme Court in *State v. Havatone* granted a *Herring* claim as part of an as-applied constitutional challenge to state implied-consent laws. The court began by explaining that Arizona and Nevada both have implied-consent laws, which permit law-enforcement officials to "make or direct nonconsensual blood draws from unconscious DUI suspects."[159] Don Jacob Havatone was injured in a car accident in Arizona and airlifted to a hospital in Nevada for treatment.[160] Consistent with Arizona's and Nevada's implied-consent laws and department policy, an officer requested a blood sample from an unconscious Havatone, which revealed a blood alcohol content several times over the legal limit.[161] The trial court denied Havatone's motion to suppress the blood sample on the ground that even if the warrantless blood draw was illegal, the officers relied in good faith on the statutes and department policy to make the seizure, thereby qualifying for the good-faith exception.[162]

After Havatone's arrest but before the Arizona Supreme Court's decision in *Havatone*, the U.S. Supreme Court decided in

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[156] *Id.*

[157] *Id.* at 545-46.

[158] *Id.* (citing Rochin v. California, 342 U.S. 165 (1952); Winston v. Lee, 470 U.S. 753 (1985)).

[159] *See* State v. Havatone, 389 P.3d 1251, 1253 (Ariz. 2017); ARIZ. REV. STAT. ANN § 28-1321(A), (C) (2020); NEV. REV. STAT. ANN. § 484C.160(1), (3) (West 2020).

[160] *Havatone*, 389 P.3d at 1253.

[161] *Id.*

[162] *Id.*

Missouri v. McNeely that nonconsensual, warrantless blood draws in DUI cases required exigent circumstances beyond the natural dissipation of alcohol in the blood.[163] As the *Havatone* court pointed out, even decades before *McNeely*, the Supreme Court in *Schmerber v. California* made clear that warrantless blood draws from DUI suspects were never per se exigent but rather required a totality of the circumstances showing of exigency.[164] The Arizona Supreme Court held that the implied-consent statutes could only be constitutional after a showing of exigent circumstances under a totality of the circumstances, and the state failed to make such a showing in Havatone's case.[165] The court reasoned that the police department should have known that *Schmerber* and its progeny cast doubt on implied-consent statutes authorizing warrantless nonconsensual blood draws, and the department's routine and "rote application" of the statute in contravention of this precedent was not objectively reasonable.[166] The department thus could not rely on the good-faith exception because "'recurring or systemic negligence' [was] present" in the form of the department's erroneous "policy and training," which failed to reflect *Schmerber* and *McNeely*.[167]

But beyond such egregious fact patterns, courts more readily deny *Herring* claims. Courts appear particularly reluctant to grant *Herring* relief when officers rely on errors in databases. For example, in *Gonzalez v. United States Immigration and Customs Enforcement*, the Ninth Circuit denied *Herring* relief where law enforcement relied on a faulty database providing erroneous information on defendants' removability from the United States.[168] The court reasoned that "[e]ven if an individual database provides incomplete information, *other* databases may compensate for those weaknesses, resulting in a sufficiently reliable accumulation of evidence to furnish probable cause."[169] The Fourth Circuit similarly rejected a *Herring* claim that alleged that a police "database is

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[163] 569 U.S. 141 (2013).

[164] *Havatone*, 389 P.3d at 1257 (citing Schmerber v. California, 384 U.S. 757 (1966)).

[165] *Id.* at 1255-56.

[166] *Id.* at 1259.

[167] *Id.* at 1256, 1264 (internal quotation marks omitted).

[168] 975 F.3d 788 (9th Cir. 2020).

[169] *Id.* at 823 (emphasis added).

known to be frequently incorrect," reasoning that the "database generally is accurate and that widespread use of its reports indicates th[at it must] be trusted."[170]

In the Tenth Circuit case *United States v. Esquivel-Rios*, Antonio Esquivel-Rios was detained after an officer called in Esquivel-Rios's temporary vehicle registration tag, which did not return a match in a database that belonged to another agency, and found methamphetamine in the vehicle.[171] In fact, Esquivel-Rios's tag was in fact in proper order, but due to a lack of information sharing between the agency that maintained the database and law enforcement, the database the officer used was not current. [172] The faulty database, Esquivel-Rios argued, undermined the officer's finding of reasonable suspicion to justify the seizure. The court rejected this *Herring* argument, holding that there was no "gross mismanagement where one agency . . . has the information that another agency . . . needs to maintain a complete database . . . . and there is no evidence that [the database-maintaining agency] negligently failed to update its database or routinely made record-keeping errors."[173]

Moreover, even where a database contained illegally retained—though accurate—information about a defendant, courts have demurred on *Herring* relief. In *United States v. Davis*, Earl Whittley Davis's DNA was entered into a police database after he was treated at a hospital for a gunshot wound and police retained his bloodstained clothing as evidence.[174] Years later, police ran a DNA check on evidence at a murder scene and found a "cold hit" for Davis's DNA, which led the police to arrest Davis.[175] Davis moved to suppress based in part on the police's illegal retention of his DNA in the database.[176] Although the Fourth Circuit agreed that retention of the DNA was unlawful, the court applied the good-faith exception because it found "at most, isolated negligence" due to a police analyst entering the DNA into the database in good faith, without realizing that doing so would constitute a Fourth

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[170] United States v. Brown, 618 F. App'x 743, 745 (4th Cir. 2015) (per curiam).
[171] 786 F.3d 1299, 1301-02 (10th Cir. 2015).
[172] *Id.* at 1302, 1304.
[173] *Id.* at 1309.
[174] 690 F.3d 226, 230-31 (4th Cir. 2012).
[175] *Id.* at 229.
[176] *Id.*

Amendment violation.[177] Applying *Herring*, the Fourth Circuit deemed the police negligence at issue insufficiently systemic to warrant relief for Davis.[178]

In theory, *Herring* represents a narrow exception to the good-faith exception to the exclusionary rule. If defendants can show that officers' good-faith violations of the Fourth Amendment were the product of system-wide negligence in policing, defendants may revive the possibility of an exclusionary remedy (otherwise threatened by the good-faith exception). Lower court practice, however, reflects the challenges of making out a *Herring* claim, and courts seem particularly hesitant to grant exclusionary remedies when police error is due to a database error. If *Song Ja Cha*, *Booker*, and *Havatone* are any indication, the few success stories of *Herring* claims relate either to repeated egregious incidents of police detention or extreme, unconsented bodily intrusions that may sound in fundamental fairness due process doctrine as well.

C. Brillon*'s Systemic-Breakdown Calculation Under the Speedy Trial Clause*

The Speedy Trial Clause of the Sixth Amendment ensures that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."[179] The Speedy Trial Clause "has its roots at the very foundation of [the] English law heritage."[180] It protects various interests, such as preventing "undue and oppressive" pretrial incarceration, "minimiz[ing] anxiety and concern accompanying public accusation,"[181] protecting the defendant's personal life, and ensuring the defendant can adequately prepare a case through timely collection of evidence and witnesses.[182] The speedy-trial right attaches at the earlier of a defendant's arrest or becoming subject to a formal charge.[183]

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[177] *Id.* at 253.

[178] *Id.* at 252-53.

[179] U.S. CONST. amend. VI.

[180] Klopfer v. North Carolina, 386 U.S. 213, 223 (1967).

[181] Smith v. Hooey, 393 U.S. 374, 378 (1969) (quoting United States v. Ewell, 383 U.S. 116, 120 (1966)).

[182] LAFAVE ET AL., *supra* note 62, § 18.1(b).

[183] *See* United States v. Marion, 404 U.S. 307, 318 (1971) (explaining that the right to a speedy trial becomes applicable after a person is charged or accused of crime).

In *Barker v. Wingo*, the Supreme Court established a four-part balancing test to determine whether pretrial delay constitutes a violation of a defendant's constitutional right.[184] First, as a threshold matter, the defendant must demonstrate a "presumptively prejudicial" pretrial delay.[185] In practice, delays approaching one year are deemed presumptively prejudicial.[186]

Second, courts will analyze the reason for the delay. The Court has articulated three types of reasons for delay: (i) a "deliberate attempt to delay the trial in order to hamper the defense . . . weigh[s] heavily against the government," (ii) a "more neutral reason such as negligence or overcrowded courts," which "should be weighed less heavily but nevertheless should" weigh against the government, and (iii) "a valid reason, such as a missing witness . . . [which] serve[s] to justify appropriate delay."[187] Delays attributable to the defendant—including delays relating to a defendant's pretrial motion or delays in the court's ruling on that motion[188]—typically count in this third "valid reason" category.[189] Notably, "delay caused by the defendant's counsel is also charged against the defendant," whether or not counsel is a public defender or privately retained.[190]

Third, the strength of a defendant's efforts to assert the speedy trial right weigh in a defendant's favor. In *Barker* itself, the speedy trial claim was denied in part because it was clear Barker did not conscientiously push for a trial.[191] In contrast, the Second Circuit held in *United States v. Tigano* that the defendant's years-long

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184 407 U.S. 514, 530 (1972).

185 *Id.*

186 Doggett v. United States, 505 U.S. 647, 652 n.1 (1992). LaFave et al. note that some courts follow an eight-month mark, but "more commonly" courts find the *Barker* inquiry triggered at or beyond the one-year mark. *See* LAFAVE ET AL., *supra* note 63, § 18.2(b).

187 *Barker*, 407 U.S. at 531.

188 *See* United States v. Jones, 524 F.2d 834, 852 (D.C.Cir.1975).

189 LAFAVE ET AL., *supra* note 63, § 18.2(c). This, however, "does not mean that existence of a reason falling within this group will necessarily compel the conclusion that defendant's speedy trial rights were not violated." *Id.*

190 *See* Vermont v. Brillon, 556 U.S. 81, 90-91 (2009).

191 *Barker*, 407 U.S. at 534-35 ("Barker did not want a speedy trial.").

effort to assert his right to trial, even without his counsel's full approval, was sufficient to satisfy this factor.[192]

Finally, the court will weigh the delay's prejudicial effect on the defendant in (i) preventing "oppressive pretrial incarceration," (ii) minimizing "anxiety and concern of the accused," and (iii) limiting impairment of the defense's case.[193] The Court recognized that of the three types of prejudice, "the most serious" is the third kind, especially as it relates to defendant-friendly witnesses being unable to testify as a result of the delay, as was the case in *Barker*.[194] Like every *Barker* factor, prejudice is neither "a necessary [n]or sufficient condition to the finding of a deprivation of the right of speedy trial."[195] In *Doggett v. United States*, for example, the Court held that a pretrial delay of 8.5 years demonstrates government negligence so great that prejudice could be presumed based solely on the length of the delay.[196]

Within the *Barker* framework, the Supreme Court has also sown seeds of the systemic-failure doctrine. This is illustrated by *Barker*'s second prong, which analyzes "whether the government or the criminal defendant is more to blame for th[e] delay."[197] Ordinarily, "delay caused by the defendant's counsel is [] charged against the defense" because even when defense counsel is a public defender, "the attorney is the [defendant]'s agent when acting, or failing to act, in furtherance of the litigation."[198] Even when defense counsel causes a pretrial delay over a defendant's objection, courts have continued to hold that as long as "the continuances were

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[192] 880 F.3d 602, 616, 619 (2d Cir. 2018); *see also* Logan v. State, 16 N.E.3d 953, 963 (Ind. 2014) (noting the defendant "persistently and emphatically asserted his right to a speedy trial").

[193] *Barker*, 407 U.S. at 532.

[194] *Id.*

[195] *Id.* at 533.

[196] *See Doggett*, 505 U.S. at 647.

[197] *Id.* at 651.

[198] *Brillon*, 556 U.S. at 90-91 (2009) (quoting Coleman v. Thompson, 501 U.S. 722, 753 (1991)); *see also* Polk County v. Dodson, 454 U.S. 312, 318 (1981) (quoting AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE § 4-3.9 (2d ed. 1980)) (noting that attribution of delay to the defendant follows from defense counsel's delays regardless of whether counsel is "privately retained, appointed, or serving in a legal aid or defender program"). The Court in *Brillon* noted that "assigned counsel ordinarily is not considered a state actor" except when making "hiring and firing" decisions on behalf of the state. 556 U.S. 81, 91 & n.7 (2009).

sought in order to provide professional assistance in the defendant's interests," the delay is attributed to the defendant.[199]

In *Vermont v. Brillon*, the Court heard the government's petition to reverse the Vermont Supreme Court's finding of a Speedy Trial Clause violation.[200] Michael Brillon was convicted of felony domestic assault and habitual offender charges, but his trial took place nearly three years after his arrest.[201] Brillon was represented by six different public defenders, and the Vermont Supreme Court attributed the numerosity of counsel to the "inability or unwillingness [of assigned counsel] to move the case forward."[202] Writing for the Court, Justice Ginsburg held that Vermont made a "fundamental error in its application of *Barker*" because "State delays caused by the failure of several assigned [defense] counsel to move Brillon's case forward" should still be weighed against the defendant.[203]

The majority justified this decision on three grounds. First, a ruling to the contrary would establish a perverse incentive for defense counsel to seek "unreasonable continuances, hoping . . . to obtain a dismissal of the indictment on speedy-trial grounds."[204] Second, Brillon's claim was premised on the idea that assigned counsel is in some sense a state actor, but this would create an untenable distinction between assigned and retained counsel.[205] It would be unjustifiable to attribute delays to the government when assigned counsel unreasonably requests continuances but not to make the same attribution when defense counsel is privately retained.[206] Third, Brillon's own "aggressive behavior" in "forc[ing] the withdrawal of" his earlier attorneys should have counted against Brillon in the state court's analysis.[207]

Despite denying Brillon speedy-trial relief, the majority opened a door for future claims at the end of its opinion. The Court

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[199] Flores-Gomez v. State, 455 P.3d 1212, 1217 (Wyo. 2020) (citing State v. Ollivier, 312 P.3d 1, 14 (Wash. 2013) (collecting cases from state and lower federal courts)).

[200] 556 U.S. at 84.

[201] *Id.*

[202] *Id.* at 92.

[203] *Id.* at 91-92 (internal quotation marks and citation omitted).

[204] *Id.* at 93.

[205] *See id.* at 92.

[206] *See id.* at 93.

[207] *Id.* at 93-94.

noted that the "general rule attributing to the defendant delay caused by assigned counsel is not absolute," and "[d]elay resulting from a systemic breakdown in the public defender system *could* be charged to the State."[208] Brillon himself could not benefit from this systemic-breakdown avenue because the record failed to present any "institutional problems caus[ing] any part of the delay in his case."[209] The majority also invoked dicta from *Polk County v. Dodson*, a case where the Court denied a § 1983 suit alleging a civil-rights violation when a public defender withdrew on the ground that a defendant's appellate claims were frivolous.[210] The *Dodson* Court noted the regrettable "unprecedented strains, including increased demands for legal assistance" in Iowa's public defender system.[211]

After *Brillon*, some courts have minimized the availability of "systemic breakdown" relief under *Barker*. In *Weis v. State*, the Georgia Supreme Court was parsimonious in applying *Brillon* when the state's funding of Jamie Weis's attorneys in his capital case ran out for a five-month period during his prosecution.[212] Although the *Weis* court counted against the government the delay due to the lack of funding during that five-month period, the court denied that there was systemic breakdown under *Brillon*. It reasoned that other attorneys capable of representing Weis were still available within the state, meaning the system could not have "broken down from the lack of funding."[213] The court held that "there can be no systemic breakdown in the public defender system when there are still attorneys within that system who are available to represent the criminal defendant."[214] The *Weis* court appears to have held that a defendant's *Brillon* right is virtually nonexistent

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[208] *Id.* at 94 (emphasis added) (internal quotation marks and citations omitted).

[209] *Id.*

[210] *Id.* (citing Polk Cnty. v. Dodson, 454 U.S. 312 (1981)); *see also* Anders v. California, 386 U.S. 738, 744 (1967) (holding that an attorney who wishes to withdraw from a case after conviction on the ground that the appeal would be frivolous must file a brief referring to anything in the record that might support an appeal); *see also* Jones v. Barnes, 463 U.S. 745, 753-54 (1983) (noting that counsel is not required to raise every nonfrivolous issue in an *Anders* brief).

[211] *Dodson*, 454 U.S. at 324.

[212] 694 S.E. 2d 350, 354-56 (Ga. 2010).

[213] *Id.* at 355.

[214] *Id.* (internal quotation marks and citations omitted).

where there is funding to ensure that *some* attorney could potentially work for the defendant.

Similarly, in *State v. Thomas*, a Louisiana appellate court reversed a trial court's grant of *Brillon* relief where Eugene Thomas's and Morris Patin's attorneys withdrew amidst the chaos of Hurricane Katrina in 2006 and the defendants cycled through various different counsel due to retention and administrative strains in the public defender's office after the hurricane.[215] "[E]ven if this [hurricane-caused] delay can be considered to have been due to a 'breakdown' in the public defender system," the appellate court reasoned, this breakdown "comprised only three months of the over-eight years of delay in this case," so was insufficient to find a speedy-trial violation for the defendants.[216]

The rarity of *Brillon* relief might be due in part to the ambiguity over what constitutes a systemic breakdown. The California Supreme Court in *People v. Williams* lamented that *Brillon*'s description of what constitutes systemic breakdown amounts to vague "institutional problems," leaving "much we do not know."[217] That court added its own gloss to *Brillon*, suggesting "unreasonable resource constraints, misallocated resources, inadequate monitoring or supervision, or other systemic problems" might provide indicia of breakdown.[218]

When courts have found systemic breakdown under *Brillon*, it is usually along the lines outlined by the California Supreme Court. In *People v. Superior Court* (*Vasquez*), a California appellate court attributed a two-year delay to the government when the public defender's office faced dysfunction arising from budget cuts, heavy workload, and public defenders' transfers between offices.[219] In *In re Butler*, another California appellate court similarly granted a *Brillon* claim when the "public defender's mismanagement of th[e] case went beyond any particular attorney's performance," including

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[215] *See* 2010-709 (La. App. 3 Cir. 12/8/10); 54 So. 3d 146, 149-52.

[216] *Id.* at 37.

[217] 315 P.3d 1, 38 (Cal. 2013); *see also* State v. Ochoa, 406 P.3d 505, 514 (N.M. 2017) (holding that although a multiday government furlough affecting public defenders was "institutional in origin," it did not constitute systemic breakdown under *Brillon* because it was not "so debilitating as to justify attributing the delay to the government").

[218] *Williams*, 315 P.3d at 38.

[219] 238 Cal. Rptr. 2d 14, 42 (Ct. App. 2018).

failure to push for probable-cause hearings or complete trial preparation and its "relay race of substituting counsel."[220] In the *Butler* court's view, systemic breakdown may be shown when there is "a perfect storm of institutional dysfunction."[221] The funding of the public defender's office had particular salience in *Boyer v. Vannoy*. There, Boyer's *Barker* claim was ultimately unsuccessful, but the Fifth Circuit did weigh a two-year delay against the government when Jonathan Boyer and his public defender repeatedly (over the course of seven years) motioned for additional funding for counsel.[222]

Brillon claims seem to have the most success when tied to last-minute substitutions of public defenders and budget shortfalls, but generally courts cabin *Brillon* relief. As in *Thomas* and *Williams*, *Brillon* relief attributes delay to the government only for *part* of the period of pretrial delay. In other words, *Brillon* relief does not guarantee speedy-trial relief under *Barker*. So, a successful *Brillon* claim gets a defendant only part of the way to a successful speedy-trial claim.

III. SYSTEMIC FAILURE OUTSIDE THE DOCTRINE

An understanding of *Armstrong*, *Herring*, and *Brillon* would be incomplete without attention to the cases in which the court has recognized a systemic failure in criminal administration but nonetheless declined to provide a route to relief. The cases discussed in this Part, unlike the cases discussed in Part II, involve civil claims. In these cases, the Court has relied on standing as a doctrinal tool to preclude relief where the Justices have concerns about the overbreadth of the requested remedy. Because the claims for relief at issue in *Armstrong*, *Herring*, and *Brillon* were raised by individual criminal defendants in their own prosecutions, standing was no bar to relief. Thus, one way to see the difference between the cases discussed in Part II and those discussed in this Part is to understand that the systemic-failure doctrine characterized in Part

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[220] *In re* Butler, 269 Cal. Rptr. 3d 649, 658 (Ct. App. 2020).

[221] *Id.* at 662.

[222] 863 F.3d 428, 442-45 (5th Cir. 2017). Although Boyer's *Barker* claim was ultimately unsuccessful, the Fifth Circuit did weigh the funding delay in Boyer's favor. *Id.* at 445.

II concerns claims of relief by individual defendants, while the doctrine in this Part involves claims for class-wide systemic relief. In these cases, standing doctrine provides a way for the Court restrict relief for systemic failure when the remedy lacks a limiting principle. Distinguishing these two lines of cases helps illuminate the Court's motivation in providing for relief of systemic failure under certain circumstances.

Before turning to this other set of systemic-failure cases, it is important to address a threshold explanation that, while helpful, does not tell the full story. One way to account for the relief offered in *Armstrong*, *Brillon*, and *Herring* is that the Court was recognizing weak points in the criminal justice system, where systemic failures are most likely to occur, and providing some means to redress them. Indeed, each of the three cases may be put into direct correspondence with a source of contention in criminal-justice dialogue: prosecutors' allocation of resources (*Armstrong*), the quality of public defense (*Brillon*), and police-citizen interactions (*Herring*). Although the evidence that the Court confronted in each of these cases was insufficient to establish systemic failure, the Court nonetheless recognized that similar systemic failures in a future case might substantiate claims for individual relief and provide a blueprint for how defendants might seek to bring such claims. To be sure, the similarity between *Armstrong*, *Brillion*, and *Herring* suggests that the Court's decision to recognize a weak point in criminal justice is a necessary condition for it to provide an avenue of relief for systemic failure.

But however necessary this recognition is, it is not sufficient to explain why the Court has fashioned the doctrine as it has. In the cases described below—many of which concern prisoners' claims against state agencies and officers—the Court has acknowledged systemic failures in criminal justice but declined the opportunity to offer individual defendants an opportunity for relief. Examining these cases reveals that even when the Court recognizes a systemic failure, it will not make relief available unless it can locate a limiting principle. The Court has repeatedly emphasized that,

without a limiting principle, such relief threatens to throw the system into chaos.[223]

A. Failures Excluded from the Systemic-Failure Doctrine

The distinctive features of the systemic-failure doctrine are most easily identified by investigating those cases falling just outside the theoretical protections of this doctrine. These cases, though identifying "systemic" failures in criminal justice, afforded no prospective relief for individual defendants in the way *Armstrong*, *Herring*, and *Brillon* did. The most infamous of these cases is *McCleskey v. Kemp*.[224] Warren McCleskey, a black death-row inmate in Georgia, was convicted of the murder of a white police officer in 1978.[225] Following his loss on direct appeal at the Georgia Supreme Court and the U.S. Supreme Court's denial of his certiorari petition, McCleskey challenged his sentence on Eighth Amendment and equal-protection grounds in a habeas petition that eventually reached the Supreme Court.[226]

The primary basis for McCleskey's challenge was a groundbreaking study by David Baldus, which established with statistical significance that defendants who killed white victims were much more likely to receive a death sentence than those who killed black victims.[227] Per Justice Powell, a 5-4 Court rejected McCleskey's challenge, finding that the significant racially based sentencing discrepancies identified in the study did not rise to the level of a "major systemic defect[]."[228] Among several considerations that it cited to justify its decision, the majority opinion noted that "there is no limiting principle to the type of challenge brought by McCleskey,"[229] revealing a concern that "recognition of McCleskey's claim would open the door to widespread challenges to all aspects of criminal sentencing."[230] In dissent, Justice Brennan suggested

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[223] *See, e.g.*, Brown v. Plata, 563 U.S. 493, 550 (2011) (Scalia, J., dissenting); Lewis v. Casey, 518 U.S. 343, 385-86 (1996) (Thomas, J., concurring).

[224] 481 U.S. 279 (1987); *see supra* Section II.A.

[225] *Id.* at 283.

[226] *Id.* at 285-91.

[227] *Id.* at 286-91.

[228] *Id.* at 313 (quoting Pulley v. Harris, 465 U.S. 37, 54 (1984)).

[229] *Id.* at 318.

[230] *Id.* at 339 (Brennan, J., dissenting).

that the majority ruled as it did out of "a fear of too much justice."[231] Also in dissent, Justice Blackmun reasserted the Eleventh Circuit's finding that the study "showed that systemic and substantial disparities existed" within Georgia's capital sentencing regime.[232] Justice Stevens remarked in his own dissent that "the Court's decision appears to be based on a fear that the acceptance of McCleskey's claim would sound the death knell for capital punishment in Georgia."[233] In the dissenters' view, the Court's decision to deny relief had little to do with its judgment of whether a systemic defect in fact existed, and more to do with its fear that allowing relief for this systemic failure would unduly upset an institution of criminal justice.

In many Eighth Amendment cases since *McCleskey*, the Court has drawn upon similar concerns to deny relief even when systemic failure is evident. A pair of cases from the 1990s, *Wilson v. Seiter*[234] and *Lewis v. Casey*,[235] illustrate the general pattern of how the Court has used strict mens rea and standing requirements, respectively, to limit the availability of relief for systemic failures in criminal justice.

In *Wilson*, Pearly L. Wilson brought a § 1983 suit against officials at Ohio's Hocking Correctional Facility, arguing that systemic failures had rendered conditions at the state prison inhumane, violating the Eighth Amendment's prohibition on cruel and unusual punishment.[236] Writing for a 5-4 majority, Justice Scalia explained that to trigger the Eighth Amendment, it was not enough for Wilson to show a deprivation of "the minimal civilized measure of life necessities."[237] To prevail, the majority wrote, Wilson must have also shown that the prison officials acted with "deliberate indifference" to the harm Wilson suffered.[238] Concurring only in the judgment, Justice White, joined by Justices Marshall,

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[231] *Id*.

[232] *Id.* at 353 (Blackmun, J., dissenting) (citation omitted).

[233] *Id.* at 367 (Stevens, J., dissenting).

[234] 501 U.S. 294 (1991); *see also* Estelle v. Gamble, 429 U.S. 97, 106 (1976) (raising similar issues); Farmer v. Brennan, 511 U.S. 825 (1994) (same).

[235] 518 U.S. 343 (1996); *see also* Rizzo v. Goode, 423 U.S. 362 (1976) (raising similar issues); City of Los Angeles v. Lyons, 461 U.S. 94 (1983) (same).

[236] Wilson, 501 U.S. at 296.

[237] *Id.* at 298 (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)).

[238] *Id.* at 303 (quoting LaFault v. Smith, 834 F.2d 389, 391 (4th Cir. 1987) (Powell, J., sitting by designation)).

Blackmun, and Stevens, highlighted a problem with the majority's approach: the "deliberate indifference" standard was poorly suited to redressing systemic failure in prison administration.[239] "Inhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time," the concurrence observed.[240] "[I]ntent simply is not very meaningful when considering a challenge to an institution."[241] Along with *Estelle v. Gamble*,[242] which introduced the "deliberate indifference" standard, and *Farmer v. Brennan*,[243] in which the Court further intensified the individualistic focus of the conditions-of-confinement inquiry, *Wilson* effectively foreclosed the majority of prisoners' claims for redress from systemic failures in prison administration.[244]

Lewis v. Casey[245] continued this trend of circumscribing the availability of systemic relief. Fletcher Casey, Jr. and twenty-one other inmates in Arizona state prisons brought a class action under § 1983, alleging that various shortcomings in the prisons' library facilities deprived the plaintiffs of their First, Sixth, and Fourteenth Amendment rights of access to the courts as those had been defined in *Bounds v. Smith*.[246] While Casey and the other plaintiffs obtained an injunction in federal district court, the Supreme Court reversed on standing grounds.[247] The logic of *Casey* precluded the inmates from establishing actual injury from a *Bounds* violation unless they had proven that the alleged resource shortcomings actually hindered their pursuit of nonfrivolous legal claims relating to their sentences, treatment, or conditions of

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[239] *Id.* at 310-11 (White, J., concurring).

[240] *Id.* at 310.

[241] *Id.*

[242] 429 U.S. 97 (1976).

[243] 511 U.S. 825 (1994).

[244] *See* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1864-66 (2015) (discussing how the holdings in *Wilson* and *Farmer* operate to "exclu[de] . . . [prison] administration from judicial review").

[245] 518 U.S. 343 (1996).

[246] *Casey*, 518 U.S. at 346; *see also* Bounds v. Smith, 430 U.S. 817, 828 (1977) ("[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.").

[247] *Casey*, 518 U.S. at 349.

confinement.[248] Although the possibility of relief for a systemic *Bounds* violation technically survived after *Casey*, the Court's opinion rendered that possibility remote. The Court found that one of the named plaintiffs, Bartholic, made the necessary showing of "actual injury," but this was insufficient to establish grounds for the injunction, because individual instances of "actual injury" were insufficient to prove a system-wide impact.[249]

Because its primary holding concerned standing, *Casey*'s impact extended well beyond the *Bounds* context. By refusing to provide class-wide standing based on Bartholic's actual injury, the *Casey* court strongly suggested that, to obtain class-wide relief for systemic violations of constitutional rights, § 1983 plaintiffs were required to prove "that some or all of the unnamed class could themselves satisfy the standing requirements for named plaintiffs."[250] "Merely the status of being subject to a governmental institution that was not organized or managed properly," the majority wrote, was not enough "to invoke the intervention of the courts" without evidence of "actual, imminent harm" caused by the deficient management.[251] The four dissenting Justices resisted this treatment of standing and criticized the majority for "us[ing] the case as an opportunity to meander through the laws of standing and access to the courts, expanding standing requirements here and limiting rights there," for an "excessively strict" result.[252]

B. Brown v. Plata: *A Rare Exception*

Not all Eighth Amendment claimants seeking relief for systemic failures have met the same fate as McCleskey, Wilson, and Casey. In the single, exceptional case in which the Supreme Court granted large-scale relief for a systemic Eighth Amendment violation, the same considerations that appeared in *McCleskey*, *Wilson*, and *Casey* influenced the parameters under which the

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[248] *Id.* at 351.

[249] *Id.* at 358-60.

[250] *Id.* at 395 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

[251] *Id.* at 350. The *Casey* majority's view of standing echoed the Court's earlier pronouncements in *Rizzo v. Goode*, 423 U.S. 362 (1976), and *City of Los Angeles v. Lyons*, 461 U.S. 94 (1983), both of which denied standing to plaintiffs seeking to challenge unconstitutional police practices.

[252] *Casey*, 518 U.S. at 408-09 (Stevens, J., dissenting).

Court was willing to allow relief. *Brown v. Plata*[253] stands alone as the exception to the limits on systemic relief. In our view, it is the exception that explains the rule.[254]

In *Plata*, a three-judge district court had ordered a release of prisoners to cure a systemic Eighth Amendment violation due to overcrowded conditions in California prisons, which "had operated at around 200% of design capacity for at least 11 years."[255] The order required the state to reduce its prison population to 137.5% of design capacity—requiring the release of as many as 46,000 prisoners.[256] The Supreme Court upheld the order in a 5-4 opinion.[257]

What made *Plata* different from cases like *Wilson* or *Casey*? To start, *Plata* related to the deplorable conditions in California's prisons. The Court noted that "[a]s many as 200 prisoners may live in a gymnasium" and that "[a]s many as 54 prisoners may share a single toilet."[258] Perhaps to justify its decision to uphold the district court's sweeping systemic remedy, the Court did not shy away from describing highly graphic details. The majority recounted how "[a] psychiatric expert reported observing an inmate who had been held in such a cage for nearly 24 hours, standing in a pool of his own urine, unresponsive and nearly catatonic. "[259] The Court even took the unusual step of appending to the 48-page opinion three black-and-white photos of the conditions in California prisons.[260] Given these extraordinary facts, the majority issued a narrow ruling that provided the prisoners relief.[261]

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[253] *See* 563 U.S. 493 (2011).

[254] The procedural history of the case is, to put it mildly, byzantine. The litigation over California's prison conditions continued through 2022 when it was voluntarily dismissed. *See, e.g.*, Coleman v. Brown, No. 2:90-cv-0520-KJM-DB-P, 2020 WL 7074556 (E.D. Cal. Dec. 3, 2020), *ordered dismissed by* Coleman v. Newsom, No. 21-15039, 2021 WL 2816731 (9th Cir. Jan. 7, 2021) (date filed). By necessity, the following discussion of the case is somewhat simplified.

[255] *Id.* at 500, 502. Pursuant to the Prison Litigation Reform Act (PLRA), only a three-judge district court may order such relief. *See* 18 U.S.C. § 3626(a).

[256] *Plata*, 563 U.S. at 501.

[257] *Id.* at 498, 502.

[258] *Id*. at 502.

[259] *Id.* at 504 (quoting App. C).

[260] *See* Brown v. Plata, No. 09-1233, slip op. at 51-52 (U.S. May 23, 2011).

[261] The majority opinion in *Plata* also recalls an earlier era of cases involving southern prisons, upon which the film *Brubaker* was based. *See* Vincent Canby,

But the facts alone do not fully explain the opinion. Execrable as the prison conditions were, these individual instances of poor medical treatment might have appeared legally insufficient to grant class-wide relief. Indeed, the *Casey* Court opined if the judicial branch were to grant relief to a class of prisoners "simply on the ground that the prison medical facilities were inadequate, the essential distinction between judge and executive would have disappeared."[262] Thus, in order to come out the other way, the majority in *Plata* had to distinguish *Casey*. Justice Kennedy's majority opinion discussed the distinction in a footnote, in the midst of his description of individual physical and mental health crises created and exacerbated by the prison conditions.[263] Unlike *Wilson* and *Casey*, the *Plata* plaintiffs did not challenge particular "deficiencies in care" that operated upon them individually, but "*systemwide* deficiencies" that, "taken as a whole," violated the Eighth Amendment right.[264] In dissent, Justice Scalia attacked the majority's reasoning, and he quoted his own majority opinion in *Casey*, writing that "the notion that the plaintiff class can allege an Eighth Amendment violation based on 'systemwide deficiencies' is assuredly wrong."[265]

Indeed, no other recent Supreme Court decision has shown the same solicitude for a systemic remedy for a violation of inmates' constitutional rights.[266] The underlying problem at issue in *Plata* caused actual injuries to most, if not all, inmates subject to severe overcrowding. The actual injury to any given plaintiff was indistinguishable from that of any other—each member of the plaintiff class in *Plata* was equally damaged by each additional inmate added to the overcrowded prison system. This aspect of the claim presents a potential basis for distinguishing the inmates' claim in *Plata* from cases in which the Court has declined to find

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'Brubaker' Stars Redford as Jail Reformer, N.Y. TIMES (June 20, 1980), https://www.nytimes.com/1980/06/20/archives/brubaker-stars-redford-as-jail-reformer.html [https://perma.cc/6EFL-WT6Z]; *see also* Holt v. Sarver, 300 F. Supp. 825, 829 (E.D. Ark. 1969), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

[262] Lewis v. Casey, 518 U.S. 343, 350 (1996).

[263] *See Plata*, 563 U.S. at 505 n.3.

[264] *Id.*

[265] *Id.* at 553 (Scalia, J, dissenting).

[266] *See* Pamela S. Karlan, *Foreword: Democracy and Disdain*, 126 HARV. L. REV. 1, 71 n.418 (2012) (citing Horne v. Flores, 129 S. Ct. 2579 (2009)).

that all the class plaintiffs have standing to bring systemic-injury claims.

C. The Court's Limiting Principle

In *McCleskey*, *Wilson*, *Casey*, and *Plata* the Court recognized that allowing individuals to obtain relief would itself threaten the system's integrity.[267] In *McCleskey* and *Wilson*, this concern was enough for the Court to deny any individual or system-wide relief.[268] Similar concerns were raised in *Casey*, which led the court to significantly restrict the availability of system-wide relief, even as it left the door open to individual relief for a narrow category of plaintiffs.[269] Finally, the *Plata* Court allowed a claim for systemic relief to proceed, but the remedy in that case was itself systemic, and thus unavailable to individual litigants.[270] Together, these cases demonstrate that where the Court recognizes that relief cannot stop at the individual defendant, it establishes a high bar to obtain it, regardless of whether the relief sought is individualized or systemic. Because judicial superintendence of these systemic failures raises powerful separation-of-powers and federalism concerns, the Court has resisted systemic remedies for the sorts of constitutional rights claims at issue in these cases.[271]

But if even one defendant can demonstrate that part of the criminal-justice system has failed, then it is difficult to argue that any similarly affected defendant should be barred from obtaining relief. The result is an all-or-nothing approach to relief for systemic failures: either the problem is so severe and pervasive, as in *Plata*, that a court may grant systemic relief, or the court may grant no relief at all. As several decades of Supreme Court cases demonstrate, the latter scenario is far more common. What then emerges is a bifurcation of remedies for systemic failures. Where the remedies can be highly individualized or tailored notwithstanding the systemic nature of the injury, the Court may grant relief. Yet where the only remedy for systemic failure is

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[267] *See* discussion *supra* Section III.A.- B.
[268] *Id.*
[269] *Id.*
[270] *Id.*
[271] *See* Metzger, *supra* note 242, at 1859-63.

inherently systemic, the Court remains far more parsimonious and grants relief in only the rarest of cases.

IV. REVITALIZING SYSTEMIC-FAILURE DOCTRINE

Although the Supreme Court has recognized that defendants should be able to obtain relief where systemic failures in criminal justice operate to their detriment, courts have been reluctant to grant relief. In this Part, we reflect on how courts and state and local institutions might make the systemic-failure doctrine a reality.

A. Why Systemic-Failure Doctrine Works

Although some might argue that the systemic-failure doctrine suffers from the same scope-of-remedy issues outlined in Part III,[272] this concern is unwarranted. In Part III, we discussed cases in which plaintiffs sought class-wide relief based on system-wide violations of constitutional rights, typically in the Eighth Amendment context.[273] With the exception of *Brown v. Plata*, the Court has generally denied system-wide relief for lack of Article III standing. This is consistent with the Justices' view over the last four decades that the Case or Controversy requirement is at heart about separation of powers, only permitting federal courts to resolve actual disputes concerning specific violations of rights and not to micromanage the Executive.[274] Justice Thomas's concurrence in *Lewis v. Casey* illustrates how this separation-of-powers principle has played out in class-action litigation based on systemic failures:

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[272] *See* discussion *supra* Section III.C.

[273] *See supra* Section III.A.

[274] *See* Allen v. Wright, 468 U.S. 737, 761 (1984) ("[S]eparation of powers[] counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties."); *see also* Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992) (noting that conversion of an "undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts" would run afoul of the Take Care Clause and render the judiciary to "continu[ally] monitor[]" the Executive); *cf.* Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1838-39 (2016) (noting that the Supreme Court often invokes the Take Care Clause as a pretext to freewheeling separation-of-powers analysis).

> The Constitution charges federal judges with deciding cases and controversies, not with running state prisons. Yet, too frequently, federal district courts in the name of the Constitution effect wholesale takeovers of state correctional facilities and run them by judicial decree . . . dictating [programs] in excruciatingly minute detail . . . . Such gross overreaching by a federal district court . . . cannot be tolerated [and runs afoul] [p]rinciples of federalism and separation of powers[.][275]

The Court's hesitance to find standing reflects a deeper concern that granting system-wide relief might prospectively entangle the federal courts in executive functions.

One need not stretch the imagination to understand how the systemic-failure doctrine of *Armstrong*, *Herring*, and *Brillon* may run into a similar issue. In the systemic-failure cases outlined in Part II, defendants seeking relief must, at some point, demonstrate that the criminal-justice system is subject to system-wide error, whether it is in the execution of prosecutorial strategy, the collection of warrant data, or the efficacy of a public-defender system. For judges and scholars concerned about separation of powers, the systemic-failure doctrine may threaten excessive judicial invitation into executive affairs. Whereas cases like *Casey* and *Plata* demand the judiciary prescribe a system-wide remedy to cure a constitutional infirmity, *Armstrong*, *Herring*, and *Brillon* may seem indistinguishable. For example, if a defendant in one case can demonstrate that police collected incriminating evidence based on a faulty warrant system in violation of *Herring*, one may argue that future defendants can rely on the finding of a faulty warrant system as a basis of ongoing exclusionary relief. Or imagine, in the selective-prosecution context, that one defendant's showing of a discriminatory policy of non-prosecutions of similarly situated defendants opened the floodgates to discovery for future defendants prosecuted under the same policy. What then would

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[275] Lewis v. Casey, 518 U.S. 343, 364 (1996) (Thomas, J., concurring).

distinguish the systemic-failure cases in Part II from the cases in Part III?

This separation-of-power concern is thus mitigated by the systemic-failure doctrine's requirement that a defendant make a showing of *individualized* injury. When a court grants relief to a defendant on an *Armstrong*, *Herring*, or *Brillon* claim, the finding of a systemic failure is more analogous to that of a breach of duty, not injury, which is an additional requirement for relief. To obtain access to relief based on a prior finding of systemic failure, future similarly situated plaintiffs must independently establish their own injuries resulting from the same systemic failure. For example, a defendant raising a *Herring* suppression claim cannot merely show that a local police department's warrant system is faulty;[276] rather, the defendant must show that the faulty warrant system led to the police conducting an unconstitutional search or seizure against the defendant himself.[277] The distinction between the two sets of cases recalls the Court's modern standing cases, in which plaintiffs must show that they have faced harm that is concrete or bearing "a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts";[278] particularized to the plaintiff; and actual or imminent.[279] Thus, the cases in Part II contain a potential limiting principle that the cases in Part III lacked.

B. A Workable Systemic-Failure Doctrine

1. Bridging the Discovery Gap

In some ways, *Armstrong* presents the most hopeful picture of how courts have worked within Supreme Court doctrine to sustain meritorious claims of unconstitutional selective prosecution. While many courts have echoed *Armstrong*'s skepticism of empirical methods in selective-prosecution claims, some courts have found ways to accommodate *Armstrong*'s demanding standards. For instance, some courts have shown greater solicitude for attorney

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[276] *See supra* Section II.B.

[277] *See, e.g.*, Herring v. United States, 555 U.S. 135, 147-48 (2009).

[278] TransUnion v. Ramirez, 141 S. Ct. 2190, 2200 (2021) (quoting Spokeo, Inc. v. Robins, 578 U.S. 330, 340-41 (2016)).

[279] *Id.* at 2203.

affidavits than high-level or national datasets, and other courts have shown greater leniency with selective-enforcement claims over selective-prosecution claims.[280]

While other courts might adopt these innovations in the future, the most likely way to make more *Armstrong* claims viable belongs to local, state, and federal legislatures. *Armstrong* places defendants in a quandary: those who seek to bring an *Armstrong* claim often have some evidence of a discriminatory use of prosecutorial power, but unless they have the resources necessary to gather the substantial evidence required to sustain their claim that other similarly situated defendants were not prosecuted, they cannot obtain discovery.[281] Legislatures could bridge this gap by requiring prosecutorial authorities to report certain data on exercises of their discretion—for instance, individual-level data on individuals targeted for investigation, regardless of whether there was a declination or charge filed—to a new independent regulatory agency. These agencies would be tasked with collecting, synthesizing, and maintaining this data in a usable format. Any defendant seeking to raise an *Armstrong* claim who could make a prima facie showing of some discriminatory effect would be entitled to submit his claim to the agency, which would release to the defendant the aggregated data necessary to substantiate a request for *Armstrong* discovery in court.

These new agencies could fill the "discovery gap" left by *Armstrong* without requiring any doctrinal change. Take, for example, the defendants in the Fourth Circuit case *United States v. Hare*.[282] A group of black defendants was targeted as part of an ATF

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[280] People v. Superior Court (*Baez*), 94 Cal. Rptr. 2d 706, 707-10 (Ct. App. 2000) (accepting defense attorneys' affidavits as the basis for a successful *Armstrong* claim); United States v. Washington, 869 F.3d 193, 218-220 (3d Cir. 2017) (treating a claim of "selective enforcement" more leniently than a claim of "selective prosecution").

[281] As mentioned in Part II, courts have denied *Armstrong* claims where a defendant only alleges that a small number of similarly situated defendants were not prosecuted even where the parallels to the defendant are otherwise striking. *See, e.g.*, United States v. Hare, 820 F.3d 93, 99-100 (4th Cir. 2016) (denying an *Armstrong* claim despite the defendant demonstrating that an entire "crew" of similarly situated individuals of a different race were not prosecuted). As such, defendants hoping to succeed on an *Armstrong* claim will likely need to prove that a sizable number of similarly situated defendants were not prosecuted and that they differed in a protected characteristic from the defendant.

[282] *Id.*

sting operation, and in raising an *Armstrong* claim, they provided compelling evidence that investigators declined to direct the sting toward a similarly situated "crew" of white defendants who operated in the same neighborhood.[283] Although this fell short of *Armstrong*'s standard, these defendants seem to be apt candidates for receiving more information from our theorized state law-enforcement database: they made a highly particularized showing that similarly situated individuals were not prosecuted or investigated, and any equal protection claim could be scrutinized under the current *Armstrong* framework with the benefit of more data. Because most law enforcement is organized at the state and local level, legislation on this issue may not be national—each locality could enact legislation suited to its unique needs. Indeed, while not specifically focused on providing discovery, many states are currently considering legislation that would greatly expand the right to discovery. In 2021, the National Conference of State Legislatures reported 142 proposed and 30 enacted bills in state legislatures aiming to provide increased collection and transparency of law enforcement data.[284] Although it is too early to tell how criminal defendants may leverage insights from these databases in the future, they may well help defendants to surpass the high bar set by *Armstrong*.

2. Scrutinizing Recurring or Systemic Negligence

The few courts that have granted relief under *Herring* have done so only when faced with egregious facts.[285] In other cases, even where litigants have put forward considerable evidence of "recurring or systemic" negligence, courts have been reluctant to grant relief. Much like the *Armstrong* context, given the volume of courts that have declined to expand the *Herring* exception for "recurring or systemic negligence," a legislative solution may be most promising. Because the problems faced by *Herring* and *Armstrong* claimants are similar—namely, that establishing their

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[283] *Id.* at 96-98.

[284] *Legislative Responses for Policing-State Bill Tracking Database*, NAT'L CONF. OF STATE LEGISLATURES (May 5, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/legislative-responses-for-policing.aspx [https://perma.cc/V4PU-KZW7].

[285] *See supra* Part II.

claims depend on evidence that is difficult for them to obtain—a similar solution would be helpful.

Independent regulatory agencies could also play a useful role in the *Herring* context by investigating police negligence and determining whether it is "recurring or systemic." For example, legislation could allow defendants to petition the agency to investigate potential law enforcement negligence. Where a defendant makes a prima facie showing of law enforcement negligence, the agency would investigate whether the negligence was "recurring or systemic." Critically, the agency would need to have access to a full suite of investigative tools necessary to pursue claims. Once the investigation is complete, the agency would deliver a report to the claimant indicating the result and supporting evidence. Similar to the previous Section, this solution would be most sensibly implemented by states and municipalities.

People v. Robinson shows how this kind of solution might prove useful.[286] Four days before the statute of limitations would have expired, a prosecutor filed a felony complaint against "John Doe, unknown male" for the rape of Deborah L., describing him by his DNA profile from a rape kit.[287] An arrest warrant issued the next day.[288] Around a month later, investigators got a hit from a state DNA database, and Paul Eugene Robinson was arrested.[289] Authorities later discovered that Robinson's DNA profile in the state's DNA database, which linked him to the crime, was based on a sample that had been mistakenly collected by state agencies.

Appealing his conviction at the California Supreme Court, Robinson argued that the sample was the result of a "cascading series of errors" that were "indicative of a systemic breakdown," but the state refuted this claim with testimony from a manager of California's DNA data-bank laboratory.[290] Ultimately, the court concluded that the negligence in the case was isolated, and upheld the application of the denial of Robinson's motion to suppress under the good-faith exception.[291] If California had implemented the

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[286] *See generally* 224 P.3d 55 (Cal. 2010).
[287] *Id.* at 60.
[288] *Id.*
[289] *Id.*
[290] *Id.* at 68, 70.
[291] *Id.* at 71.

proposal detailed above, Robinson's showing of negligence would have afforded him an independent investigation of whether the negligence was systemic, potentially providing him with data that he could have used to refute the testimony that allowed the court to deny his motion to suppress.

3. A Broader View of Systemic Breakdown

Compared to *Armstrong* and *Herring*, the "systemic breakdown" exception in *Brillon* appears far more capacious. On its face, the standard would seem to allow relief for a broad range of defects in public defender systems, to include "unreasonable resource constraints, misallocated resources, inadequate monitoring or supervision, or other systemic problems."[292] California courts appear to have adopted this capacious reading of *Brillon*, allowing defendants who can demonstrate that delays in trial are attributable to systemic breakdown to obtain relief.[293] Other courts have a narrower view of the *Brillon* right.[294]

Unlike *Armstrong* and *Herring* claims, the best opportunity to provide defendants with a meaningful opportunity to vindicate the *Brillon* right may lie with the courts. In addition to the state court decisions noted above and in Section II.C, the Supreme Court hinted at the existence of a systemic breakdown exception to *Barker* as early as 1988, more than two decades before *Brillon*.[295] Most recently, several Supreme Court Justices have also shown openness to expanding the *Brillon* doctrine to cover a broader class of systemic failures.[296] In *Boyer v. Louisiana*, the Court granted certiorari to consider "[w]hether a state's failure to fund counsel for an indigent defendant for five years, particularly where failure was

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[292] *See* People v. Williams, 315 P.3d 1, 38 (Cal. 2013).

[293] *See, e.g.*, *In re* Butler, 269 Cal. Rptr. 3d 649, 682 (Cal. App. 2020); *see also* People v. Superior Court (*Vasquez*), 238 Cal. Rptr. 2d 14 (Ct. App. 2018).

[294] *See, e.g.*, State v. Thomas, 2010-0528 (La. App. 4 Cir. 7/15/10); 54 So. 3d 1 (limiting *Brillon* relief despite defects in the public-defender system resulting from Hurricane Katrina).

[295] *See* United States v. Taylor, 487 U.S. 326, 341 n.12 (1988) (noting that, under *Barker v. Wingo*, 407 U.S. 514 (1972), "it would be appropriate under some circumstances, as, for example, where there was a *systemic problem* with the procedures of a particular United States Attorney's Office, for a district court to bar reprosecution in a case involving a delay of only a few days" (emphasis added)).

[296] *See* Boyer v. Louisiana, 569 U.S. 238, 246 (2013) (Sotomayor, J., dissenting).

the direct result of the prosecution's choice to seek the death penalty, should be weighed against the state for speedy trial purposes."[297] Jonathan Boyer, an indigent defendant charged with first-degree murder, languished in jail for more than seven years between his arrest and trial.[298]

In a per curiam decision, the Court dismissed the writ as improvidently granted, sidestepping the issue. In a strongly worded dissent, Justice Sotomayor, joined by Justices Ginsburg, Breyer, and Kagan, argued for a modest expansion of *Brillon*, suggesting that when a state fails to provide adequate funding for indigent defense and that lack of funding causes a delay, the consequences of that delay should be attributed solely to the state under the *Barker* analysis. The four-Justice dissent in *Boyer*, along with state court decisions that follow similar lines, demonstrates that courts may be well-positioned to monitor the efficacy of public defense.

CONCLUSION

The systemic-failure doctrine has emerged against a national conversation about the shortcomings of the criminal justice system. Any robust systemic-failure doctrine must contend with two headwinds. First, relief must be tailored to the litigant in a particular case, with *Brown v. Plata* as the notable exception. To receive individualized relief, a defendant must show not only that he individually was injured by breakdowns in the criminal justice system but also that similarly situated defendants were as well. Yet, if similarly situated defendants also want relief, they will have to make the same individualized showing in their own case. Second, courts take a parsimonious approach in evaluating *Armstrong*, *Herring*, and *Brillon* claims.[299] Defendants face a high bar, with courts in many cases demanding sophisticated studies evidencing failure or facially egregious facts. State and federal legislative reforms may prove more fruitful than the judicial doctrine we describe here, but the systemic-failure doctrine may yet hold promise.

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[297] Petition for Certiorari at i, *Boyer*, 569 U.S. 238 (No. 05-1631).

[298] *Boyer*, 569 U.S. at 241 (Sotomayor, J., dissenting from the dismissal of cert. as improvidently granted).

[299] *See supra* Part II.