# CRIMINAL JUSTICE AND THE EROSION OF CONSTITUTIONAL RIGHTS

TERRY SKOLNIK

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**Abstract:** In the context of criminal justice, many constitutional rights have eroded for reasons that are largely ignored. Beginning in the 1960s, the criminal procedure revolution sought to expand rights and remedies, encourage front-line justice system actors to respect defendants' rights, and counteract discrimination. Yet many of these rights and remedies have progressively weakened. Prosecutors and police officers can easily evade constitutional norms. And defendants have little recourse against routine forms of discrimination that pervade the criminal justice system. How did this happen? And why?

This Article argues that four overlooked phenomena explain why certain constitutional rights weaken within the criminal justice system. First, constitutional rights can impose administrative burdens on justice system actors, which encourages under-investigation, under-litigation, and assembly-line guilty pleas. Second, constitutional rights may result in subtractability, meaning that each defendant's legal claims can lower the quality of justice for others. The realities of administrative burdens and subtractability, in turn, elucidate how defendants who exercise their constitutional rights can impose negative externalities (or unaccounted-for costs) onto others that decrease the quality of criminal justice. Third, in response to expansive interpretations of rights, justice system actors can bypass these rights through different means: funding cuts, penalties, gamesmanship, and overregulation. Lastly, although courts initially interpret rights and remedies expansively, subsequent judicial decisions may deflate these rights and remedies over time. These four phenomena demonstrate how some constitutional rights can be self-defeating or can produce systemic adverse effects that are hiding in plain sight.

Ultimately, this Article provides a novel and comprehensive theory of how constitutional rights can deteriorate in the criminal justice system, and offers a starting point to better comprehend the erosion of constitutional rights more generally.

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## INTRODUCTION

One of the criminal justice system's worst kept secrets is that many constitutional rights weaken over time. And whether we notice it or not, the exercise of certain constitutional rights can produce negative consequences that tend to be overlooked, especially in the context of criminal law and constitutional criminal procedure.[1]

These negative consequences matter. The adverse consequences of constitutional rights can undermine the very interests that these rights aim to safeguard. As a result, constitutional rights may erode progressively and become self-defeating.[2] The adverse effects of constitutional rights can also produce systemic effects that lower the quality of justice.[3] And like elsewhere in life and in law, the poorest individuals disproportionately bear the burden of these negative consequences.[4]

This picture strays significantly from how constitutional rights and their benefits tend to be characterized. Constitutional rights are rightfully lauded because they protect individuals and their interests against governmental power.[5] Furthermore, these rights safeguard vulnerable individuals and minority

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[1] On the concept of negative externalities, see Claire A. Hill, *The Rhetoric of Negative Externalities*, 39 SEATTLE U. L. REV. 517, 517 (2016) (defining negative externalities as "costs imposed on third parties"); Richard A. Epstein, *Positive and Negative Externalities in Real Estate Development*, 102 MINN. L. REV. 1493, 1495 (2018) (broadly defining externalities as "cover[ing] any impact that one party's activities have on the welfare of another party," and noting that these "impacts can be positive or negative"); Gideon Parchomovsky & Peter Siegelman, *Cities, Property, and Positive Externalities*, 54 WM. & MARY L. REV. 211, 214 (2012) (describing negative externalities as "harmful third-party effects").

[2] *See* Adam B. Cox, *Self-Defeating Minimalism*, 105 MICH. L. REV. FIRST IMPRESSIONS 53, 54, 57 (2006), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1107&context=mlr_fi [https://perma.cc/6YEL-3UB3] (analyzing the possibility that Supreme Court jurisprudence "preserv[ing] legislative primacy with respect to partisan gerrymandering claims" might be "self-defeating" and "counterproductive"); Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1167–71 (1998) ("The goals that [criminal procedure] doctrine is meant to serve are vital ones. But they are goals that the doctrine in fact disserves in today's social and political context.").

[3] *See, e.g.*, William J. Stuntz, Miranda*'s Mistake*, 99 MICH. L. REV. 975, 975–77 (2001) ("Because of *Miranda*, sophisticated suspects have a right to be free from questioning altogether—not simply free from coercive questioning—while unsophisticated suspects have very nearly no protection at all."); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 35–44 (1997) [hereinafter Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*] ("[T]he tradeoffs between constitutional litigation and other sorts of claims or arguments do not merely change the mix of claims a particular defendant raises. They also change which defendants aggressively contest the charges against them, meaning that they change the distribution of defense victories.").

[4] *See* Thalia González & Giovanni Saarman, *Regulating Pollutants, Negative Externalities, and Good Neighbor Agreements: Who Bears the Burden of Protecting Communities?*, 41 ECOLOGY L.Q. 37, 42, 46–48 (2014) (discussing the disproportionate impact of negative externalities in the context of the environmental justice movement).

[5] *See* Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 355–56, 358–59 (1993) (characterizing the constitutional protection of individual rights as a

groups against a tyranny of the majority.[6] Constitutional rights have enshrined the dignity and equal status of historically marginalized groups, for instance, by invalidating racial segregation and constitutionalizing same-sex marriage.[7] Constitutional remedies, in turn, give teeth to these rights. In the context of criminal justice, judges can reverse convictions, suppress evidence, award damages, and dismiss charges.[8] Such remedies both vindicate rights and aim to improve the conduct of various justice system actors.[9] For instance, the exclusionary rule's primary justification is to deter constitutional rights violations by the police.[10] Indeed, some empirical studies suggest that many police officers

framework that has emerged as an alternative to expressly "enforcing an internal limit on governmental power . . . [because] we are not used to reasoning in these terms"); Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 865 (1960) ("I prefer to think of our Bill of Rights as including all provisions of the original Constitution and Amendments that protect individual liberty by barring government from acting in a particular area or from acting except under certain prescribed procedures.").

[6] *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 136 (2d ed.1986) (describing the modern political structure as one designed "not [for] protection of the majority against irresponsible, oligarchic government[,] [but] rather, [for the] protection of minorities against a majority in a working, deep-cutting democracy"); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 7–8 (1980) ("The tricky task has been and remains that of devising a way or ways of protecting minorities from majority tyranny that is not a flagrant contradiction of the principle of majority rule . . . ."); Samuel Moyn, *On Human Rights and Majority Politics*, 52 VAND. J. TRANSNAT'L L. 1135, 1136–37 (2019) (describing the evolving conceptions of democracy as it relates to the protection of minority groups against "popular incursion" and "tyranny of the *majority*").

[7] Obergefell v. Hodges, 576 U.S. 644 (2015) (protecting constitutional right to same-sex marriage); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (invalidating racial segregation); *see* Steve Sanders, *Dignity and Social Meaning:* Obergefell*,* Windsor*, and* Lawrence *as Constitutional Dialogue*, 87 FORDHAM L. REV. 2069, 2070–71 (2019) (discussing *Obergefell*'s role in the emergence of constitutional protections for same-sex couples); BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 128–31 (2014) (describing the impact and ongoing disagreement over how to interpret *Brown*'s constitutional bar against segregation).

[8] Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2004 (1998).

[9] Kit Kinports, *Culpability, Deterrence, and the Exclusionary Rule*, 21 WM. & MARY BILL RTS. J. 821, 849–55 (2013) (discussing the evolution of the Court's theoretical justifications for these remedies); Adam M. Gershowitz, *Prosecutorial Dismissals as Teachable Moments (and Databases) for the Police*, 86 GEO. WASH. L. REV. 1525, 1527 (2018) (suggesting that prosecutors inform police officers when criminal charges are dropped because of police error violating the defendant's rights, because this feedback may reduce the rights violations that occur).

[10] *See* Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1, 45 (2001) ("In 1969, [Justice Black] turned to the view that exclusion has 'one primary and overriding purpose, the deterrence of unconstitutional searches and seizures by the police.'" (quoting Kaufman v. United States, 394 U.S. 217, 238 (1969) (Black, J., dissenting))); Kenworthey Bilz, *Dirty Hands or Deterrence? An Experimental Examination of the Exclusionary Rule*, 9 J. EMPIRICAL LEGAL STUD. 149, 149–50 (2012) (discussing the Court's focus on deterrence as the primary justification for excluding evidence from a criminal trial); Morgan Cloud, *Judicial Review and the Exclusionary Rule*, 26 PEPP. L. REV. 835, 836–37 (1999) (discussing "the Supreme Court's recent decisions declaring that deterrence rationale is the only justification for the exclusionary remedy").

*do* care about the exclusionary rule and that it influences their behavior.[11] Judges, for their part, may take defendants' rights seriously and assess constitutional claims carefully so that they are not reversed on appeal.[12] This is a rough sketch. But it captures how many construe the benefits of constitutional rights and remedies.

This does not mean that the discourse surrounding constitutional rights is all sunshine and rainbows. Scholars argue that certain constitutional rights and remedies fail to protect individuals against governmental overreach, arbitrariness, and abuse.[13] And rightfully so. Most defendants—somewhere around ninety-five percent—plead guilty and waive their constitutional rights.[14] Yet constitutional criminal procedure largely fails to regulate plea bargains and guilty pleas.[15] The upshot: defendants have minimal constitutional protection

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[11] *See, e.g.*, Albert W. Alschuler, *Studying the Exclusionary Rule: An Empirical Classic*, 75 U. CHI. L. REV. 1365, 1372–74 (2008) (describing studies that have consistently found that the exclusionary rule improves police conduct, through a mechanism which "works over the long term by allowing judges to give guidance to police officers who ultimately prove willing to receive it").

[12] *See* Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L. REV. 469, 477 (1998) (explaining that judges tend to be averse to the risk of reversal on appeal, and as a result "will, on the margin, decide cases so as to reduce the likelihood that the decision will be reversed on appeal").

[13] *See, e.g.*, AZIZ Z. HUQ, THE COLLAPSE OF CONSTITUTIONAL REMEDIES 3–9 (2021) (introducing and describing the "rise and fall of constitutional remedies for unlawful state coercion"); CRAIG M. BRADLEY, THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION 37–61 (1993) (explaining that the Supreme Court's "usual leisurely manner of constitutional decision making" fails to provide guidance to the police that is sufficiently clear, complete, or stable, and that as a result "the criminal procedure revolution has been a failure"); Anthony O'Rourke, *Structural Overdelegation in Criminal Procedure*, 103 J. CRIM. L. & CRIMINOLOGY 407, 408–14 (2013) (arguing that criminal rights have eroded in part because courts overdelegate discretion to law enforcement and other government actors); David H. Gans, *"We Do Not Want to Be Hunted": The Right to Be Secure and Our Constitutional Story of Race and Policing*, 11 COLUM. J. RACE & L. 239, 243 (2021) ("The constitutional law of policing is in shambles today because the Supreme Court has concentrated more and more power in the police . . . . It has gutted virtually every remedy to hold the police accountable.").

[14] *See* Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1229 (2020) ("Observers identify plea bargaining as the heart of prosecutorial power, given that 95 percent of criminal convictions result from guilty pleas."); Alexandra Natapoff, *Misdemeanors*, 11 ANN. REV. L. & SOC. SCI. 255, 259 (2015) ("The overall misdemeanor plea rate is 95%, no different from felonies."); Jenia I. Turner, *Virtual Guilty Pleas*, 24 U. PA. J. CONST. L. 211, 215 n.11 (2022) (observing that guilty pleas accounted for 95% of convictions in state courts (citing MATTHEW R. DUROSE & PATRICK A. LANGAN, BUREAU JUST. STAT., U.S. DEP'T OF JUST., NCJ 215646, FELONY SENTENCES IN STATE COURTS, 2004, at 1 (2007))).

[15] *See, e.g.*, Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1119 (2011) [hereinafter Bibas, *Regulating the Plea-Bargaining Market*] ("The Court's indifference to [regulating] pleas reflected both practicality and principle . . . . Courts, assuming that innocent defendants would not plead guilty and that parties plea bargain in the shadows of expected trial outcomes, counted on jury trials as backstops to protect defendants. Additionally, the Bill of Rights provided no explicit protections for plea bargaining."); Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150, 150–51 (2012) [hereinafter Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*] ("When

where it should matter most. Courts tolerate coercive plea-bargaining practices—such as overcharging—that discourage defendants from going to trial and exercising their rights.[16] The Supreme Court has also authorized pretextual traffic stops that are a breeding ground for racial profiling and discrimination.[17] Many routine police encounters—such as stop-and-frisk searches, traffic stops, and pedestrian interrogations—are low visibility and escape judicial oversight.[18] As a result, victims of police misconduct may never get their day in court, and their rights are never vindicated.[19] These are major and pervasive problems that continue to plague the justice system.

And these issues are only the tip of the iceberg. Although courts expanded constitutional rights and remedies significantly in the 1960s, the criminal justice system subsequently tilted in a more punitive direction.[20] Pre-trial detention rates skyrocketed in the decades following the criminal procedure revolution's onset in the 1960s.[21] State criminal codes and federal criminal law ex-

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it has regulated pleas, the Court has largely focused on the procedures for waiving trial rights, not the substantive pros and cons of striking a deal.").

[16] *See* Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1313–14 (2018) (describing overcharging); Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 85–87 (1968) (explaining that prosecutors and defense attorneys tend to adopt different definitions of "overcharging").

[17] Whren v. United States, 517 U.S. 806, 819 (1996); *see* Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of* Whren v. United States, 83 GEO. WASH. L. REV. 882, 884–86 (2015) ("*Whren v. United States* is notorious for its effective legitimation of racial profiling in the United States . . . . [S]ince it was decided, many courts have upheld stops in the face of substantial evidence of racial discrimination."); Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1006–07 (2010) ("*Whren v. United States* . . . effectively rendered the Fourth Amendment impotent in combating pretextual stops of automobiles based on the race of the occupants.").

[18] Terry Skolnik, *Policing in the Shadow of Legality: Pretext, Leveraging, and Investigation Cascades*, 60 OSGOODE HALL L.J. 505, 517–18 (2023); *see also* William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 13 (1996) ("Probable cause to believe one has violated a traffic convention is constitutionally equivalent to probable cause to believe one has committed a major-league crime . . . . Yet a great deal of Fourth, Fifth, Sixth, and Fourteenth Amendment law seems premised on a picture of investigation and prosecution of a *serious* crime . . . .").

[19] Skolnik, *supra* note 18, at 517–18.

[20] *See* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 19–21 (2001) ("Since the late 1970s, those who work in criminal justice have experienced a period of unrelenting upheaval and reform that shows no sign of letting up."). On the judicial expansion of constitutional rights in the criminal justice system in the 1960s, see discussion *infra* Part I.

[21] *See* Insha Rahman, *Undoing the Bail Myth: Pretrial Reforms to End Mass Incarceration*, 46 FORDHAM URB. L.J. 845, 865–66 (2019) (describing an increase in county jail populations from 160,000 in 1970 to nearly 750,000 in 2010, and noting that "[t]he vast majority of that increase was due to pretrial detention"); Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1401–02 (2017) ("On any given day, the United States detains almost half a million individuals before trial, with over 60% of the U.S. jail population comprised of individuals who have not yet been convicted.").

panded significantly as well.[22] Mandatory minimum penalties and three-strikes laws proliferated during this time—and have resulted in harsh sentencing regimes that reflected public opinion and survived constitutional review.[23] Yet constitutional rights and remedies did little to counteract these tendencies. What explains this?

Scholars have offered various answers. Some argue that the Warren Court's expansive protection of civil liberties triggered a counter-revolution that restricted defendants' constitutional rights.[24] Others note that the constitutionalization of criminal procedure produced backlash that resulted in harsher criminal justice policies.[25] Indeed, President Nixon was elected in 1968 due

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[22] *See* DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 4–17 (2008) (arguing that the United States "overpunish[es] and overcriminalize[s]," and pointing to the "sheer number of criminal statutes" at the state and federal levels as a proxy to "quantify the degree of criminalization"); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512–19 (2001) (describing the increased number of criminal code provisions in Illinois, Virginia, Massachusetts, and the federal code); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 703–12 (2005) (listing various ways in which "the United States has experienced a dramatic enlargement in governmental authority and the breadth of law enforcement prerogatives" at both the state and federal level); Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 750–56 (2005) (discussing the emergence of a "scheme of dual or concurrent federal and state jurisdiction" resulting from the expansion of federal criminal laws, which overlap with the general police power traditionally reserved for the states).

[23] *See* Stephanie Holmes Didwania, *Mandatory Minimum Entrenchment and the Controlled Substances Act*, 18 OHIO ST. J. CRIM. L. 25, 28–35 (2020) (discussing the emergence and evolution of mandatory minimums for drug offenses); Cara H. Drinan, *The* Miller *Trilogy and the Persistence of Extreme Juvenile Sentences*, 58 AM. CRIM. L. REV. 1659, 1665–66 (2021) (noting that mandatory minimums "have contributed to mass incarceration by requiring lengthy prison terms in cases where the defendant is not a threat to public safety"); John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. 711, 759–60 (2020) ("[F]rom the 1970s through at least the mid-1990s, Americans expressed generally punitive penal policy opinions. The public firmly supported the death penalty, three-strikes laws, and mandatory minimum sentences." (citations omitted)).

[24] *See* Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2468–69 (1996) (discussing the post-Warren Court's shift in approach to constitutional protections in criminal law); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure?*, 20 HARV. J.L. & PUB. POL'Y 435, 437–38 (1997) (same); Charles H. Whitebread, *The Burger Court's Counter-Revolution in Criminal Procedure: The Recent Criminal Decisions of the United States Supreme Court*, 24 WASHBURN L.J. 471, 498 (1985) ("Overall, the history of constitutional criminal procedure at the Supreme Court is cyclical. The Warren Court dramatically expanded the federally protected constitutional rights of state criminal defendants while the Burger Court has to some degree contracted them."); MICHAEL J. GRAETZ & LINDA GREENHOUSE, THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT 8 (2016) ("[T]he Burger Court defied expectations in failing to overturn the Warren Court's leading criminal law precedents. But it left those precedents hollowed out, while also erecting daunting barriers to defendants seeking to vindicate their rights in federal court.").

[25] *See* Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1363–64 (2004) ("[The Warren Court's] most aggressive [criminal procedure] decisions drew criticism from coast-to-coast, faired [sic] poorly in major public opinion polls, triggered contrary legislation, and even inspired a backlash 'law and order' campaign that helped send Richard Nixon to the White House . . . ."); Otis H. Ste-

partly to his tough-on-crime agenda and open hostility to the Warren Court's criminal procedure jurisprudence.[26] Some suggest that the politicization of crime—and its rise to prominence as one of the most salient electoral issues—prompted a punitive turn in the United States.[27] Each of these perspectives deepens our understanding of how the criminal justice system became harsher, and why constitutional rights and remedies failed to counteract this shift.

But other important forces contribute to the incremental erosion of constitutional rights and remedies in the context of criminal justice, some of which are more obvious, many of which are not. One of the most overlooked features of constitutional rights and remedies—the fact that they can impose significant unaccounted-for costs onto others—also explains why these rights and remedies can weaken progressively, and ultimately become self-defeating.[28] And

phens Jr., *The Burger Court: New Dimensions in Criminal Justice*, 60 GEO. L.J. 249, 249–51 (1971) (describing the rise of the "law and order" issue during the 1968 presidential election, and noting that "the 'activist' Warren Court majority served as a convenient and highly visible target of criticism"); Stephen A. Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO L.J. 151, 152 (1980) (describing various criticisms of the Warren Court's expansion of constitutional criminal protections); Michael Vitiello, *Introducing the Warren Court's Criminal Procedure Revolution: A 50-Year Retrospective*, 51 U. PAC. L. REV. 621, 625–26 (2020) ("The [Warren] Court's criminal procedure revolution came at a cost. By 1968, 63 percent of Americans believed that the courts were too lenient on criminal defendants . . . . Many Americans also blamed the Supreme Court for increasing crime rates during that period." (citation omitted)).

[26] *See* EARL M. MALTZ, THE COMING OF THE NIXON COURT: THE 1972 TERM AND THE TRANSFORMATION OF CONSTITUTIONAL LAW 2 (2016) (describing Richard Nixon's campaign in which he "criticiz[ed] the [Warren] Court for giving the 'green light' to 'criminal elements in this country'"); Chris Hickman, *Courting the Right: Richard Nixon's 1968 Campaign Against the Warren Court*, 36 J. SUP. CT. HIST. 287, 292–300 (2011) (describing how the 1968 Nixon campaign developed its stance and messaging about crime, including an internal debate about to what extent Nixon should openly criticize the Warren Court's criminal procedure decisions).

[27] *See* Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL'Y REV. 9, 13–14 (1999) (noting that the prevalence of crime as a prominent issue in political campaigning originated in the 1960s); Marc Mauer, *The Causes and Consequences of Prison Growth in the United States*, 3 PUNISHMENT & SOC'Y 9, 14 (2001) (discussing the increased politicization of crime during the 1960s, particularly as a result of the presidential campaign messaging of Barry Goldwater in 1964 and Richard Nixon in 1968); John A. Shjarback & Jacob T.N. Young, *The "Tough on Crime" Competition: A Network Approach to Understanding the Social Mechanisms Leading to Federal Crime Control Legislation in the United States from 1973–2014*, 43 AM. J. CRIM. JUST. 197, 199–200 (2018) ("Overall, the politicization of crime, as well as the public expectations that subsequently accompanied it, served as a catalyst for the dramatic expansion of the criminal justice system.").

[28] *See* Terry Skolnik, *The Tragedy of the Criminal Justice Commons*, 58 U.C. DAVIS L. REV. 2475, 2512–22 (2025) [hereinafter Skolnik, *The Tragedy of the Criminal Justice Commons*] (discussing criminal justice system mechanisms that "motivate defendants to self-exclude from the criminal justice commons and consume few of its resources"); Terry Skolnik, *Precedent, Principles, and Presumptions*, 54 U.B.C. L. REV. 935, 944–46 (2021) [hereinafter Skolnik, *Precedent, Principles, and Presumptions*] (discussing instances when courts were able to use legal principles to correct flawed judicial precedent); Terry Skolnik, *Criminal Justice Reform: A Transformative Agenda*, 59 ALTA. L. REV. 631, 652 (2022) [hereinafter Skolnik, *Criminal Justice Reform: A Transformative Agenda*] ("[M]andatory minimum penalties create negative externalities within the criminal justice system . . . .

once we notice the negative externalities of constitutional rights inside the criminal justice system, we may see them outside of it, too.

This Article argues that four overlooked phenomena explain why constitutional rights erode in the fields of criminal law and constitutional criminal procedure. First, constitutional rights impose heavy *administrative burdens* onto justice system actors, who in turn push defendants to plead guilty to ease docket pressures.[29] The constitutionalization of criminal procedure externalized onerous learning, compliance, and psychological costs onto front-line justice actors who already faced crushing caseloads.[30] Justice system actors value guilty pleas because they involve minimal administrative burdens and help clear dockets.[31]

Second, constitutional rights can result in *subtractability*, meaning that each defendant's legal claims can impose unaccounted-for costs onto other defendants, such as the under-investigation or under-litigation of their cases, longer delays, and more pre-trial detention.[32] Yet each of these consequences discourages defendants from exercising their rights and contributes to assembly-line guilty pleas.[33] These first two phenomena—administrative burdens and subtractability—illuminate how a defendant who exercises their constitutional rights can impose unaccounted-for costs onto other defendants that decrease the quality of justice. This reality highlights how the exercise of constitutional rights can produce systemic adverse consequences that are largely ignored.

Third, *constitutional bypassing* occurs when governmental actors employ different tactics to circumvent individuals' constitutional rights.[34] Bypassing

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[Constitutional challenges] create[] additional delays for the defendant and monopolize[] judicial resources that could be used to adjudicate other defendants' disputes.").

[29] This argument was first advanced in Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2512–13. *See* PAMELA HERD & DONALD P. MOYNIHAN, ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS 22 (2018) (defining administrative burden as "the learning, psychological, and compliance costs that citizens experience in their interactions with government"); *infra* Part II; *see also* Jennifer L. Selin, *The Best Laid Plans: How Administrative Burden Complicates Voting Rights Restoration Law and Policy*, 84 MO. L. REV. 999, 1001–02 (2019).

[30] *See infra* Part II.B (discussing the administrative costs associated with the litigation of constitutional criminal rights).

[31] *See infra* notes 167–184 (discussing the prevalence of guilty pleas as a solution responsive to the administrative costs of the criminal justice system).

[32] This argument was first advanced in Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2505–11. *See also infra* Part III; David Feeny, Fikret Berkes, Bonnie J. McCay & James M. Acheson, *The Tragedy of the Commons: Twenty-Two Years Later*, 18 HUM. ECOLOGY 1, 3 (1990) (defining subtractability in the context of open-access resources); Joanna Burger & Michael Gochfeld, *The Tragedy of the Commons 30 Years Later*, 40 ENV'T: SCI. & POL'Y FOR SUSTAINABLE DEV. 4, 8 (1998) (defining subtractability as "the ability of one user to subtract from the welfare of the others").

[33] *See* Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2510 (noting that the higher quantities of motions brought by higher-income defendants contribute to the "strong incentives to plead guilty [for] low-income defendants"); *infra* Part III.

[34] *See infra* Part IV.

techniques include funding cuts and underfunding, coercion and penalties, gamesmanship, and overregulation.[35] Bypassing can increase the level of difficulty, the metaphorical cost, or the risks of exercising a right or seeking a remedy.[36]

Fourth, *constitutional deflation* transpires when constitutional rights and remedies gradually deteriorate.[37] Two principal factors contribute to this. For one, the judiciary's unique role and institutional competence limit its capacity to allocate resources to safeguard rights and issue remedies.[38] Additionally, courts normalize permissive exceptions—such as exceptions to the Fourth Amendment's probable cause and warrant requirements—that produce similar results.[39] Constitutional deflation also occurs because judges are reluctant to provide certain remedies—such as dismissals with prejudice or excluding evidence—that allow factually guilty defendants to walk.[40]

To be clear, none of this suggests that defendants would be better off if the Warren Court's criminal procedure revolution never occurred, or that the negative externalities of constitutional rights outweigh their benefits. Instead, this Article highlights some of the main reasons why constitutional rights erode, demonstrates how the exercise of certain rights can produce unaccounted-for costs, and shows why quasi-affirmative constitutional rights can weaken in ways that other rights do not.

The structure of this Article is as follows. Part I provides an overview of the Warren Court's expansion of constitutional rights and remedies throughout

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[35] *See infra* Part IV.A (funding cuts and underfunding); Part IV.B (coercion and penalties); Part IV.C (gamesmanship); Part IV.D (overregulation).

[36] *See infra* Part IV.

[37] *See infra* Part V; *see also* David M. Paciocco, *Constitutional Deflation and the Rebound Effect: The* Charter *and the Enhancement of State Power*, CANADIAN ISSUES, Fall 2007, at 89, 89 (defining "constitutional deflation" to mean "the process through which common law principles lose their currency or moral suasion as a result of constitutional adjudication").

[38] *See* Ralph Cavanagh & Austin Sarat, *Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence*, 14 LAW & SOC'Y REV. 371, 377 (1980) (providing an overview of this argument); Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 880, 893, 917 (2001) (discussing the necessity of resources for litigation to enforce rights, the limited capacity for courts to enforce their own decisions, and the institutional limitations on the judicial ability to evaluate the nuances of certain rights and policies).

[39] *See, e.g.*, Nirej Sekhon, *Purpose, Policing, and the Fourth Amendment*, 107 J. CRIM. L. & CRIMINOLOGY 65, 123–24 (2017) (discussing the "less stringent procedural standards" applied to certain types of investigations, which can result in "goal confusion and pretextual enforcement").

[40] *See* Jennifer Yackley, Hudson v. Michigan*: Has the Court Turned the Exclusionary Rule into the Exclusionary Exception?*, 30 HAMLINE L. REV. 409, 440–41 (2007) ("In its analysis of the costs of applying the exclusionary rule to knock and announce violations, the Court reasoned that application of the exclusionary rule always engenders the grave cost of excluding relevant evidence . . . ."); Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 644–46 (1996) (noting that many judges are hesitant to find violations of the Sixth Amendment right to a speedy trial, because the Supreme Court has held that such a violation necessitates dismissal with prejudice—a remedy which "in effect, exclude[es] all evidence of guilt forever").

the 1960s.[41] Each subsequent Part of this Article explores a distinct phenomenon that explains why constitutional rights erode in the criminal justice system. Part II describes how these rights produce administrative burdens that adversely impact criminal justice system actors.[42] Part III sets out how these rights result in subtractability and rivalry between defendants.[43] Part IV discusses how governmental actors bypass constitutional rights.[44] And Part V elucidates how and why constitutional rights and remedies deflate over time.[45] Ultimately, this Article offers new insight into how constitutional rights deteriorate in the criminal justice system more specifically, and offers a starting point to analyze the erosion of constitutional rights more generally.

## I. The Criminal Procedure Revolution, Rights, and Remedies

During the 1960s, the Warren Court's criminal procedure revolution expanded constitutional rights and remedies and sought to achieve three objectives.[46] Section A discusses the adoption of protections during criminal investigations, trials, and sentencing.[47] Section B then discusses protections against misconduct by government actors in criminal proceedings.[48] Finally, Section C discusses protections against discrimination.[49]

### *A. Protections During Investigations, Trials, and Sentencing*

First, the Court attempted to better protect defendants during criminal investigations, trials, and sentencing.[50] The Justices selectively incorporated various provisions of the Bill of Rights against the states through the Fourteenth Amendment.[51] The Justices provided broader protection against search and

[41] *See infra* notes 46–93 and accompanying text.

[42] *See infra* notes 94–184 and accompanying text.

[43] *See infra* notes 185–294 and accompanying text.

[44] *See infra* notes 295–418 and accompanying text.

[45] *See infra* notes 419–493 and accompanying text.

[46] *See* Craig M. Bradley, The Failure of the Criminal Procedure Revolution 18–20 (1993) (providing a high-level summary of the Warren Court's incorporation of nearly every criminal provision in the Bill of Rights to the states); Lain, *supra* note 25, at 1363–64 (noting that the Warren Court's criminal law jurisprudence "is widely known as the 'criminal procedure revolution,' [because] vast . . . protections [were] afforded to unpopular and politically powerless criminal defendants").

[47] *See infra* notes 50–65 and accompanying text.

[48] *See infra* notes 66–79 and accompanying text.

[49] *See infra* notes 80–93 and accompanying text.

[50] *See* George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 Mich. L. Rev. 145, 148 (2001) ("In incorporating the criminal procedure guarantees, the Court sought to provide the benefits of the broad federal protections to state criminal defendants." (citation omitted)).

[51] Jerold H. Israel, *Selective Incorporation: Revisited*, 71 Geo. L.J. 253, 253 (1982). The selective incorporation theory "holds that the fourteenth amendment's due process clause fully incorporates all

seizure, self-incrimination, oppressive delays, pre-trial custody, and more.[52] For instance, in 1963, in *Gideon v. Wainwright*, the Supreme Court held that indigent defendants have the constitutional right to free legal representation.[53] And in 1966, in *Miranda v. Arizona*, the Court provided broader protection to defendants during interrogations.[54]

During this time, the Court also invalidated various laws that violated constitutional rights. In 1962, in *Robinson v. California*, the Court struck down a law that criminalized the status of narcotics addiction, finding that such a law violated the Eighth Amendment's protection against cruel and unusual punishments.[55] Several years later, the Court invalidated laws that prohibited the sale of contraceptives and infringed the right to privacy.[56] Toward the end of the criminal procedure revolution, the Supreme Court struck down a miscegenation statute as a violation of both the Equal Protection Clause and the Due Process Clause.[57]

The criminal procedure revolution also imposed quasi-affirmative duties on the government and its actors.[58] For example, prosecutors were required to disclose exculpatory evidence to the defense.[59] Police officers were obliged to

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of those guarantees of the Bill of Rights deemed to be fundamental and thereby makes those guarantees applicable to the states." *Id.*

[52] Steven Arrigg Koh, *Core Criminal Procedure*, 105 MINN. L. REV. 251, 262–63 (2020).

[53] 372 U.S. 335, 344–45 (1963); *see* David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1279–80 (2002) ("[S]ince *Gideon v. Wainwright* the Supreme Court has required the government to hire a lawyer for every felony defendant who cannot afford one . . . ." (citation omitted)).

[54] 384 U.S. 436, 467 (1966); *see* Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 766 (2012) ("In *Miranda*, the Court for the first time applied the Fifth Amendment privilege against self-incrimination to police interrogations and imposed prophylactic rules and an exclusionary remedy to protect suspects during those interrogations.").

[55] 370 U.S. 660, 666–67 (1962); *see* John B. Neibel, *Implications of* Robinson v. California, 1 HOUS. L. REV. 1, 3 (1963) (summarizing the majority, concurring, and dissenting opinions in *Robinson*).

[56] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (holding criminal laws banning the use of contraception unconstitutional as a violation of privacy rights); Roe v. Wade, 410 U.S. 113 (1973) (holding criminal laws banning all abortions except those required to save the mother's life unconstitutional), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022); Dorothy E. Patton, Roe v. Wade*: Its Impact on Rights of Choice in Human Reproduction*, 5 COLUM. HUM. RTS. L. REV. 497, 505–06 (1973) ("In *Roe v. Wade* the Supreme Court . . . held that the Texas criminal abortion law was unconstitutional [and] bas[ed] its ruling on the right to privacy . . . .").

[57] Loving v. Virginia, 388 U.S. 1, 11–12 (1967); *see* Robert A. Pratt, *Crossing the Color Line: A Historical Assessment and Personal Narrative of* Loving v. Virginia, 41 HOWARD L.J. 229, 239 (1998). Before *Loving v. Virginia* struck them down, miscegenation statutes banned interracial marriage in sixteen different states (including Virginia). *See* Pratt, *supra*, at 239.

[58] *See* Sklansky, *supra* note 53, at 1230–32 (defining quasi-affirmative rights as "constitutional conditions on actions that government cannot realistically be expected to forego" and discussing these rights in the context of criminal procedure).

[59] Brady v. Maryland, 373 U.S. 83, 87 (1963); *see* Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 685–86 (2006) ("[B]y explicitly commanding prosecutors to disclose to defendants facing a criminal trial any favorable evidence that is material to their guilt or punishment, *Brady* launched the modern development of constitutional disclosure requirements.").

gather information and articulate probable grounds to obtain a warrant.[60] And governments were required to fund a system of free legal representation for indigent defendants.[61]

Throughout the criminal procedure revolution, the Warren Court also expanded the scope of remedies for rights violations, which reinforced the strength of these rights. In 1961, in *Mapp v. Ohio*, the Court adopted the exclusionary rule as a remedy against the states, and judges suppressed unconstitutionally obtained evidence.[62] Following the selective incorporation of the Sixth Amendment right to a speedy trial, judges enjoyed a broader power to dismiss cases that subjected defendants to an oppressive delay.[63] The Court also expanded the jurisdiction and authority of federal courts, especially in the context of habeas corpus.[64] Through this jurisdictional expansion, the Supreme Court Justices provided greater oversight of state court decision-making.[65] By broadening rights and remedies, the constitutional revolution expanded judicial power significantly at the federal and state level.

### *B. Protections Against Governmental Misconduct*

Second, the criminal procedure revolution sought to prevent governmental misconduct.[66] The Warren Court developed prophylactic rules that aimed to

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[60] *See* Sklansky, *supra* note 53, at 1241, 1245–47 (discussing the evolution of the warrant requirement in practice).

[61] Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963); *see* Sklansky, *supra* note 53, at 1279–80.

[62] 367 U.S. 643, 655–56 (1961); *see* Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1368 (1983) (noting that in *Mapp v. Ohio*, a majority of the Court "concluded that the fourth and fourteenth amendments required that evidence seized in an illegal search be excluded from state trials as well as federal ones"). Note that the exclusionary rule is traced back to prior decisions, such as *Weeks v. United States*, 232 U.S. 383, 398 (1914).

[63] *See* Klopfer v. North Carolina, 386 U.S. 213, 223 (1967) (holding "that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment" and should thus be incorporated to the states).

[64] *See* Rebecca E. Zietlow, *The Judicial Restraint of the Warren Court (and Why It Matters)*, 69 OHIO ST. L.J. 255, 269–70 (2008) (discussing the Warren Court's decisions "expanding federal jurisdiction to facilitate the vindication of [civil] rights in federal courts"); Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 519–20, 528 ("[T]he Court sought to recast and refurbish the federal habeas corpus remedy into a more effective instrument for the direct application of federal judicial power in behalf [sic] of persons claiming that state incarceration violated their constitutional immunities.").

[65] Lain, *supra* note 25, at 1372.

[66] *See* Philip B. Heymann, *The New Policing*, 28 FORDHAM URB. L.J. 407, 447–48 (2000) (discussing the Warren Court doctrines aimed at curbing "police abuse of the powers to search, arrest, and interrogate"); Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33, 33 (2012) ("For those interested in reducing police misconduct, the primary measure of federal legal remedies for police misconduct is whether they deter future bad acts.").

achieve this objective.[67] The *Miranda* decision encouraged police officers to respect defendants' Fifth Amendment rights against self-incrimination so that confessions were deemed free, voluntary, and admissible.[68] Similarly, the per se warrant requirement nudged officers to abide by the Fourth Amendment so that damning evidence would be admitted at trial.[69]

Stronger constitutional remedies aimed to prevent and remedy police wrongdoing. The Warren Court decided that the Fourth Amendment's exclusionary rule was justified by the need to deter police misconduct—a rationale that later became the rule's sole justification.[70] The exclusionary rule's deterrence rationale presupposes that constitutional norms shape police behavior.[71] Indeed, some studies suggest that the exclusionary rule influences whether police officers act lawfully, especially when crucial evidence is suppressed.[72] Some police departments increased officer training and implemented accountability mechanisms to promote compliance with Supreme Court precedent.[73] Certain empirical studies suggest that police departments' in-person training increased officers' knowledge and understanding of constitutional criminal

[67] Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 240 (1983); *see also* Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 101, 105 (1985–1986) (defining "prophylactic constitutional rule . . . [to mean] a rule that functions as a preventative safeguard to insure that constitutional violations will not occur").

[68] Grano, *supra* note 67, at 106–11.

[69] Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1038–39 (2001).

[70] Mapp v. Ohio, 367 U.S. 643, 648, 656 (1961); *see* William C. Heffernan, *The Fourth Amendment Exclusionary Rule as a Constitutional Remedy*, 88 GEO. L.J. 799, 800 (2000) (noting that "[a]ccording to the contemporary Court, exclusion functions *solely* as a third-party remedy" to deter future violations).

[71] For one of the most in-depth studies that summarizes existing empirical research on the deterrence hypothesis, see L. Timothy Perrin, H. Mitchell Caldwell, Carol A. Chase & Ronald W. Fagan, *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule: A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule*, 83 IOWA L. REV. 669, 679–83 (1998).

[72] *See id.* at 679 ("Deterrence from the exclusionary rule was most common when police officers felt a personal sense of disappointment at the loss of a potential conviction."); Bradley C. Canon, *Testing the Effectiveness of Civil Liberties Policies at the State and Federal Levels: The Case of the Exclusionary Rule*, 5 AM. POL. Q. 57, 71–72, 75 (1977) (discussing data demonstrating that the efficacy of *Mapp*'s deterrence effects varied across cities, but emphasizing that the data also shows "that the exclusionary rule can work—for it has worked dramatically in a number of cities"); Myron W. Orfield Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1038 (1987) ("Officers were asked what specific lessons they had learned from having evidence suppressed. The responses indicate the officers learned lessons in the law of search and seizure and the need for specificity in preparing case reports.").

[73] Orfield, *supra* note 72, at 1027–29.

procedure.[74] This does not mean that all police officers internalize and respect these norms. But research suggests that many officers do.[75]

Certain criminal procedure revolution decisions also attempted to influence prosecutorial conduct.[76] Decisions such as *Brady v. Maryland* transformed the evidentiary disclosure regime.[77] As a result of *Brady*, prosecutors must disclose material exculpatory evidence to the defense so that charges are not dismissed and convictions are not reversed (note that defendants who seek to reverse their convictions still bear a difficult burden).[78] Similarly, prosecutors can no longer comment on defendants' silence at trial without the risk of a mistrial or a successful writ of habeas corpus.[79]

### *C. Protection Against Discrimination*

Third and interrelatedly, the criminal procedure revolution sought to protect indigent individuals and persons of color against discrimination.[80] Many of the Warren Court's decisions were released during the era of the Civil Rights Movement, which drew increased attention to the plight of African Americans and the struggle for racial justice.[81] For instance, in 1968, in *Terry v. Ohio*, the Court attempted to limit police officers' discretion to stop and search individuals.[82] The decision imposed the reasonable suspicion standard

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[74] William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J.L. REFORM 311, 337–38 (1991).

[75] Orfield, *supra* note 72, at 1052–53.

[76] *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that prosecutors violate due process rights if they withhold exculpatory evidence); Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 643–44 (2002) ("*Brady* . . . embodied the prosecutor's ethical duty to pursue 'justice' and not simply victory in the courtroom.").

[77] 373 U.S. at 87.

[78] Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 870 (1997); *see also* Elizabeth Napier Dewar, *A Fair Trial Remedy for* Brady *Violations*, 115 YALE L.J. 1450, 1452 (2006) (discussing the barriers to justice for defendants subject to *Brady* violations because of the difficulty in discovering undisclosed evidence, and the tendency of courts to find violations "harmless").

[79] Griffin v. California, 380 U.S. 609, 615 (1965); *see* Ted Sampsell-Jones, *Making Defendants Speak*, 93 MINN. L. REV. 1327, 1339 (2009) (discussing the holding and significance of *Griffin*); J. Allison DeFoor II, *Prosecutorial Misconduct in Closing Argument*, 7 NOVA L.J. 443, 449–51 (1983) (same).

[80] Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, *supra* note 3, at 5; *see* Kahan & Meares, *supra* note 2, at 1553 (discussing institutionalized racism as a catalyst for the Warren Court's criminal procedure doctrines); Tracey L. Meares, *What's Wrong with* Gideon, 70 U. CHI. L. REV. 215, 229–30 (2003) ("The post-*Gideon* Court fought racism through general constitutional standards that were calculated to constrain racially motivated policies indirectly."); Mark Tushnet, *Observations on the New Revolution in Constitutional Criminal Procedure*, 94 GEO. L.J. 1627, 1627–28 (2006) (noting that the two interconnected targets of the Warren Court's criminal procedure revolution were "everyday policing" and "race").

[81] Lain, *supra* note 25, at 1388–89.

[82] 392 U.S. 1 (1968).

for investigative detentions and authorized stop-and-frisk searches based on reasonable belief that the individual is armed.[83] In the decision, Chief Justice Warren recognized the reality of police-community tensions in urban neighborhoods that flow from aggressive police tactics, such as intrusive pedestrian interrogations and humiliating frisk searches.[84] He also acknowledged African Americans' complaints and concerns about being subject to police harassment.[85] Although the decision provided meager protection against abusive stop-and-frisk practices, the Court did attempt to constrain police discretion that resulted in racial profiling and discrimination.[86]

Other criminal procedure revolution decisions sought to protect indigent defendants who faced distinct disadvantages because they could not afford to hire an attorney.[87] *Gideon v. Wainwright* guaranteed the right to free legal representation for indigent defendants.[88] The decision attempted to promote greater equality between affluent and impecunious defendants.[89] *Gideon* sought to counteract poverty and discrimination in another way: overturning the Supreme Court's *Betts* decision that applied to the states.[90] In 1942, in *Betts v. Brady*, the Court decided that state-funded free legal representation applied only where its denial violated fundamental fairness, such that counsel would be appointed only in special circumstances.[91] *Gideon* was valuable because it

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[83] *Id.* at 19–20, 24, 27.

[84] *Id.* at 12, 14–15 n.11.

[85] *Id.* at 14.

[86] *See* William J. Mertens, *The Fourth Amendment and the Control of Police Discretion*, 17 U. MICH. J.L. REFORM 551, 589–91 (1984) (discussing the mixed results from *Terry*'s regulation of police discretion, addressing both strengths and weaknesses of the opinion's effects in practice); Jeffrey D. Swartz, Terry v. Ohio *at 50: What It Created, What It Has Meant, Is It Under Attack and Is the Court Opening the Door to Police Misconduct?*, 38 N. ILL. U. L. REV. 44, 50 (2017) (explaining the factors considered in the "*Terry* Balancing Test").

[87] Arthur J. Goldberg, *The Warren Court and Its Critics*, 20 SANTA CLARA L. REV. 831, 833–34 (1980).

[88] 372 U.S. 335, 344 (1963).

[89] Shaun Ossei-Owusu, *The Sixth Amendment Facade: The Racial Evolution of the Right to Counsel*, 167 U. PA. L. REV. 1161, 1203 (2019); *see also* Lawrence C. Marshall, Gideon*'s Paradox*, 73 FORDHAM L. REV. 955, 960 (2004) ("[T]he heart of *Gideon* [is] that there be parity between defense counsel and the prosecution with respect to resources . . . .").

[90] Betts v. Brady, 316 U.S. 455, 461–62 (1942), *overruled by Gideon*, 372 U.S. 335; *see* David A. Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845, 870–71 (2007) (discussing the Court's decision to overturn the discretionary rule in *Betts* with the stricter rule introduced in *Gideon*); Ossei-Owusu, *supra* note 89, at 1195 ("[*Betts*] could be understood as a battle about federalism and the incorporation of the Sixth Amendment right to counsel to states.").

[91] *See* Strauss, *supra* note 90, at 868 ("*Betts* held that whether counsel must be appointed in a state prosecution was to be decided case by case, under the Due Process Clause, by determining whether, under the totality of the circumstances, the failure to appoint counsel denied 'fundamental fairness.'"); Ossei-Owusu, *supra* note 89, at 1196 (noting that the *Betts* "fundamental fairness" test in practice "proved unworkable and yielded inconsistent results"); Charles C. Brown Jr., Betts v. Brady*—After Twenty Years*, 17 INTRAMURAL L. REV. N.Y.U. 304, 304–05 (1962) (noting—in an arti-

imposed a bright-line rule—free legal representation for indigent persons—rather than a standard that conferred significant judicial discretion—establishing a special circumstance and proving a violation of fundamental fairness.[92] The effect of the rule was that it prevented judges from exercising their discretion to deny legal representation because of a contempt or animus against poor persons or racial minorities.[93]

Although the criminal procedure revolution expanded the scope of constitutional rights and remedies, many of these rights have weakened over time. The next Parts explore four unnoticed phenomena that contribute to the erosion of constitutional rights in criminal justice: (1) administrative burden, (2) subtractability, (3) constitutional bypassing, and (4) constitutional deflation.

## II. ADMINISTRATIVE BURDEN

In the context of criminal justice, attempts to safeguard constitutional rights can impose administrative burdens that weaken these rights. In this Part, Section A discusses how administrative burdens comprise learning, compliance, and psychological costs.[94] Section B then discusses the administrative burden of constitutional claims.[95] Finally, Section C discusses the adverse consequences of administrative burdens on criminal defendants.[96]

### *A. Learning, Compliance, and Psychological Costs*

First, constitutional rights impose heavy administrative burdens on prosecutors, defense attorneys, and judges. The term "administrative burden" connotes "an individual's experience of a policy's implementation as onerous."[97] Although the notion of administrative burdens tends to fall within the research field of public administration, it is also associated with the concept of "sludge" in behavioral economics, a term which means "excessive or unjustified frictions that make it difficult for [individuals] to get what they want or to do as they wish."[98]

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cle published before *Gideon*—that "what is now essential to fundamental fairness has been expanded to the point that it can be said the holding of *Betts v. Brady* is no longer followed").

[92] Strauss, *supra* note 90, at 870.

[93] *See id.* at 870–71 ("Perhaps one reason the Warren Court tended to adopt rules was that it expected that those entities responsible for implementing its decisions . . . would be resistant; compliance with rules is usually easier to monitor than compliance with a standard.").

[94] *See infra* notes 97–122 and accompanying text.

[95] *See infra* notes 123–148 and accompanying text.

[96] *See infra* notes 149–184 and accompanying text.

[97] HERD & MOYNIHAN, *supra* note 29, at 22.

[98] Cass R. Sunstein, *Sludge Audits*, 6 BEHAV. PUB. POL'Y 654, 656 (2022); *see also* CASS R. SUNSTEIN, SLUDGE: WHAT STOPS US FROM GETTING THINGS DONE AND WHAT TO DO ABOUT IT 1 (2021) (defining and discussing some of the origins of "sludge" in various contexts—including legal institutions).

Pamela Herd and Donald Moynihan note that there are three principal categories of administrative burdens: learning costs, compliance costs, and psychological costs.[99] Learning costs are the time and effort that individuals must spend to acquire information, analyze its relevance, and evaluate rules and eligibility requirements.[100] Compliance costs refer to the burdens that individuals experience when they attempt to meet a scheme's requirements, such as having to fill out paperwork, provide documentation, and substantiate eligibility requirements.[101] Third, psychological costs connote the mental anguish and negative feelings that individuals face when they seek to comply with a policy.[102] For instance, individuals who exert effort to abide by onerous policies may feel anxious, frustrated, overwhelmed, stigmatized, or hopeless.[103]

The consequences of administrative burden are serious and disparate. Administrative burden is expensive and can consume a significant portion of a system's overall expenditures.[104] For example, according to some estimates, up to thirty-four percent of U.S. healthcare costs are administrative in nature.[105] In 2011, administrative complexity resulted in up to $389 billion dollars of wasted spending.[106]

Similar examples exist outside of the healthcare context. The Office of Regulatory Affairs estimated that in 2013, individuals spent roughly 9.4 billion hours on federal government-related paperwork—a number that translates to

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[99] Pamela Herd & Donald Moynihan, *Administrative Burdens in Health Policy*, 43 J. HEALTH & HUM. SERVS. ADMIN. 3, 3–4 (2020).

[100] Donald Moynihan, Pamela Herd & Hope Harvey, *Administrative Burden: Learning, Psychological, and Compliance Costs in Citizen-State Interactions*, 25 J. PUB. ADMIN. RSCH. & THEORY 43, 45–46 (2016).

[101] *Id.*; *see also* Elizabeth Linos, Lisa T. Quan & Elspeth Kirkman, *Nudging Early Reduces Administrative Burden: Three Field Experiments to Improve Code Enforcement*, 39 J. POL'Y ANALYSIS & MGMT. 243, 243 (2020) (listing "providing proof of documentation" as an example of compliance costs).

[102] *See* Mette Kjærgaard Thomsen, Martin Baekgaard & Ulrich Thy Jensen, *The Psychological Costs of Citizen Coproduction*, 30 J. PUB. ADMIN. RSCH. & THEORY 656, 657 (2020) (listing "feelings of stress, stigma, and loss of autonomy" as examples of psychological costs).

[103] *See* HERD & MOYNIHAN, *supra* note 29, at 25–27 (describing different ways in which psychological costs can be experienced by individuals navigating convoluted administrative processes); Martin Baekgaard & Tara Tankink, *Administrative Burden: Untangling a Bowl of Conceptual Spaghetti*, 5 PERSPS. ON PUB. MGMT. & GOVERNANCE 16, 18 (2022) (expanding on the definition of psychological costs to include "feeling[s] of uncertainty about [one's] situation" and "feeling[s] of emptiness or meaninglessness").

[104] *See, e.g.*, Donald M. Berwick & Andrew D. Hackbarth, *Eliminating Waste in US Healthcare*, 307 JAMA 1513, 1514 (2022) (estimating waste resulting from administrative complexity in the United States healthcare system).

[105] *See* Michael Anne Kyle & Austin B. Frakt, *Patient Administrative Burden in the US Health Care System*, 56 HEALTH SERVS. RSCH. 755, 756 (2021) ("Estimates of total administrative costs range from 8% to 34% of total health care spending in the United States . . . .").

[106] Berwick & Hackbarth, *supra* note 104, at 1514.

substantial financial and labor costs.[107] By 2020, that number had ballooned from 9.4 billion hours to 11.6 billion hours.[108]

Administrative burden is bad for another reason: it can harm individuals' fundamental interests.[109] Some individuals forgo necessary medical treatment due to heavy learning, compliance, and psychological costs in the healthcare system.[110] Others do not apply for social assistance or tax benefits for similar reasons.[111] These hurdles also impact persons who have had prior contact with the criminal justice system. Individuals may not seek a criminal record expungement because it is expensive and administratively onerous.[112] Those who wish to obtain a criminal record expungement may be required to complete a criminal record check, travel to police stations or courts, have their fingerprints taken, complete forms, pay fees, and more.[113] Administrative burden helps explain why the uptake rate for criminal record expungements tends to be sur-

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[107] OFF. MGMT. & BUDGET, INFORMATION COLLECTION BUDGET OF THE UNITED STATES GOVERNMENT, 2014, at 2 (2014). Cass Sunstein (using an estimate of 9.78 billion hours) notes that the financial costs of this administrative burden are approximately $195 billion, if each individual were paid at the rate of $20 per hour. Cass R. Sunstein, *Sludge and Ordeals*, 68 DUKE L.J. 1843, 1848–49 (2019). Similarly, Adam Samaha observes that if administrative burden was distributed evenly amongst all adults in the U.S. population, each person would complete roughly forty hours of federal government related paperwork per year. Adam M. Samaha, *Death and Paperwork Reduction*, 65 DUKE L.J. 279, 280 (2015).

[108] OFF. MGMT. & BUDGET, INFORMATION COLLECTION BUDGET OF THE UNITED STATES GOVERNMENT, 2018–2021, at 1 (2023).

[109] Sunstein, *supra* note 107, at 1849–50; *see also* Herd & Moynihan, *supra* note 99, at 4–5 (characterizing administrative burdens as both consequential and distributive, with a disproportionate impact on poor and politically powerless populations); Albert J. Heuer, *More Evidence That the Healthcare Administrative Burden Is Real, Widespread and Has Serious Consequences*, 11 INT'L J. HEALTH POL'Y & MGMT. 536, 536 (2022) (noting that administrative burdens "may have a deleterious impact on patients and clinical outcomes, and thus may actually undermine value-based healthcare").

[110] *See* Sunstein, *supra* note 107, at 1863 (discussing state regulation of abortion procedures, which impose administrative costs that "increase the cost of abortion by 19 percent and decrease the number of abortions by between 13 and 15 percent"); Kyle & Frakt, *supra* note 105, at 761 ("Administrative tasks often impose barriers to care: 24.4% of respondents in our sample reported delayed or foregone care due to administrative tasks."); Pamela Herd & Donald Moynihan, *Health Care Administrative Burdens: Centering Patient Experiences*, 56 HEALTH SERVS. RSCH. 751, 751–52 (2021) (discussing Kyle and Frakt's findings, including the disproportionate impact on lower-income individuals).

[111] *See, e.g.*, Laura M. Giurge, Ashley V. Whillans & Colin West, *Why Time Poverty Matters for Individuals, Organisations and Nations*, 4 NATURE HUM. BEHAV. 993, 999 (2021) ("Many families do not have the time to fulfil all [the application] requirements [for Medicaid and the Earned Income Tax Credit,] and end up missing out on benefits for which they are eligible.").

[112] J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2501–04 (2020); *see also* Sonja B. Starr, *Expungement Reform in Arizona: The Empirical Case for a Clean Slate*, 52 ARIZ. ST. L.J. 1059, 1062, 1070–01 (2020) (discussing factors that contribute to the low rates of eligible individuals pursuing expungement).

[113] *See* Prescott & Starr, *supra* note 112, at 2501–04 (explaining the process to apply for expungement in Michigan); Terry Skolnik, *Two Criminal Justice Systems*, 56 U.B.C. L. REV. 286, 327–29 (2023) (explaining the process to apply for "record suspension" in Canada).

prisingly low.[114] For example, only 6.5% of eligible individuals receive a criminal record expungement in the state of Michigan.[115] Some estimates suggest that the criminal record expungement uptake rate is under 5% in New York, Connecticut, Washington, Missouri, and Colorado, and is slightly higher in California (5–8%) and in North Carolina (6%).[116]

The consequences of administrative burden tend to skew against indigent individuals.[117] Compared to more affluent persons, indigent persons may be required to take public transport, manage childcare responsibilities, and work several jobs with unpredictable schedules.[118] These types of obligations restrict the amount of time that individuals have to manage learning and compliance costs, and can compound the psychological costs they experience from administrative burden.[119] Furthermore, heavy administrative burdens may undermine the public's confidence in public assistance schemes.[120] The ways in which social programs and their administrative burdens are advertised can shape how individuals view these programs.[121] For instance, outreach programs that inform potential beneficiaries of administrative burdens and employ destigmatizing language may increase the uptake rate for a particular scheme.[122]

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[114] *See* Skolnik, *supra* note 113, at 329 (noting the increase in expungement uptake rates in systems that automatically grant expungements to eligible individuals, compared to lower rates in "opt-in" systems where individuals must apply). The term "uptake rate" is defined as "the rate at which those who are legally eligible for expungements actually receive them." Prescott & Starr, *supra* note 112, at 2466.

[115] Prescott & Starr, *supra* note 112, at 2466.

[116] Colleen Chien, *America's Paper Prisons: The Second Chance Gap*, 119 MICH. L. REV. 519, 556–57 (2020).

[117] *See* Giurge et al., *supra* note 111, at 1000 ("[T]ime poverty might be more detrimental for low-income workers who are unable to pay their way out of such constraints.").

[118] *Id.* at 999–1000.

[119] *Id.*

[120] Lael R. Keiser & Susan M. Miller, *Does Administrative Burden Influence Public Support for Government Programs? Evidence from a Survey Experiment*, 80 PUB. ADMIN. REV. 137, 138 (2019).

[121] *Id.*; *see also* Martin Baekgaard, Kim Sass Mikkelsen, Jonas Krogh Madsen & Julian Christensen, *Reducing Compliance Demands in Government Benefit Programs Improves the Psychological Well-Being of Target Group Members*, 31 J. PUB. ADMIN. RSCH. & THEORY 806, 809, 818 (2021) (explaining the study's hypotheses and findings that suggest "the reduction of compliance demands in the context of unemployment benefit programs led to improved psychological well-being among target group members").

[122] *See* Jessica Lasky-Fink & Elizabeth Linos, *Improving Delivery of the Social Safety Net: The Role of Stigma*, 34 J. PUB. ADMIN. RSCH. & THEORY 34, 34 (2024) (finding increased application rates for government assistance program of 52% from recipients of informational outreach and 79% from recipients of outreach with destigmatized language); *see also* Keiser & Miller, *supra* note 120, at 137 (introducing study results "suggest[ing] that highlighting information about administrative burden in [a government program for low-income families] increases support for the program and improves attitudes toward beneficiaries").

### *B. The Administrative Burdens of Constitutional Claims*

Although administrative burden is everywhere, scholars devote minimal attention to its role and effects in the criminal justice system. Like in the contexts of healthcare, social assistance programs, and tax benefits, administrative burdens permeate the criminal justice process.[123] The constitutionalization of criminal procedure allowed defendants to advance novel claims, such as motions to suppress evidence.[124] Empirical studies demonstrate that the number of prisoner petitions in district courts has increased significantly since the 1960s.[125] Yet each claim imposes administrative burdens onto defense attorneys, prosecutors, and judges.

Begin with learning costs. Defense attorneys who seek to bring a pre-trial motion may be required to comb through police reports, analyze evidence, interview witnesses, and read relevant case law.[126] Prosecutors must also devote significant time and effort to prepare cases, and must analyze much of the same information to respond to defense attorneys' pre-trial motions.[127] Judges face similar learning costs; they must analyze evidence, read the parties' motions, and prepare adequately for hearings.[128]

Consider compliance costs next. Pre-trial motions must comply with statutes, case law requirements, and applicable procedures.[129] These compliance

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[123] This argument was first advanced in Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2512–13. *See also id.* at 2486–87 (listing some of the administrative costs within the criminal justice system); Terry Skolnik, *The Regulatory Offence Revolution in Criminal Justice: The Choice Architecture of Regulatory Offences*, 62 ALTA. L. REV. 39, 47 (2024) (describing the administrative burdens in the criminal justice system in Canada).

[124] Mapp v. Ohio, 367 U.S. 643, 660 (1961). On the novelty of this type of claim, and the jurisprudential development of the exclusionary rule, see Stewart, *supra* note 62, at 1372–77.

[125] Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 470, 537 (2004).

[126] Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2512–13; Margaret L. Steiner, *Adequacy of Fact Investigation in Criminal Defense Lawyers' Trial Preparation*, 1981 ARIZ. ST. L.J. 523, 525–26; *see also* James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154, 211 (2012) (suggesting that "increasing discovery in criminal cases is likely to make outcomes less dependent upon the individual defense lawyer").

[127] *See, e.g.*, Stephan H. Peskin, *Innovative Pre-Trial Motions in Criminal Defense*, 1 AM. J. TRIAL ADVOC. 35, 35, 38 (1977) (discussing the prosecutor's role in pre-trial motions and arraignment proceedings); Esther Nir, *Empowering the Exclusionary Rule: Using Suppression Motion Data to Improve Police Searches and Searches in the United States*, 22 INT'L J. POLICE SCI. & MGMT. 96, 98 (2020) ("In preparing the response [to a suppression motion], the prosecutor generally confers with the police officer(s) involved to discuss the officer(s)' perspective(s) of the challenged incident.").

[128] *See, e.g.*, Daniel S. McConkie, *The Local Rules Revolution in Criminal Discovery*, 39 CARDOZO L. REV. 59, 75 (2017) ("Judges . . . know that discovery motions can gum up the docket and require judges to wade into a time-consuming thicket.").

[129] Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2512–13; *see, e.g.*, Esther Nir & Siyu Liu, *Defending Constitutional Rights in Imbalanced Courtrooms*, 111 J. CRIM. L. & CRIMINOLOGY 501, 504–06, 512 (2021) (discussing the case law exceptions to the evaluation process for motions to suppress).

costs matter for both prosecutors and defense attorneys, but for different reasons. Defense attorneys may devote significant time and effort to craft a successful suppression motion because it is their last line of defense; the evidence against the defendant is overwhelming and they have no other options.[130] Successful suppression motions may result in an acquittal or encourage prosecutors to dismiss the defendant's case.[131] In contrast, prosecutors are willing to expend compliance costs to refute defendants' pre-trial motions for various reasons. A prosecutor's performance, opportunity for career advancement, or electoral prospects can hinge on conviction rates.[132] Given the institutional culture of prosecutors' offices and pressures to secure convictions, prosecutors aim to ensure that judges do not exclude damning evidence, dismiss cases with prejudice, or acquit factually guilty defendants.[133] Judges, for their part, are also willing to pay compliance costs. They aim to issue well-reasoned decisions that show how they considered a case's factual matrix and complied with statutes and case law, which insulates them against reversal and maximizes their prospect of career advancement.[134]

Constitutional claims also generate important psychological costs that worsen the stress associated with high caseloads. Studies indicate that public defenders (who represent upwards of eighty percent of defendants), prosecutors, and judges all tend to face excessive caseloads.[135] According to some es-

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[130] *See* Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2488 ("Even before the trial begins, defendants can . . . bring motions to exclude unconstitutionally obtained evidence . . . . Each of these claims are litigated in the criminal justice commons, and expend the time, effort, and scrutiny of its actors.").

[131] Nirej Sekhon, *Mass Suppression: Aggregation and the Fourth Amendment*, 51 GA. L. REV. 429, 465 (2017); *see also* Malcolm Richard Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214, 228 (1978) (noting that when the exclusionary rule applies, "the 'penalty' is the same irrespective of the [violating officer's] offense[:] . . . the evidence is barred, the accused is freed, and this is all the 'punishment' the officer receives").

[132] Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOWARD L.J. 475, 484 (2006); *see also* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 328–29 (defining prosecutor "conviction psychology" to mean "an emphasis on obtaining convictions over 'doing justice'").

[133] Stephanos Bibas, *Rewarding Prosecutors for Performance*, 6 OHIO ST. J. CRIM. L. 441, 444 (2009) (discussing the "adversarial mindset" of prosecutors, which may "tempt[] them to go further [than zealous advocacy] and hit below the belt" to obtain or maintain a conviction); Bandes, *supra* note 132, at 483–84 ("It is likely . . . that the binary opposition between the obligation to seek justice and the institutional imperative to convict fails to capture the complex nature of the competing loyalties facing prosecutors.").

[134] David E. Klein & Robert J. Hume, *Fear of Reversal as an Explanation of Lower Court Compliance*, 37 LAW & SOC'Y REV. 579, 581–82 (2003).

[135] *See* Samantha Jaffe, *"It's Not You, It's Your Caseload": Using* Cronic *to Solve Indigent Defense Underfunding*, 116 MICH. L. REV. 1465, 1467–68 (2018) (discussing excessive caseloads in public defenders offices); Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 262–63 (2011); Irene Oritseweyinmi Joe, *Regulating Public Defender Identity*, 92 FORDHAM L. REV. 1335, 1349 (2024) ("Public defenders represent approximately 80 percent of defendants in the criminal

timates, in 2007, roughly seventy-five percent of county-level public defender offices exceeded the American Bar Association's recommended maximum caseload of either 400 misdemeanors or 150 felonies assigned per attorney in a given year.[136] Excessive caseloads remain commonplace in many public defender offices.[137] Research suggests that prosecutors' offices also tend to manage high caseloads, with estimates from various counties averaging over 250 filings per prosecutor (a figure that combines felony and misdemeanor filings).[138] In one jurisdiction, individual prosecutors managed more than 1,500 felony charges per year.[139] Trial judges also face high caseloads—a reality that is compounded by judicial vacancies in federal courts.[140] According to survey studies, the stress associated with high caseloads is one of the most pervasive and significant psychological costs that criminal justice actors experience.[141]

Constitutional claims exacerbate these psychological costs. For example, speedy trial claims carry such severe consequences that—despite high caseloads—prosecutors, defense attorneys, and judges must often manage tight and stressful deadlines associated with pre-trial motions.[142] Furthermore, certain constitutional claims are high stakes. A defendant's fate can rest on a successful constitutional claim that results in a dismissal with prejudice or the exclusion of damning evidence.[143] The asymmetric relationship between a single criminal

processes."); Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 BYU L. REV. 3, 6–7 (discussing high caseloads for trial judges).

[136] Jaffe, *supra* note 135, at 1467; *see also* DONALD J. FAROLE, JR. & LYNN LANGTON, U.S. DEP'T JUST., NCJ 231175, SPECIAL REPORT: COUNTY-BASED AND LOCAL PUBLIC DEFENDER OFFICES, 2007, at 1 (2010) ("About three-quarters (73%) of county-based public defender offices exceeded the maximum recommended limit of cases received per attorney in 2007.").

[137] NICHOLAS M. PACE, MALIA N. BRINK, CYNTHIA G. LEE & STEPHEN F. HANLON, NATIONAL PUBLIC DEFENSE WORKLOAD STUDY 4 (2023).

[138] *See* Gershowitz & Killinger, *supra* note 135, at 268–71 (presenting data of the total misdemeanor and felony filings per prosecutor across different counties in 2006); Peter A. Joy & Kevin C. McMunigal, *Overloaded Prosecutors*, 33 CRIM. JUST. 31, 31–32 (2018) ("Items in the news recently indicate that [prosecutorial] overloading has not been resolved. Rather, it may well have become exacerbated in recent years by budget cuts in some counties and cities.").

[139] Gershowitz & Killinger, *supra* note 135, at 271.

[140] *See* Robel, *supra* note 135, at 6–11 (discussing survey responses from trial judges in federal courts, which indicate that these judges experience "significant pressures from caseload"); Crystal S. Yang, *Resource Constraints and the Criminal Justice System: Evidence from Judicial Vacancies*, 8 AM. ECON. J.: ECON. POL'Y 289, 289 (2016) (discussing judicial vacancies).

[141] Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2512–13; *see* Chongmin Na, Tae Choo & Jeffrey A. Klingfuss, *The Causes and Consequences of Job-Related Stress Among Prosecutors*, 43 AM. J. CRIM. JUST. 329, 339–44 (2018); Robel, *supra* note 135, at 39–40 (discussing the impact of high caseloads on judges); Elizabeth Dotson, David C. Brody & Ruibin Lu, *An Exploratory Study of Occupational and Secondary Traumatic Stress Among a Mid-Sized Public Defenders' Office*, 4 J. CRIM. JUST. & L. 22, 22–24 (discussing the impact of high caseloads on public defenders).

[142] Yang, *supra* note 140, at 294.

[143] *See* Amar, *supra* note 40, at 645–46 (discussing the potential relief provided for successful speedy trial or exclusionary rule claims).

charge and the number of possible constitutional claims magnifies these psychological costs.[144] A single criminal charge can result in a number of constitutional claims that are orders of magnitude greater, and which justice system actors must manage despite their caseloads and other obligations.[145] Furthermore, criminal justice system actors take these claims seriously—and are willing to satisfy their compliance costs—to avoid the psychological cost of reputational harm. Defense attorneys, prosecutors, and judges care about their reputations.[146] Despite caseload volume, they do not want to manage constitutional claims in a manner that weakens their case, portrays them as incompetent or unprepared, or hinders career advancement.[147] Criminal justice actors thus satisfy the compliance costs of constitutional claims so that their reputations do not suffer.[148]

### *C. The Adverse Consequences of Administrative Burden for Defendants*

The administrative burdens of constitutional rights contribute to three phenomena that adversely impact defendants: under-investigation, under-litigation, and assembly-line guilty pleas.[149] These consequences occur because administrative burden consumes a greater degree of justice system actors' already scarce time and resources.[150] Learning, compliance, and psychological costs aggravate the extent to which these actors must ration their time and re-

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[144] Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2501, 2514–15.

[145] *Id.* at 2501–02, 2514–15.

[146] *See, e.g.*, Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. REV. 463, 479–80 (2017) (noting that "virtually all prosecutors have a personal interest in appearing successful . . . [and] want[] to appear competent, skilled, and prudent").

[147] *Id.* at 480; *see also* William G. Ross, *The Ratings Game: Factors That Influence Judicial Reputation*, 79 MARQ. L. REV. 401, 403 n.7 (1996) (listing factors that impact the reputations of judges, including qualities such as "professional expertise and competence, including analytical powers"); James G. Carr, *A Judge's Guide to Protecting Your Reputation*, 36 LITIG. 26, 26, 28 (2010) (noting that "[o]ne of a lawyer's most important assets is his or her reputation," and cautioning that, whether intentional or inadvertent, "[m]isrepresentation of the law will indelibly tarnish your reputation for competence and probity").

[148] *See* Nuno Garoupa & Tom Ginsburg, *Judicial Audiences and Reputation: Perspectives from Comparative Law*, 47 COLUM. J. TRANSNAT'L L. 451, 452 (2008) (describing how reputational concerns impact judicial motivation).

[149] These impacts have been explored by scholars such as William Stuntz, Stephanos Bibas, and Irene Oritseweyinmi Joe. *See, e.g.*, Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, *supra* note 3, at 32–35 (under-litigation); Stephanos Bibas, *Sacrificing Quantity for Quality: Better Focusing Prosecutors' Scarce Resources*, 106 NW. L. REV. COLLOQUY 138, 139 (2011), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1061&context=nulr_online [https://perma.cc/8ALL-TX8K] (under-litigation); Irene Oritseweyinmi Joe, *Systematizing Public Defender Rationing*, 93 DENV. L. REV. 389, 405 (2016) (plea bargains).

[150] *See* Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401, 405 (2013) (noting "that judicial attention is a scarce resource"); Bibas, *supra* note 149, at 139 (describing resource constraints in prosecutors' offices).

sources amongst many defendants, and encourage these actors to adopt strategies that ease administrative burdens yet adversely impact defendants.[151]

To illustrate this point, consider first how administrative burdens promote under-investigation. Together, caseload pressures and resource constraints influence the extent to which public defenders, court-appointed counsel, and prosecutors investigate their cases.[152] The time that public defenders and court-appointed counsel expend to fulfill the administrative burdens of constitutional claims cannot be spent investigating other defendants' cases.[153] Over-burdened defense attorneys may be unable to interview certain witnesses or investigate their backgrounds, seek out experts, or visit the place where the crime occurred.[154] As a result, they may not discover crucial exculpatory evidence that would have increased the strength of pre-trial motions, conferred greater plea-bargaining leverage, encouraged prosecutors to dismiss cases, or maximized acquittal prospects.[155] Furthermore, the failure to investigate cases properly hinders a defense attorney's capacity to properly advise their client.[156]

Prosecutors face the mirror image of this problem. They must screen criminal charges to decide whether to decline or dismiss charges, plea bargain, or go to trial.[157] But caseload pressures and administrative burdens restrict the amount of time that they can use to investigate and screen criminal charges.[158] This creates familiar problems. Given the need to satisfy heavy administrative burdens associated with other cases, prosecutors may overlook crucial excul-

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[151] *See* HERD & MOYNIHAN, *supra* note 29, at 16 (suggesting that individuals may engage in a cost-benefit consideration of administrative burden, particularly when resources to deal with that burden are scarce).

[152] *See* Joe, *supra* note 149, at 403 (listing steps that "[a]n ideal criminal defense attorney" would take when preparing to represent a client, but acknowledging that this is unrealistic "[g]iven that legal resources are predominantly finite and limited"); Don Stemen & Bruce Frederick, *Rules, Resources, and Relationships: Contextual Constraints on Prosecutorial Decision Making*, 31 QUINNIPIAC L. REV. 1, 2–3 (2013) ("As a result of high caseloads and limited staffing, prosecutors make decisions to ensure the efficient use of those limited resources."); Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 FORDHAM L. REV. 723, 750 (1999) ("By necessity, investigative discretion is already limited by prosecutors in most cases by a cost-benefit analysis . . . .").

[153] Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2507.

[154] Joe, *supra* note 149, at 403, 405.

[155] *See* Vida B. Johnson, *A Plea for Funds: Using* Padilla*,* Lafler*, and* Frye *to Increase Public Defender Resources*, 51 AM. CRIM. L. REV. 403, 423 (2014) ("In juggling scores . . . of pre-trial cases at a time, public defenders in high-volume offices frequently spend most of each day in court. Most indigent defenders struggle to find time to investigate and conduct research, visit all clients in jail, advise each client promptly of plea offers, and bargain effectively.").

[156] *Id.* at 419–20.

[157] Celesta A. Albonetti, *Prosecutorial Discretion: The Effects of Uncertainty*, 21 LAW & SOC'Y REV. 291, 297 (1987).

[158] *See* Gershowitz & Killinger, *supra* note 135, at 280–82, 285–87 (discussing ways in which prosecutor caseloads can delay or prevent sentence reductions and case dismissals for innocent defendants).

patory evidence that should have been disclosed to the defendant.[159] They may quickly plea bargain cases that should have been declined or dismissed.[160] And innocent defendants may be wrongfully convicted because prosecutors failed to investigate their cases properly.[161]

The administrative burdens of constitutional rights produce a second consequence for defense attorneys: under-litigation.[162] The concept of under-litigation implies that these attorneys litigate cases less aggressively than would be necessary to achieve optimal outcomes.[163] Defense attorneys may have to draft well-written constitutional claims to maximize acquittal or dismissal prospects.[164] They may be required to spend significant amounts of time conducting broad legal research to craft a strong constitutional claim.[165] Administrative burdens and caseload pressures may force attorneys to ration the number of claims that they present as part of a defendant's defense, and restrict how aggressively they can litigate each claim.[166]

Third, the administrative burdens of constitutional rights contribute to a culture of assembly-line guilty pleas.[167] Given heavy caseloads, overburdened defense attorneys may exert significant pressure on their clients to plead guilty.[168] Prosecutors also favor guilty pleas that ease docket pressures, secure convictions, and avoid trials.[169] Beyond a shared desire to manage caseloads, judges are inclined to accept guilty pleas that maximize certainty, predictabil-

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[159] *Id.* at 282–83.

[160] *Id.* at 285–87.

[161] *Id.* at 287–91.

[162] Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, *supra* note 3, at 32–35.

[163] *See id.* at 33–35 (discussing resource constraints preventing public defenders from pursuing different strategies or constitutional claims, and noting that "recent studies suggest that defendants with retained counsel" able to pursue these strategies and claims "do significantly better"); Joe, *supra* note 149, at 404–05 (analogizing public defenders' allocation of resources to different clients and claims as a "triage or rationing" system).

[164] *See* Siyu Liu & Esther Nir, *Mission Impossible? Challenging Police Credibility in Suppression Motions*, 33 CRIM. JUST. POL'Y REV. 584, 585 (2022) (explaining that "defendants generally bear the burden to prove that the police violated their constitutional rights").

[165] Joe, *supra* note 149, at 403.

[166] *Stuntz*, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, *supra* note 3, at 33–34; *see* Rodney J. Uphoff, *On Misjudging and Its Implications for Criminal Defendants, Their Lawyers and the Criminal Justice System*, 7 NEV. L.J. 521, 541–42 (2007) (describing under-funded public defenders as "often little more than a plea facilitator" because of time constraints from excessive caseloads).

[167] *See* Lisa C. Wood, Daniel T. Goyette & Geoffrey T. Burkhart, *Meet-and-Plead: The Inevitable Consequence of Crushing Defender Workloads*, 42 LITIG. 20, 23 (2016) (on the "assembly-line justice" culture of guilty pleas).

[168] Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, *supra* note 15, at 171.

[169] F. Andrew Hessick III & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 190–91, 210 (2002).

ity, and efficiency in the criminal justice process.[170] Unlike onerous motions or trials, guilty pleas involve minimal administrative burden.[171] Furthermore, guilty pleas are quick.[172] In some jurisdictions, indigent clients meet their attorneys minutes before their arraignment and then plead guilty.[173] Some plea colloquies only last minutes (note that defendants can also waive these hearings, which further increases efficiency).[174] And judges may only minimally scrutinize the factual accuracy of guilty pleas.[175] Many jurisdictions (around half) do not require written agreements for plea bargains.[176] The lack of a written plea requirement reduces the administrative burden for prosecutors, defense attorneys, and judges.[177]

Assembly-line guilty pleas are pernicious because they remove certain types of administrative burdens that aim to enhance fairness and accuracy in the criminal justice system. Not all administrative burdens are bad. Certain administrative burdens—such as the need to provide proof of income or a tax return to receive social assistance—exist partly to enhance accuracy, prevent

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[170] Turner, *supra* note 14, at 237; *see* Charlie Gerstein, *Dependent Counsel*, 16 STAN. J. C.R. & C.L. 147, 159–60 (2020) (describing judicial caseloads as a factor explaining why judges sometimes "want to get cases resolved quickly and without extensive hearings").

[171] *See* Skolnik, *supra* note 123, at 49–50 (noting factors that encourage criminal defendants to accept guilty pleas even if factually innocent, such as the high cost of trial); Turner, *supra* note 14, at 217 ("[S]tudies of . . . plea hearings have shown judicial review of pleas to be quick and relatively superficial.").

[172] *See, e.g.*, Turner, *supra* note 14, at 222–23 ("A few empirical studies have . . . found that plea hearings last on average fourteen minutes or less and misdemeanor hearings are even shorter, just under eight minutes."); Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 415–16 (2008) (describing the efficient process behind plea bargaining "[i]n routine case processing," which typically applies to "high-volume, low-stakes cases like misdemeanors and low-grade felonies").

[173] *See* Russell D. Covey, *Toward a More Comprehensive Plea Bargaining Regulatory Regime*, 101 OR. L. REV. 257, 277 (2023) (describing examples of "'meet 'em and plead 'em' lawyering," in which defendants were given minimal to no time with a defense attorney before accepting guilty pleas); Sriram H. Ramesh, Note, *Burden of the Bargain: Ineffective Assistance of Counsel Claims in the Absence of a Plea Offer*, 92 FORDHAM L. REV. 2275, 2283–84 (2024) (noting that public defenders "often have mere minutes to meet with their clients").

[174] *See* Kelsey S. Henderson, Erika N. Fountain, Allison D. Redlich & Jason A. Cantone, *Judicial Strategies for Evaluating the Validity of Guilty Pleas*, 59 CT. REV. 44, 47 (2023) (discussing the short length of plea hearings); Amy Dezember et al., *Plea Validity in Circuit Court: Judicial Colloquies in Misdemeanor vs. Felony Charges*, 28 PSYCH., CRIME & L. 268, 275 (2022) (noting that some defendants "waived advisement of their rights, meaning the judge did not go through oral colloquy during the hearing"). Plea colloquy refers to the responsibility of judges to "determine[e] the validity of guilty plea decisions, which is done by asking the defendant a series of questions . . . ." Henderson et al., *supra*, at 47. The questions are meant to help the judge determine whether the defendant's guilty plea is voluntary, knowing, and intelligent. *Id.*

[175] Keith A. Findley, Maria Camila Angulo Amaya, Gibson Hatch & John P. Smith, *Plea Bargaining in the Shadow of a Retrial: Bargaining Away Innocence*, 2022 WIS. L. REV. 533, 585.

[176] Meghan J. Ryan, *Criminal Justice Secrets*, 59 AM. CRIM. L. REV. 1541, 1556 (2022).

[177] Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2514–15.

fraud, and deter abuse.[178] These types of compliance costs aim to ensure that individuals provide truthful information, which can help maintain a scheme's fairness and integrity.[179] As a regulatory scheme, constitutional criminal procedure imposes administrative burdens on government actors to achieve similar objectives.[180] For instance, the Fourth Amendment's warrant and probable cause requirements attempt to prevent governmental misconduct and maintain the integrity of criminal procedure as a regulatory system.[181] The administrative burdens of constitutional rights that fall on the prosecution—such as the need to prove that confessions were free and voluntary or to establish the defendant's guilt beyond a reasonable doubt—seek to deter abuse, enhance fairness, and promote adjudicative accuracy.[182]

Yet a culture of assembly-line guilty pleas eliminates the learning and compliance costs of constitutional rights that are meant to prevent wrongful convictions and promote proportionate sentences. The administrative burdens of constitutional rights help force justice system actors to investigate a defendant's case, examine whether their rights were respected, and detect mitigating circumstances for sentencing.[183] Systemic pressures that push defendants to waive their rights and plead guilty remove these learning and compliance costs that promote fair and accurate adjudication, deter government abuse, and prevent wrongful convictions.[184]

[178] *See* Elizabeth Bell, Ani Ter-Mkrtchyan, Wesley Wehde & Kylie Smith, *Just or Unjust? How Ideological Beliefs Shape Street-Level Bureaucrats' Perceptions of Administrative Burden*, 81 PUB. ADMIN. REV. 610, 610–11 (2021) (describing compliance requirements for public benefits programs, justified in part by the "potential to reduce fraud, waste, and abuse").

[179] SUNSTEIN, *supra* note 98, at 73–78.

[180] *See* Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, *supra* note 3, at 12–22 (describing mechanisms through which constitutional criminal procedure is meant "to get prosecutors, court personnel, and defense attorneys to behave properly").

[181] *See, e.g.*, Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977, 990–93 (discussing evolution of the warrant and probable cause requirements, and noting that "[t]he Fourth Amendment was promulgated against [a] background of abuse of the warrant process—and revulsion against that abuse").

[182] *See* Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1385–1403 (1991) (discussing the Court's evolving—and sometimes counterintuitive—interpretation of the protections and limitations of "[t]ruth-furthering rights" in constitutional criminal procedure).

[183] *See, e.g.*, Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2515–16 (noting that the plea-bargaining system and prosecutorial discretion "are largely unregulated by constitutional criminal procedure" because of minimal judicial oversight and a lack of transparency in the negotiation process).

[184] *Id.*

## III. SUBTRACTABILITY

Subtractability is another factor that weakens constitutional rights. In this Part, Section A introduces the criminal justice system as a commons.[185] Section B then explains the subtractability of constitutional rights in the criminal justice commons.[186] Section C addresses the question of why wealthy defendants produce more negative externalities than defendants with fewer resources.[187] Finally, Section D addresses the question of why wealthy defendants are better protected against negative externalities.[188]

### *A. The Criminal Justice System as a Commons*

The second negative externality of constitutional rights is subtractability, a phenomenon that is typically associated with a tragedy of the commons.[189] The term "subtractability" refers to how one individual's use of a scarce open-access resource can decrease its quality for others.[190] As a collective action problem, a tragedy of the commons can occur when too many users over-exploit an open-access resource and destroy its shared use.[191] For instance, ranchers who allow too many cattle to graze on a pasture can reduce the amount of grass for others, and ultimately, contribute to the pasture's demise.[192] Tragedies of the commons develop because individuals who exploit open-access resources do not fully internalize the costs of their own behavior.[193] As Elinor Ostrom observes, a tragedy of the commons can happen because "individually rational strategies"—exploiting the resource as much as possible for self-interested reasons—"lead to collectively irrational outcomes"—annihilating the resource for all.[194]

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[185] *See infra* notes 189–210 and accompanying text.

[186] *See infra* notes 211–237 and accompanying text.

[187] *See infra* notes 238–259 and accompanying text.

[188] *See infra* notes 260–294 and accompanying text.

[189] This Part's arguments were first advanced in Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28. The tragedy of the commons is defined as "a form of collective action problem that occurs when individuals over-exploit a scarce and open-access natural resource, which leads to the resource's demise." *Id.* at 2482.

[190] Feeny et al., *supra* note 32, at 3; Burger & Gochfeld, *supra* note 32, at 8.

[191] *See, e.g.*, Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244–45 (1968) (providing examples of tragedy of the commons in the context of cattle grazing, parking spaces, national parks, and pollution); Elinor Ostrom, *Coping with Tragedies of the Commons*, 2 ANN. REV. POL. SCI. 493, 493–94 (1999) (noting that "'the tragedy of the commons' has been used as a metaphor for the problems of overuse and degradation of natural resources," and that "[e]xternal authorities are presumably needed to impose rules and regulations" to address this problem).

[192] Hardin, *supra* note 191, at 1244.

[193] Emeline Bezin & Gregory Ponthière, *The Tragedy of the Commons and Socialization: Theory and Policy*, 98 J. ENV'T ECON. & MGMT., Nov. 2019, at 1, 1.

[194] ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 5 (1990).

Two interrelated characteristics explain why certain open-access resources—including the criminal justice system—are vulnerable to a tragedy of the commons. First, these resources are characterized by a limited power to exclude others.[195] Exclusion may be impossible or impractical due to the resource's size, the financial costs to exclude others, or norms that prohibit exclusion.[196] Second, open-access resources result in subtractability—alternatively called rivalry—between users.[197] Subtractability occurs because one individual's use of the resource can impose negative externalities that reduce the resource's availability or value to all others.[198]

Tragedies of the commons arise in various circumstances. Waterways are susceptible to over-fishing that decimates local fish populations.[199] In response, governments may impose moratoria that result in the collapse of commercial fishing industries, large-scale unemployment, and economic devastation.[200] Tragedies of the commons also arise outside of natural resource contexts. Under-funded public healthcare systems can deteriorate significantly due to labor shortages, excessive demand, and overuse.[201] Parks and other public spaces can be subject to overuse in a manner that undermines their shared worth.[202]

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[195] *Id.* at 6. Limitations on the ability to exclude members from the benefits of the group give rise to the "free-rider problem," wherein "each person is motivated not to contribute to the joint effort, but to free ride on the efforts of others." *Id.*

[196] *See* Feeny et al., *supra* note 32, at 3 (noting circumstances in which exclusion from access to natural resources is either expensive or impossible).

[197] *Id.*

[198] *Id.* In other words, subtractability reflects "the potential divergence between individual and collective rationality." *Id.*

[199] Fikret Berkes, *Fishermen and the 'Tragedy of the Commons,'* 12 ENV'T CONSERVATION 199, 199, 202–04 (1985); *see* Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2482 ("Lakes and rivers can be over-fished, which can endanger the fish population and decrease its availability as a communal food source.").

[200] *See, e.g.*, William E. Schrank & Noel Roy, *The Newfoundland Fishery and Economy Twenty Years After the Northern Cod Moratorium*, 28 MARINE RES. ECON. 397, 397 (2013) (discussing the significant economic and political impact of a Newfoundland ban against commercial fishing of a particular breed of fish).

[201] *See* Khalil Hassanally, *Overgrazing in General Practice: The New Tragedy of the Commons*, 65 BRIT. J. GEN. PRAC. 81, 81 (2015) (addressing the tragedy of the commons in the healthcare industry, and noting that "[g]eneral practice seems a prime example of a resource being overgrazed"); Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2483 ("Public healthcare systems that are open to all persons can implode under the pressure of underfunding and overconsumption.").

[202] Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2482; Sheila R. Foster, *Collective Action and the Urban Commons*, 87 NOTRE DAME L. REV. 57, 59–61 (2011); *see also* Terry Skolnik, *How and Why Homeless People Are Regulated Differently*, 43 QUEEN'S L.J. 297, 304 (2018) ("According to some theories, a failure to adequately regulate common property, such as parks and sidewalks, will cause people to avoid them, ultimately depriving people of the very communal interaction and democratic gathering that these spaces permit.").

The criminal justice system functions as an open-access commons for defendants.[203] Individuals who are charged with crimes must participate in the criminal justice system to defend themselves against a criminal charge; they cannot rely on any other institution.[204] The criminal justice system is a monopoly that the state controls.[205] Like other types of commons, the criminal justice system's resources are notoriously limited.[206] Defendants must use the justice system's scarce resources—such as judges, stenographers, public defenders, courtrooms, and so on—as part of their defense.[207]

When multiple defendants attempt to exploit these finite resources available in the criminal justice system, a tragedy of the commons within this system occurs, such that the overall quality of justice deteriorates.[208] As discussed more below, such tragedies produce various negative consequences for defendants: miscarriages of justice, coercive plea bargains, assembly-line guilty pleas, and wrongful convictions.[209] Furthermore, the effects of such tragedies skew against indigent individuals and persons of color.[210]

### *B. Constitutional Rights and Subtractability in the Criminal Justice Commons*

The criminal justice system is characterized by two features—limited excludability and subtractability—that expose it to the problem of a tragedy of the commons.[211] Consider first the concept of limited excludability. Defendants enjoy constitutional rights that allow them to exploit the justice system's resources as part of their defense—a reality that limits the government's power

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[203] Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2478, 2486 ("The criminal justice system is the sole common resource for individuals who are charged with crimes."). Various scholars have argued that the criminal justice system resembles an open-access commons. *See, e.g.*, DAVID W. RASMUSSEN & BRUCE L. BENSON, THE ECONOMIC ANATOMY OF A DRUG WAR: CRIMINAL JUSTICE IN THE COMMONS 17–37 (1994) (on the allocation of public resources to law enforcement); David W. Rasmussen & Bruce L. Benson, *Rationalizing Drug Policy Under Federalism*, 30 FLA. ST. U. L. REV. 679, 721–22 (2003) (on the allocation of public resources to "[p]olice, prosecutors, public defenders, probation services, and prisons").

[204] This argument was initially advanced in Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2486–88.

[205] *Id.* at 2486; Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 917–18 (2007).

[206] *See* Darryl K. Brown, *Criminal Procedure, Justice, Ethics, and Zeal*, 96 MICH. L. REV. 2146, 2148 (1998) (noting general acceptance of the fact "that prosecutors and defenders work in a world of heavy case loads and limited resources that compel trade-offs between the degrees of zeal an attorney gives different cases").

[207] Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2486–87.

[208] *Id.* at 2478–79.

[209] *Id.*; *see infra* Part III.B–C.

[210] Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2509.

[211] *Id.* at 2483, 2486.

to exclude defendants from the criminal justice commons.[212] For instance, defendants have a constitutionally protected right to call witnesses, be tried by a jury for certain crimes, request the suppression of unlawfully obtained evidence, and more.[213] The state cannot bar individuals from exercising these rights—and from using justice system resources—to defend themselves against a criminal charge.[214]

Consider also that the criminal justice system is characterized by subtractability between defendants. Defendants who exercise their constitutional rights can create negative externalities imposed on others—and these externalities may ultimately encourage those other defendants to plead guilty.[215] Two examples illustrate the phenomenon of subtractability: longer trial delays and lengthier pre-trial detention.

First, defendants who exercise their constitutional rights can increase delays for other defendants.[216] The amount of time that judges, prosecutors, and defense attorneys can devote to each defendant is limited, and cannot be devoted to other defendants simultaneously.[217] Defendants must wait until others' legal claims are resolved.[218] Yet the greater the number of claims that must be

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[212] *Id.* at 2487–88; Ralph S. Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 U. PA. L. REV. 473, 492 (1978); *see also* Andrew Manuel Crespo, *No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action*, 90 FORDHAM L. REV. 1999, 2013–15 (2022) (listing the rights a defendant is entitled to invoke, and noting that each of these rights can incur significant direct and administrative costs for the government).

[213] *See* Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2487–89 (listing defendants' constitutional rights at various points before and during trial); Crespo, *supra* note 212, at 2013–15 (same).

[214] Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2488–89.

[215] *Id.* at 2492; *see also* Skolnik, *Precedent, Principles, and Presumptions*, *supra* note 28, at 976–77 ("[T]he greater the number of complex motions to vindicate [constitutional] rights, the more it creates downstream effects that foster inefficiency in the criminal justice system that limits access to justice for others."); Skolnik, *Criminal Justice Reform: A Transformative Agenda*, *supra* note 28, at 652 ("The process of challenging mandatory minimum sentences . . . externalizes the delays associated with constitutional review onto other defendants, and slows down the justice system for all.").

[216] *See* Skolnik, *Precedent, Principles, and Presumptions*, *supra* note 28, at 974–77 (describing ways in which pre-trial motions can contribute to "many delays in the justice system"); Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2492 ("The time that justice system actors devote to a defendant's legal claims can create delays for other defendants who must queue in line and wait for their own claims to be adjudicated.").

[217] *See, e.g.*, Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2491 ("The time that each actor spends on one defendant's case—and the scrutiny that they devote to these cases—cannot be spent on other defendants."); Levy, *supra* note 150, at 409–11, 413 (discussing proposed solutions to the heavy caseload of federal judges, but noting that because "the judiciary's main constraints are unlikely to be alleviated in the foreseeable future, judicial attention likely will remain a scarce resource"); Brian Sheppard, *Judging Under Pressure: A Behavioral Examination of the Relationship Between Legal Decisionmaking and Time*, 39 FLA. ST. U. L. REV. 931, 932–33 (2012) (noting that because of court budget cuts and delays in filling seats, "[v]acancies have reached 'crisis' levels in the federal courts"); Joe, *supra* note 149, at 403 (on resource constraints of public defenders); Stemen & Frederick, *supra* note 152, at 2–3 (on resource constraints of prosecutors).

[218] Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2492.

adjudicated, the longer the delays for defendants.[219] Studies indicate that defendants in some jurisdictions must wait months—if not years—to be tried.[220] Yet lengthier trial delays can incentivize defendants to plead guilty to put an end to the uncertainty of trial, multiple court appearances, or restrictive release conditions.[221]

Two interrelated factors exacerbate delays as a form of subtractability: aggregation and triage.[222] The aggregation of individual claims—meaning that many different defendants exercise their constitutional rights simultaneously—aggravates delays because each additional claim lengthens the time every other defendant must wait for the adjudication of their claims.[223] The need to triage constitutional claims also worsens delays for some defendants, but for different reasons.[224] Urgent or time-sensitive constitutional claims—such as motions to dismiss charges with prejudice due to oppressive delay—may take precedence over claims that are less pressing or more costly.[225] Similarly, attorneys and judges may prioritize serious felonies or highly salient cases in a manner that lengthens delays for defendants whose cases are deemed less serious or urgent.[226] Triage worsens delays for some defendants because it resembles a

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[219] *See id.* at 2493 ("The volume of defense claims completes the picture of the criminal justice commons . . . . The availability of defense claims, for their part, represent the quantity of justice system resources that each defendant can consume . . . .").

[220] *See id.* at 2505 ("As a result, defendants must wait in line—and often in jail—for weeks or months until their own claims are adjudicated."); *infra* notes 470–472 and accompanying text.

[221] Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2505; Daniel Hamburg, *A Broken Clock: Fixing New York's Speedy Trial Statute*, 48 COLUM. J.L. & SOC. PROBS. 223, 224, 229–30 (2015).

[222] On triage, see Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 15, at 1144. On aggregation, see Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 FORDHAM URB. L.J. 1043, 1045 (2013).

[223] *See* Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2492, 2501–02 (discussing the negative externalities of each claim advanced by a defendant, and the aggravation of these externalities as a result of the expansion of available constitutional rights).

[224] *See id.* at 2507 ("Justice system actors must prioritize some claims over others."); JOAN E. JACOBY & EDWARD C. RATLEDGE, THE POWER OF THE PROSECUTOR: GATEKEEPERS OF THE CRIMINAL JUSTICE SYSTEM 27 (2016) (describing the impacts of prosecutorial triage on the criminal justice system as a whole). On the delays caused by triage of constitutional claims, see *infra* notes 225–226 and accompanying text.

[225] *See* Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2507 ("A prosecutor may prioritize defendants' claims that are time sensitive, arise in serious cases, or would result in acquittals or dismissal."); Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, *supra* note 3, at 40 (noting that a factor in defense attorneys' triage analysis is the lower cost of filing a constitutional claim, compared to the higher cost of investigating whether a claim of factual innocence even exists); Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1097 (2013) (noting that "a critical side effect of triage in favor of serious [felony] cases [is] allowing the misdemeanor system to continue to function in its current, harmful manner by depriving individuals charged with misdemeanors of effective means of fighting the charges against them").

[226] *See* Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 MICH. L. REV. 187, 213–14 (2017) (noting that in setting bail, "[j]udges rely on prosecutors' recommendations,

form of queue-jumping; some defendants pass ahead of others who must wait additional time for their claims to be heard and resolved.

Second and interrelatedly, the ways in which constitutional claims produce delays can lengthen defendants' period of pre-trial custody.[227] Pre-trial detention rates have risen considerably over the past several decades.[228] In 2018, the federal pre-trial detention rate was approximately seventy percent—a rate that doubled since 1988.[229] Although generally lower than in federal cases, state pre-trial detention rates increased by roughly seventy-seven percent between 1990 and 2019.[230] According to estimates in 2020, close to three quarters of incarcerated persons are detained pending trial, rather than serving a sentence resulting from a conviction.[231] But this is only half of the problem. As pre-trial detention rates rose, case-resolution times also lengthened (more on this below).[232] As a result, defendants may be detained pending trial for longer periods of time and must wait longer to be tried.[233]

Lengthier periods of pre-trial detention produce negative consequences.[234] Pre-trial custody encourages individuals—including factually innocent ones—to plead guilty to be released from custody or end restrictive bail conditions.[235] Defendants who are detained pending trial may lose their employment, access to housing, and capacity to provide for their families.[236] Because defendants who

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and prosecutors in turn rely on the severity of the crime charged"); JACOBY & RATLEDGE, *supra* note 224, at 27 (observing that some prosecutors "establish[] priorities for what constitutes the most serious offenses and allocat[e] resources and time so they can be given sufficient attention").

[227] Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2492.

[228] *Id.* at 2504; Megan T. Stevenson & Sandra G. Mayson, *Pretrial Detention and the Value of Liberty*, 108 VA. L. REV. 709, 721 (2022). This increase can be attributed in part to the fact that "Congress has gradually expanded the list of detention-eligible offenses, as well as the circumstances that give rise to a 'presumption' of dangerousness." Stevenson & Mayson, *supra*, at 720–21.

[229] Stevenson & Mayson, *supra* note 228, at 721.

[230] Shima Baradaran Baughman, Lauren Boone & Nathan Jackson, *Reforming State Bail Reform*, 74 SMU L. REV. 447, 451 (2021). Note that between 1990 and 2004, the average pre-trial detention rate at the state level was approximately 40%. *Id.*

[231] *Id.*

[232] *See infra* notes 462–483 and accompanying text.

[233] *See infra* notes 462–483 and accompanying text; *see also* Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1354 (2014) ("[D]espite speedy trial requirements, many defendants awaiting trial are detained for months.").

[234] Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2505; *see* Wiseman, *supra* note 233, at 1353–58 (describing some of the negative consequences of pre-trial detention, including privacy and liberty violations and financial damage).

[235] *See* Wendy R. Calaway, *Probable Cause Reform as Bail Reform*, 67 ST. LOUIS U. L.J. 295, 305 (2023) ("Pretrial detention also causes people detained pretrial to disproportionately plead guilty. This includes the decision to plead guilty even when a person is innocent . . . ." (citation omitted)); John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 173–74 (2014) (noting that "many innocent defendants charged with relatively minor crimes plead guilty in order to get out of jail or avoid spending additional time in jail").

[236] Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2492; Jenny E. Carroll, *The Due Process of Bail*, 55 WAKE FOREST L. REV. 757, 774 (2020).

are incarcerated face additional barriers to preparing their defense, lengthy pretrial detention may also increase the prospect of wrongful convictions.[237]

### *C. Why Wealthy Defendants Produce More Negative Externalities*

A defendant's wealth—and their ability to consume more justice system resources when they exercise their rights—shapes the extent to which they impose negative externalities onto others. And as discussed more below, wealth also influences a defendant's ability to insulate themselves against the negative externalities that others produce.[238] Affluent defendants create more negative externalities than indigent ones for various reasons.

First, wealthy defendants can afford to hire private attorneys who face fewer resource constraints and whose conduct produces greater unaccounted-for costs.[239] In contrast to court-appointed counsel and public defenders, privately retained attorneys manage lower caseloads and are subject to different incentive structures.[240] A wealthy defendant's privately retained attorney may have the time and resources to prepare the case more carefully, advance the maximum number of constitutional claims, and litigate these claims to the full-

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[237] Wiseman, *supra* note 233, at 1355–56.

[238] This argument was first advanced in Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2510–11. *See also infra* Part III.D. The effects of wealth disparities also help explain why privately retained attorneys may achieve some better outcomes than court-appointed counsel or public defenders. *See* Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2482 (2004) (noting that "[t]he constraints on appointed attorneys' funding, time, and working relationships . . . appear to influence outcomes" relative to private counsel). According to some research studies, privately retained defense attorneys achieve better acquittal rates, more dismissed charges, fewer guilty pleas, and lighter sentences. *See* Jenny Roberts & Ronald Wright, *Expanded Criminal Defense Lawyering*, 6 ANN. REV. CRIMINOLOGY 241, 253 (2023) (providing an overview of this research, but noting that studies diverge on outcomes for defendants who hire privately retained counsel versus public defenders).

[239] *See* Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2510 ("[A]ffluent defendants can afford private attorneys who need not ration their resources, under-investigate cases, or limit their constitutional claims to ease docket pressures."); Bibas, *supra* note 238, at 2476, 2537 (describing the different funding structures for public defenders, court-appointed counsel, and private defense attorneys, and noting that "[t]hose defendants who can afford the best defense lawyers benefit the most, creating disparities based on wealth").

[240] *See* Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2510; Bibas, *supra* note 238, at 2477–82 (discussing the ways in which a defense attorney's funding incentives can impact not only his actions, but also the actions of the prosecutor, defendant, and judge); Peter A. Joy, *Ensuring the Ethical Representation of Clients in the Face of Excessive Caseloads*, 75 MO. L. REV. 771, 780 (2010) ("[U]nlike a private lawyer or law firm that has control of the number of clients they accept, the individual public defender and the public defender system may have little control over their caseload."); Ann Marie Tracey, Comment, *Caseload Ceilings on Indigent Defense Systems to Ensure Effective Assistance of Counsel*, 43 U. CIN. L. REV. 185, 188–89 (1974) (contrasting the actions that "[a] privately retained attorney . . . with command of his own schedule and caseload" is able to take in preparing a defense with those of a public defender with more limited time).

est.[241] As scholars such as Stephanos Bibas and William Stuntz note, privately retained attorneys tend to file more motions per trial compared to court-appointed counsel, all of which prosecutors and judges must address at the expense of low-income defendants.[242] Furthermore, as they note, privately retained attorneys also meet with defendants sooner and more frequently throughout the criminal justice process.[243]

The picture looks very different for indigent defendants. They tend to be represented by overburdened public defenders or court-appointed counsel.[244] These attorneys must often manage high caseloads and their resources tend to be limited.[245] Court-appointed counsel may face perverse financial incentives to push their clients to plead guilty quickly to increase income.[246] To maximize profits, they may accept a high volume of cases and devote minimal time to each defendant.[247] Yet even when these attorneys do not push guilty pleas, they may still under-litigate their cases and ration their constitutional claims to ease docket pressures.[248] Perverse incentives thus encourage court-appointed counsel and public defenders to adopt strategies that generate fewer negative externalities than privately retained counsel.[249]

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[241] *See* Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, *supra* note 3, at 32–35 (discussing the examples of under-litigation that occur when "[a]ppointed defense counsel litigate less than high-end private counsel because they cannot afford to do otherwise"); Bibas, *supra* note 238, at 2479 ("[P]rivately retained lawyers who receive generous hourly rates have incentives to bill more hours and to fight matters out and go to trial if necessary.").

[242] Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, *supra* note 3, at 35; Bibas, *supra* note 238, at 2482; Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2510.

[243] Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, *supra* note 3, at 35; Bibas, *supra* note 238, at 2482.

[244] *See* Wood et al., *supra* note 167, at 22–24 (discussing the different systems for appointing counsel to indigent defendants, and the "ample evidence that [there is] an excessive workload problem" among defense attorneys).

[245] Alma Magana, *Public Defenders as Gatekeepers of Freedom*, 70 UCLA L. REV. 978, 1009 (2023).

[246] *See* Bibas, *supra* note 238, at 2477 ("To put it bluntly, appointed or flat-fee defense lawyers can make more money with less time and effort by pushing clients to plead.").

[247] *See, e.g.*, Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2519–20; Stephen J. Schulhofer, *Client Choice for Indigent Criminal Defendants: Theory and Implementation*, 12 OHIO ST. J. CRIM. L. 505, 516 (2015) (describing the incentive structure of systems where appointed counsel is paid low hourly rates subject to a strict cap, which pushes counsel to "resolve their cases and to minimize the time and effort devoted to the case").

[248] *See* Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, *supra* note 3, at 28, 32–35 (on the problem of under-litigation in criminal defense); Neel U. Sukhatme & Jay Jenkins, *Pay to Play? Campaign Finance and the Incentive Gap in the Sixth Amendment's Right to Counsel*, 70 DUKE L.J. 775, 800–01 (2021) ("Faced with a flood of cases, public defenders are forced to apportion their limited time among them.").

[249] On why under-litigation and early plea bargaining generate fewer negative externalities, see *supra* Part II.B.

Second, unlike indigent defendants, affluent ones can afford to go to trial and litigate aggressively, which consumes far greater resources than plea bargains or pre-trial motions.[250] Wealthier defendants have the financial capacities to exercise a range of constitutional rights that are time consuming, expensive, and resource intensive.[251] For instance, privately retained counsel who represent wealthy defendants may spend significant time to vet jurors, cross-examine the prosecution's witnesses, and produce expert witnesses.[252] Prosecutors, for their part, may work hard to present the strongest possible case because they wish to secure a conviction and know that wealthy defendants will fight tooth and nail to be acquitted.[253] They too may litigate more aggressively and in a manner that drives up resource consumption. Therefore, the defendant's wealth—and their capacity to fight a criminal charge—results in a form of zero-sum game theory challenge between the parties, each of whom consumes greater resources to increase their prospect of victory.

Third, unlike indigent defendants, affluent defendants can be charged with certain types of offenses—such as white-collar crimes—that monopolize judicial resources.[254] The investigation and prosecution of white-collar crimes tend to be complex.[255] These cases can involve an array of issues that flow from intricate investigations, voluminous evidentiary disclosure, merits-based claims at trial, and mens rea issues.[256] The parties may be required to hire and

[250] *See* Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, *supra* note 3, at 28 ("Clients with the resources to pay for an aggressive defense can take full advantage of the large bodies of Fourth, Fifth, Sixth, and Fourteenth Amendment law that govern the criminal process.").

[251] *Id.*

[252] Leroy D. Clark, *All Defendants, Rich and Poor, Should Get Appointed Counsel in Criminal Cases: The Route to True Equal Justice*, 81 MARQ. L. REV. 47, 49 n.10 (1997).

[253] *See* Bandes, *supra* note 132, at 489 (discussing the psychological impacts of the adversary system's structure on prosecutors, who often "want[] to win in order to vindicate their interests").

[254] *See* Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2509 ("[A]ffluent defendants are disproportionately charged with complex financial or white-collar crimes, which may consume heavy justice system resources."); Bibas, *supra* note 238, at 2477–82 (discussing the ways in which a defense attorney's funding incentives can impact not only his actions, but also the actions of the prosecutor, defendant, and judge); Nino C. Monea, *Low Income, Poor Outcome: Unequal Treatment of Indigent Defendants*, 67 WAYNE L. REV. 345, 347 (2022) ("Outside of white-collar crime, defendants tend to be poor . . . . Overall, 80% of defendants make little enough to quality for appointed counsel."); Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, *supra* note 3, at 29–30 (noting that the prosecution of white-collar crimes tends to be expensive at both the investigation and formal litigation stages).

[255] *See* Stuart P. Green, *Moral Ambiguity in White Collar Criminal Law*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 501, 508–10 (2004) ("Most of the white collar offenses . . . tend to involve more complex forms of underlying activity, harder-to-discern harms, and harder-to-identify victims.").

[256] Sarah Ribstein, Note, *A Question of Costs: Considering Pressure on White-Collar Criminal Defendants*, 58 DUKE L.J. 857, 863–66 (2009).

present expert witnesses to support their claims.[257] White-collar criminal trials may drag on for weeks or months.[258] Furthermore, these trials may involve a litany of complex questions that require lengthy submissions and intricate jury instructions that can be difficult to understand.[259] These realities may divert resources toward affluent defendants and away from indigent ones.

### *D. Why Wealthy Defendants Are Better Protected Against Negative Externalities*

Affluent defendants not only impose more negative externalities on others; they can also insulate themselves against these unaccounted-for costs that exemplify subtractability.[260] Bail offers a compelling example. Lengthy periods of pre-trial detention encourage defendants to plead guilty.[261] So do harsh jail conditions that subject defendants to over-crowding and risks of violence.[262] Yet three factors explain why affluent defendants can protect themselves against negative externalities in the bail process that drive guilty pleas: financial resources to pay for cash bail, employment status, and social capital.[263]

Begin with the financial resources to pay for cash bail. Many jurisdictions impose secured cash bail bonds as a form of release (note that cash bail is more

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[257] *See* Robert G. Morvillo, Barry A. Bohrer & Barbara L. Balter, *Motion Denied: Systematic Impediments to White Collar Criminal Defendants' Trial Preparation*, 42 AM. CRIM. L. REV. 157, 170 (2005) (discussing this necessity in the context of *Brady* claims by white-collar defendants).

[258] *See* Harris B. Steinberg, *The Defense of the White Collar Accused: An Attorney's View*, 3 AM. CRIM. L.Q. 129, 130 (1965) (discussing how attorneys can manage the lengthy and complex nature of white-collar trials).

[259] *See, e.g.*, Mark Findlay, *Juror Comprehension and Complexity: Strategies to Enhance Understanding*, 41 BRIT. J. CRIMINOLOGY 56, 65–66 (2001) (discussing the impact of complex evidence on jurors' ability to evaluate a case); Green, *supra* note 255, at 508–10 (discussing the complexity of evidence in white-collar cases).

[260] Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2510–11; *see also* John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1596 (1993) ("Individuals and organizations with substantial resources can utilize the legal system because they can afford to pay legal costs and withstand the effects of delay.").

[261] Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2510–11 ("[D]efendants who cannot afford cash bail can be detained pending trial for long periods of time and are encouraged to plead guilty."); Jenny E. Carroll, *Beyond Bail*, 73 FLA. L. REV. 143, 196 (2021) ("[P]retrial detention becomes the means by which the state grinds a guilty plea out of a defendant."); Wiseman, *supra* note 233, at 1356 (discussing various reasons why defendants accept plea bargains); Yang, *supra* note 21, at 1406 (considering the effects of accepting a plea bargain).

[262] *See* Carroll, *supra* note 236, at 778 (discussing overcrowding and health and safety issues in county jails); Melissa Hamilton, *Modelling Pretrial Detention*, 72 AM. U. L. REV. 519, 535–36 (2022) (noting that even factually innocent defendants "may plead guilty simply to end the proceedings on the hope of gaining an earlier release from untenable jail conditions").

[263] Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2511.

common in state courts than in federal courts).[264] The term "secured cash bail" implies that defendants must pay a portion of their bail bond to be released pending trial.[265] The quantum of bail bonds can be set in different ways. Many jurisdictions impose bail schedules that set a fixed financial amount for secured cash bail irrespective of the defendant's financial circumstances.[266] Others calculate the quantum of the bail bond according to two risks: flight and dangerousness.[267] Cash bail is a common form of release.[268] Each year in the United States, millions of defendants must pay cash bail.[269] The median amount of cash bail is estimated to be approximately $10,000.[270]

Many defendants are incarcerated because they cannot afford to pay cash bail, which offers a strong incentive to plead guilty.[271] Roughly 80% of defendants earn so little income that they qualify to be represented by a public defender.[272] The U.S. Federal Reserve reports that approximately 32% of individuals cannot afford to pay a $500 emergency expense.[273] According to 2009 statistics, roughly one third of defendants in state courts were detained pending trial because they could not afford to post bail.[274] Other studies show similar trends. A 2013 research study demonstrated that 40% of the jail population in

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[264] *See* Brandon L. Garrett, *Models of Bail Reform*, 74 FLA. L. REV. 879, 882 (2022) ("The now-dominant cash bail model permits a judicial officer to require secured bonds, for which a person must pay a set bail amount up front as a guarantee of court appearance after release from jail."); Stephanie Holmes Didwania, *Discretion and Disparity in Federal Detention*, 115 NW. U. L. REV. 1261, 1268 (2021) ("Cash bail is strongly disfavored in federal courts.").

[265] Cynthia E. Jones, *Accused and Unconvicted: Fleeing from Wealth-Based Pretrial Detention*, 82 ALB. L. REV. 1063, 1065, 1083 (2018).

[266] Muhammad B. Sardar, Note, *Give Me Liberty or Give Me . . . Alternatives? Ending Cash Bail and Its Impact on Pretrial Incarceration*, 84 BROOK. L. REV. 1421, 1434 (2019).

[267] Garrett, *supra* note 264, at 882.

[268] *See* ACLU, SELLING OFF OUR FREEDOM: HOW INSURANCE CORPORATIONS HAVE TAKEN OVER OUR BAIL SYSTEM 2 (2017) (discussing the prevalence of cash bail in the justice system); Sardar, *supra* note 266, at 1433–34 (reviewing current trends in cash bail systems at the federal and state levels).

[269] ACLU, *supra* note 268, at 2; Monea, *supra* note 254, at 360. Research suggests that in 2009, approximately 72% of defendants were required to pay some form of cash bail to secure their release (an increase compared to 53% in 1990). PATRICK LIU, RYAN NUNN & JAY SHAMBAUGH, THE HAMILTON PROJECT, THE ECONOMICS OF BAIL AND PRETRIAL DETENTION 5 (2018).

[270] Sardar, *supra* note 266, at 1439; *see also* LIU ET AL., *supra* note 269, at 8 (noting variation in bail amounts depending on the crime and jurisdiction).

[271] *See* Liza Batkin, Note, *Wealth-Based Equal Process and Cash Bail*, 96 N.Y.U. L. REV. 1549, 1552 (2021) (noting that an effect of cash bail systems is "often to lock up defendants who cannot afford even modest sums").

[272] Joe, *supra* note 135, at 1349.

[273] BD. OF GOVERNORS OF THE FED. RSRV. SYS., ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2022, at 33 (2023).

[274] Batkin, *supra* note 271, at 1552 n.25 (citing Bernadette Rabuy & Daniel Kopf, *Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time*, PRISON POL'Y INITIATIVE (May 10, 2016), https://www.prisonpolicy.org/reports/incomejails.html [https://perma.cc/Q29N-W8HC]); *see also* Wiseman, *supra* note 233, at 1346 (explaining that in 2007, "roughly thirty percent of state court defendants assigned bonds of less than $5,000 [were] detained").

New Jersey were incarcerated because they lacked the financial means to pay for cash bail.[275] Similarly, studies have shown that most defendants in certain counties in Miami and Philadelphia could not afford to post cash bail that was set at $5,000.[276]

Wealthy defendants may avoid these problems.[277] Although they may impose the greatest negative externalities on others through constitutional claims, affluent defendants insulate themselves against these unaccounted-for costs. They can post cash bail more easily, avoid harsh pre-trial detention conditions, and face fewer incentives to plead guilty.[278] Yet as Muhammad Sardar observes, "[d]efendants unable to meet bail have overall income levels drastically lower than non-incarcerated people. Sixty percent of individuals who are unable to afford bail fall into the poorest third of society, while eighty percent fall into the bottom half of society."[279] These considerations illustrate why wealthy defendants can protect themselves against certain negative externalities of constitutional rights in ways that indigent defendants cannot.

Consider employment status next, which also influences whether defendants are granted bail.[280] In 2022, roughly 11.5% of individuals in the United States lived below the poverty line, which was roughly $15,000 for a one-person family unit.[281] Approximately 30% of those individuals were unemployed.[282] Yet statutes and actuarial risk assessments tend to consider employment status as a relevant factor for bail decisions, which disadvantages those without jobs.[283] Unemployment affects bail outcomes in various ways. Some

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[275] Jones, *supra* note 265, at 1085 (citing GLENN A. GRANT, N.J. COURTS, 2018 REPORT TO THE GOVERNOR AND LEGISLATURE 6 (2019), https://www.njcourts.gov/sites/default/files/2018cjrannual.pdf [https://perma.cc/YC28-5TKH]).

[276] LIU ET AL., *supra* note 269, at 9 (citing David Arnold, Will Dobbie & Crystal S. Yang, *Racial Bias in Bail Decisions*, 133 Q.J. ECON. 1885, 1892 (2018)).

[277] *See id.* at 8 (listing financial indicators for whether an individual can afford to pay bail); Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2510–11.

[278] *See* Jones, *supra* note 265, at 1076 (citing ODonnell v. Harris County, 892 F.3d 147 (5th Cir. 2018), *overruled by* Daves v. Dallas County, 64 F.4th 616 (5th Cir. 2023)) (contrasting the pre-trial detention system as experienced by wealthy versus indigent defendants); Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2511.

[279] Sardar, *supra* note 266, at 1439 (citing Rabuy & Kopf, *supra* note 274).

[280] *See* J.W. Andrew Ranson, Ashley N. Arnio & Jennifer E. Copp, *Jurisdictional Context and the (Over) Use of Pretrial Detention*, 112 SOC. SCI. RSCH., May 2023, at 1, 8, 10 (reporting study findings that "unemployment is associated with greater levels of pretrial detention"); Samuel R. Wiseman, *Fixing Bail*, 84 GEO. WASH. L. REV. 417, 446 (2016) (noting that during pre-trial hearings in many jurisdictions, judges "must consider a variety of statutorily defined factors" including employment status).

[281] EMILY A. SHRIDER, U.S. CENSUS BUREAU, POVERTY IN THE UNITED STATES: 2023, at 4–5, 18 (2024).

[282] *Id.* at 7–8.

[283] *See* Wiseman, *supra* note 280, at 446 (discussing statutory factors for bail decisions); Megan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303, 304 (2018) (discussing factors used in pre-trial "[r]isk assessment tools").

research indicates that unemployed defendants are more likely to be denied bail compared to those who have jobs.[284] The amount of bail also tends to be higher for unemployed defendants.[285] Furthermore, defendants are more likely to be detained when they reside in communities with higher rates of unemployment.[286] These realities disparately impact indigent defendants. Research demonstrates that in some counties, a significant portion of defendants who were detained pending trial were unemployed in the year prior to their arrest and earned under $5,000 annually.[287] Given the interconnection between indigence and workforce participation, unemployment can increase the amount of bail, the likelihood of pre-trial detention, and the pressure to plead guilty.[288]

Here too, affluent defendants tend to be insulated against these negative externalities. In 2022, under 2% of individuals who lived below the poverty line were employed full-time, while close to 12% of individuals who lived below the poverty line had part-time employment.[289] In contrast to indigent persons, wealthier individuals not only make more money, but also tend to be employed at higher rates.[290] The linear relationship between employment rates and the income ladder explains why wealthier individuals are better able to pay for cash bail and are more likely to be released on bail, both of which shield them against certain pressures to plead guilty.

Lastly, wealthy defendants' social capital insulates them against negative externalities. The term "social capital" refers to individuals' "social networks and associations" that confer various advantages compared to those without such communal connections: greater efficiency, more interpersonal connections, stronger trust between persons, and higher likelihood of mutual assis-

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[284] Ranson et al., *supra* note 280, at 4; *see also* Stewart J. D'Alessio & Lisa Stolzenberg, *A Multilevel Analysis of the Relationship Between Labor Surplus and Pretrial Incarceration*, 49 SOC. PROBS. 178, 186–87 (2002) (reporting findings that "a defendant's employment status has a statistically significant effect on pretrial detention," and that the "odds of pretrial incarceration are about 2.5 times as large for unemployed defendants as they are for employed defendants").

[285] Ranson et al., *supra* note 280, at 4 (citing Katherine Hood & Daniel Schneider, *Bail and Pretrial Detention: Contours and Causes of Temporal and County Variation*, 5 RUSSELL SAGE FOUND. J. SOC. SCI. 126, 141–43 (2019)).

[286] *Id.*

[287] Will Dobbie & Crystal Yang, *The Economic Costs of Pretrial Detention*, 2021 BROOKING PAPERS ON ECON. ACTIVITY 251, 258 (citing Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 213 (2018)).

[288] Ranson et al., *supra* note 280, at 3–4.

[289] SHRIDER, *supra* note 281, at 4–5.

[290] PEW RSCH. CTR., THE AMERICAN MIDDLE CLASS IS LOSING GROUND: NO LONGER THE MAJORITY AND FALLING BEHIND FINANCIALLY 33 (2015). A report by Pew Research demonstrates that the employment rate in 2015 was approximately 38% for lower-income individuals, compared to 66% for middle-income individuals and 78% for upper-income individuals. *Id.* Similarly, the unemployment rate was approximately 13% for low-income individuals, in contrast to 4% for middle-income individuals and 2% for upper-income individuals. *Id.* at 33–34. Unemployment rate refers to "the share of the labor force that is without work and actively looking for work." *Id.* at 33.

tance.[291] Lower-income defendants may have fewer affluent individuals in their social circle who could act as sureties and help pay their cash bail.[292] Furthermore, indigent defendants' social circles may be comprised of more individuals with criminal records who courts will reject as sureties.[293]

The situation can be quite different for wealthy defendants. They may have greater social capital and an affluent social network that can help pay for bail or act as sureties.[294] Furthermore, the ability to secure a surety—and be released from custody pending trial—can also protect wealthy defendants against pressures to plead guilty. Together, greater wealth, employment rates, and social capital insulate affluent defendants against the negative externalities of delays and pre-trial detention that flow from constitutional rights.

## IV. Constitutional Bypassing

Constitutional rights can also erode due to a third phenomenon: constitutional bypassing.[295] The concept of "constitutional bypassing" implies that governmental actors—lawmakers, executive branch members, prosecutors, and police officers—circumvent constitutional rights in a manner that survives ju-

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[291] David Halpern, Social Capital 2–12 (2005) (defining and explaining the main components of "social capital"); *see, e.g.*, Robert D. Putnam, Bowling Alone: The Collapse and Revival of American Community 17 (2001) ("Whereas physical capital refers to physical objects and human capital refers to properties of individuals, social capital refers to connections among individuals—social networks and the norms of reciprocity and trustworthiness that arise from them.").

[292] *See, e.g.*, Joshua Page & Christine S. Scott-Hayward, *Bail and Pretrial Justice in the United States: A Field of Possibility*, 5 Ann. Rev. Criminology 91, 103 (2022) (discussing nonprofit organizations that provide funds "to help chronically underserved defendants who linger in jail because they are poor and lack social capital" (citing Jocelyn Simonson, *Bail Nullification*, 115 Mich. L. Rev. 585, 617 (2017)).

[293] *See, e.g.*, Christopher A. Curtis, Douglas Evans & Emily Pelletier, *Developing Social Capital Through Postsecondary Correctional Education*, 60 J. Offender Rehab. 270, 278 (2021) (discussing social networks of incarcerated individuals).

[294] *See, e.g.*, Arnold et al., *supra* note 276, at 1892 (on the role of a bail surety); Liu et al., *supra* note 269, at 9–10 (discussing how having a family member or friend act as a cosigner can help a defendant obtain bail through private bond agencies); Skolnik, *The Tragedy of the Criminal Justice Commons*, *supra* note 28, at 2511.

[295] For an overview of strategies that aim to bypass constitutional rights and safeguards, see, for example, Adam Chilton & Mila Versteeg, How Constitutional Rights Matter 57–58 (2020) (noting that "even leaders with nominal commitment to the constitution can usually find ways to circumvent it" through strategies such as co-optation and divide-and-conquer); Philip Hamburger, Purchasing Submission: Conditions, Power, and Freedom 249–53 (2021) (describing administrative control and purchase conditions as tools by which government can "sidestep the Constitution's regular avenues of power and other structural protections for freedom"); Terry Skolnik, *Policing, Technology, and the Erosion of Constitutional Rights*, 49 Queen's L.J. 40, 84 (2023) (noting that "the criminal procedure doctrines of abandonment, waiver, and plain view searches . . . erode reasonable expectations of privacy").

dicial scrutiny.[296] Actors who engage in constitutional bypassing seek to weaken the effectiveness of constitutional rights, discourage individuals from exercising their rights, or impose administrative burdens that make it more difficult to exercise them. Constitutional bypassing takes various forms, each of which are discussed more below. In this Part, Section A discusses funding cuts and underfunding,[297] Section B discusses coercion and penalties,[298] Section C discusses gamesmanship,[299] and Section D discusses overregulation.[300]

### *A. Funding Cuts and Underfunding*

First, the government may cut funding or underfund resources that are meant to allow individuals to exercise their constitutional rights.[301] Abortion-related funding bans offer an example.[302] In the 1973 decision *Roe v. Wade*, the Supreme Court struck down laws that criminalized abortion.[303] For nearly fifty years, the Court upheld *Roe*, a decision that found the constitutional right to privacy—which it decided exists in the penumbra of other rights—protects a woman's right to an abortion.[304]

Several years after *Roe*, Congress passed the Hyde Amendment, which prohibited federal funding for Medicare-subsidized abortions.[305] In 1980, in

[296] *See, e.g.*, Skolnik, *supra* note 295, at 41–42 (noting that because "[l]awmakers, regulators, and judges react too slowly to law enforcement's use of emerging investigative technologies," the current system is one that has "expand[ed] police power while eroding constitutional rights").

[297] *See infra* notes 301–329 and accompanying text.

[298] *See infra* notes 330–360 and accompanying text.

[299] *See infra* notes 361–401 and accompanying text.

[300] *See infra* notes 402–418 and accompanying text.

[301] *See, e.g.*, Julian Darwall & Martin Guggenheim, *Funding the People's Right*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 619, 637–38 (2012) (noting that "where indigent defense is underfunded, more plea deals are likely to be cut in which the defendant is factually innocent" because police officers know that it is highly unlikely that illegal investigations or searches will be challenged at trial). Note that Professor Stuntz has explored the phenomenon of underfunding in significant depth. *See* Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, *supra* note 3, at 9–11, 32–35.

[302] *See, e.g.*, Carole A. Corns, Note, *The Impact of Public Abortion Funding Decisions on Indigent Women: A Proposal to Reform State Statutory and Constitutional Abortion Funding Provisions*, 24 U. MICH. J.L. REFORM 371, 372–73 (1991) (noting that government restrictions against Medicaid funding for elective abortions can "operate to coerce some indigent women into maternity"). Although the constitutional right to an abortion is no longer recognized as of the Supreme Court's 2022 decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), the analogy here is meant to demonstrate how funding can be used as a mechanism to erode constitutionally protected rights.

[303] 410 U.S. 113 (1973), *overruled by Dobbs*, 142 S. Ct. at 2228; Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from* Roe v. Wade, 138 U. PA. L. REV. 83, 83 (1989).

[304] Louise A. Wheeler & Shirley L. Kovar, Roe v. Wade*: The Right of Privacy Revisited*, 21 U. KAN. L. REV. 527, 527–29 (1973).

[305] Departments of Labor and Health, Education, and Welfare Appropriation Act, 1977, Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976); Alyssa Engstrom, Note, *The Hyde Amendment: Per-*

*Harris v. McRae*, the Supreme Court upheld the Hyde Amendment's constitutionality.[306] In doing so, the Court decided that the federal government and the states were not required to fund abortions through Medicaid dollars.[307] In response to the *Harris* decision, some states cut all Medicaid funding for abortions, while others funded abortions exclusively through state funds.[308] The federal government later limited abortion funding in other contexts, such as for women in the military or Peace Corps.[309]

Funding cuts undermined the once-recognized constitutional right to abortion in various ways. Poor women who qualified for Medicaid—many of whom were persons of color—could not have an abortion because they could not afford to pay for it through the private healthcare system.[310] This form of federal de-funding prevented lower-income women from exercising their constitutional rights.[311] Studies indicate that abortion rates are lower in states that do not provide Medicaid funding for abortions.[312]

Consider next how underfunding bypasses the Sixth Amendment's constitutional right to free legal representation for indigent defendants. This tactic may be one of the most effective ways to circumvent defendants' constitutional rights in the criminal justice process.[313] Recall how *Gideon v. Wainwright* recognized a constitutional right to free legal representation for indigent defend-

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*petuating Injustice and Discrimination After Thirty-Nine Years*, 25 S. CAL. INTERDISC. L.J. 451, 451–52 (2016).

[306] 448 U.S. 297, 311–26 (1980); George Cameron Nixon, Harris v. McRae*: Cutting Back Abortion Rights*, 12 COLUM. HUM. RTS. L. REV. 113, 113 (1980).

[307] *Harris*, 448 U.S. at 307–12; Kris Palencia, Note, Harris v. McRae*: Indigent Women Must Bear the Consequences of the Hyde Amendment*, 12 LOY. U. CHI. L.J. 255, 266 (1981).

[308] *See, e.g.*, Linda J. Wharton, Roe *at Thirty-Six and Beyond: Enhancing Protection for Abortion Rights Through State Constitutions*, 15 WM. & MARY J. WOMEN & L. 469, 501–02 (2009) (noting that state courts across various jurisdictions "have interpreted their state constitutions to provide greater protection for full public funding of abortion than the Federal Constitution").

[309] Engstrom, *supra* note 305, at 451–52.

[310] *See* Wharton, *supra* note 308, at 476 (discussing state-level litigation against "laws that curtail young and poor women's access to abortion . . . by restricting public funding for abortion"); Jill E. Adams & Jessica Arons, *A Travesty of Justice: Revisiting* Harris v. McRae, 21 WM. & MARY J. WOMEN & L. 5, 18–19 (2014) ("The *McRae* ruling allowed the government to use the Hyde Amendment to coerce the constitutionally protected procreative choices of poor women, who are disproportionately young and of color . . . .").

[311] Mark Strasser, *Unduly Burdening Abortion Jurisprudence*, 29 WM. & MARY BILL RTS. J. 367, 380 (2020).

[312] *See, e.g.*, Maria I. Rodriguez et al., *The Association of Federal Medicaid Abortion Funding Restrictions with Adverse Obstetric Outcomes Among United States Medicaid Recipients*, 126 CONTRACEPTION, Oct. 2023, at 1, 4 (reporting that "[s]tates that use their own dollars to cover abortion broadly are associated with higher rates of abortion").

[313] *See* Irene Oritseweyinmi Joe, *Structuring the Public Defender*, 106 IOWA L. REV. 113, 119 (2020) (noting that "funding the public defender has never been politically popular"); Lauren Sudeall Lucas, *Public Defense Litigation: An Overview*, 51 IND. L. REV. 89, 89 (2018) ("The failure of public defense systems to provide adequate representation to indigent defendants is often caused by severe underfunding . . . .").

ants.[314] The historical context of the decision matters. Recall how the Court issued *Gideon* during the "criminal procedure revolution."[315] The Warren Court subsequently expanded constitutional rights and remedies through a series of decisions, many of which selectively incorporated various rights against the states.[316] Because most defendants are indigent, *Gideon* functioned as a keystone right in constitutional criminal procedure.[317] The decision empowered indigent defendants to have access to an attorney—a pre-condition to vindicate their newly recognized constitutional rights and obtain other remedies that the Warren Court had created.[318] As Pamela Metzger notes, "*Gideon* promised to promote our adversarial system of constitutional criminal procedure."[319]

But the strength of the constitutional right to free legal representation—and a defendant's capacity to exercise other rights through their attorney—hinges on governmental funding.[320] The amount of governmental funding shapes the number of attorneys and support staff in a public defender's office.[321] The number of attorneys in each public defender's office, in turn, affects each attorney's caseload.[322] Funding cuts concentrate more cases amongst fewer attorneys, which results in the three phenomena discussed in Part II: under-investigation, under-litigation, and assembly-line guilty pleas.[323]

Governments may also cut funding to court-appointed counsel, which bypasses indigent defendants' right to free legal representation for different reasons. Lawmakers have imposed flat fees and maximum hour caps that discourage

[314] 372 U.S. 335, 344–45 (1963); Kyung M. Lee, *Reinventing* Gideon v. Wainwright*: Holistic Defenders, Indigent Defendants, and the Right to Counsel*, 31 AM. J. CRIM. L. 367, 369 (2004).

[315] Lain, *supra* note 25, at 1364–65.

[316] *Id.* at 1364–65, 1372. On the Warren Court's criminal procedure revolution, see *supra* Part I.

[317] *See* Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956) ("Of all of the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have."). On the high percentage of defendants who are indigent, see *supra* note 135 and accompanying text.

[318] Pamela R. Metzger, *Fear of Adversariness: Using* Gideon *to Restrict Defendants' Invocation of Adversary Procedures*, 122 YALE L.J. 2550, 2552 (2013).

[319] *Id.*

[320] Molly Heidorn, *An "Obvious Truth": How Underfunded Public Defender Systems Violate Indigent Defendants' Right to Counsel*, 52 NEW ENG. L. REV. 159, 160 (2018).

[321] *See, e.g.*, Alex Bunin, *Public Defender Independence*, 27 TEX. J. ON C.L. & C.R. 25, 35 (2021) (noting various impacts of underfunding for a public defender's office); Emily Rose, Note, *Speedy Trial as a Viable Challenge to Chronic Underfunding in Indigent-Defense Systems*, 113 MICH. L. REV. 279, 284 (2014) (discussing widespread criticism of a 2013 budget cut to the Federal Defender Office that resulted in attorney furloughs and significant delays in the federal criminal justice system).

[322] *See, e.g.*, Colleen Cullen, Note, *Mo' Money, Fewer Problems: Examining the Effects of Inadequate Funding on Client Outcomes*, 30 GEO. J. LEGAL ETHICS 675, 676–77 (2017) (noting that a 2016 budget cut for the Missouri State Public Defender "caus[ed] MSPD to have fewer attorneys to handle its caseload").

[323] *See supra* Part II.B.

court-appointed counsel from devoting unpaid time to their cases.[324] Flat fees imply that defense attorneys receive a fixed amount for a particular type of case.[325] Given that the quantum of flat fees can be very low, court-appointed counsel may take on many cases but devote minimal time to them.[326] Furthermore, flat fees incentivize defense attorneys to accept a heavy caseload, but to plea bargain most cases to maximize profits.[327] Fee caps, for their part, impose a ceiling on the maximum amount that an attorney can receive for a particular type of case.[328] Yet like flat fees, fee caps incentivize attorneys to spend minimal time on their cases, attain the payment ceiling, and then plea bargain their cases.[329] Underfunding thus limits the capacity of public defenders and court-appointed counsel to protect defendants' constitutional rights in the criminal justice process.

### *B. Coercion and Penalties*

Coercion and penalties constitute a second form of constitutional bypassing that erodes fundamental rights. Governmental actors may threaten individuals with coercion or penalties if they attempt to exercise their constitutional rights. Such tactics encourage individuals to waive their rights to avoid unpleasant consequences, which bypasses constitutional safeguards that would normally apply. Coercion and penalties alter individuals' cost-benefit analysis in the criminal justice process.[330] Coercion and penalties drive up the costs of exercising one's constitutional rights.[331] As a result, defendants may believe that the costs of exercising a constitutional right outweigh its benefits, and that the benefits of a waiver outweigh its costs.[332]

In theory, the unconstitutional conditions doctrine—under which the government cannot provide a benefit on the condition that the recipient renounce their constitutional right—protects individuals against coercion and penalties

[324] Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, *supra* note 3, at 10–11, 32–35.

[325] Eve Brensike Primus, *The Problematic Structure of Indigent Defense Delivery*, 122 MICH. L. REV. 207, 210 (2023).

[326] Sukhatme & Jenkins, *supra* note 248, at 797–98.

[327] Primus, *supra* note 325, at 210.

[328] *Id.* at 229; *see also* Monea, *supra* note 254, at 383–85 (listing fee caps imposed in various jurisdictions, and noting that these amounts "are low [not only] in absolute terms, but they are also low in relative terms" compared to fees paid to private defense counsel).

[329] Primus, *supra* note 325, at 210.

[330] *See, e.g.*, Benjamin Newman, *Plea Bargaining with Wrong Reasons: Coercive Plea-Offers and Responding to the Wrong Kind of Reason*, 18 CRIM L. & PHIL. 369, 372 (2024) ("[T]he threat of harsh penalty, on the one hand, and the inducement of the leniency offered, on the other hand, compel defendants to plead guilty, rendering the plea-bargaining practice coercive.").

[331] *Id.*

[332] *See* Skolnik, *supra* note 18, at 530–31 (discussing loss aversion as a reason why individuals might not enforce their constitutional rights in the context of a vehicle search by police).

that encourage waivers.[333] Kathleen Sullivan notes that due to this doctrine, the "government may not condition tax exemptions or government jobs on political silence or conformity, public unemployment compensation on acceptance of work on one's sabbath day, or public broadcasting subsidies on abstinence from editorializing."[334]

Yet in practice, courts uphold conditional governmental benefits that are backed by coercion or penalties. For instance, the Supreme Court has decided that individuals who wish to receive social assistance payments are not subject to unconstitutional conditions when they must renounce their privacy rights and allow a caseworker to enter their home and conduct a search.[335] No waiver, no social assistance. In other contexts, the Supreme Court decided that the government could lawfully fund family planning services on the condition that the money would not be used for abortion counseling—a funding arrangement that required entities to waive their First Amendment rights in order to receive funding.[336] The Supreme Court has also upheld takings without just compensation when the individual must give up portions of their land to obtain a building permit from the city.[337]

Coercive plea bargaining is perhaps the best example of how governmental actors use coercion and penalties to bypass constitutional rights.[338] Defendants who go to trial can fully exercise their constitutional rights.[339] In contrast,

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[333] Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989); *see also* Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 6–7 (1988) ("[I]n the context of individual rights, the doctrine [of unconditional conditions] provides that on at least some occasions receipt of a benefit to which someone has no constitutional entitlement does not justify making that person abandon some right guaranteed under the constitution.").

[334] Sullivan, *supra* note 333, at 1416 (citations omitted).

[335] Wyman v. James, 400 U.S. 309, 326 (1971); *see also* Sullivan, *supra* note 333, at 1417 (noting that with few exceptions, "the Court has rejected every other claim that conditions on food stamps or welfare payments unconstitutionally burden" the constitutional rights of a recipient); Dorothy E. Roberts, *The Only Good Poor Woman: Unconstitutional Conditions and Welfare*, 72 DENV. U. L. REV. 931, 931 (1995) (noting that applying the unconstitutional conditions doctrine to welfare, there is a "tension between seeking to protect the *private* decisions of welfare recipients while at the same time seeking to obtain *public* assistance for exercising those decisions").

[336] Rust v. Sullivan, 500 U.S. 173, 180–81, 196 (1991); Adam B. Cox & Adam M. Samaha, *Unconstitutional Conditions Questions Everywhere: The Implications of Exit and Sorting for Constitutional Law and Theory*, 5 J. LEGAL ANALYSIS 61, 65 (2013).

[337] Cox & Samaha, *supra* note 336, at 66; *see* Dolan v. City of Tigard, 512 U.S. 374, 386, 391 (1994) (establishing the "essential nexus" and "rough proportionality" requirements for a building permit condition to be constitutionally valid). As Adam Cox and Adam Samaha observe, "[s]ometimes, but only sometimes, these deals are declared unconstitutional by the judges." Cox & Samaha, *supra* note 336, at 66.

[338] *See, e.g.*, Samantha Luna, *Defining Coercion: An Application in Interrogation and Plea Negotiation Contexts*, 28 PSYCH. PUB. POL'Y & L. 240, 250 (2022) (discussing various ways prosecutors' plea-bargaining tactics can coerce defendants into pleading guilty).

[339] Maurita Elaine Horn, Note, *Confessional Stipulations: Protecting Waiver of Constitutional Rights*, 61 U. CHI. L. REV. 225, 225 (1994).

those who plead guilty waive their rights and lose the constitutional safeguards they would normally enjoy.[340] Coercive plea-bargaining practices increase the costs of going to trial so significantly that defendants are encouraged to plead guilty and avoid the unpalatable consequences of exercising their rights.

Prosecutors employ various techniques that coerce or penalize defendants so that they plead guilty and waive their rights.[341] First, prosecutors may threaten defendants with a significant trial penalty if they refuse to plead guilty.[342] The term "trial penalty" refers to the difference between the sentence that defendants will receive if they plead guilty versus the likely sentence they will receive if they are convicted at trial.[343] Trial penalties confer greater leverage to prosecutors during plea bargaining.[344] As a form of coercion, trial penalties offer a strong incentive for defendants to accept a more lenient plea deal to avoid a much harsher sentence if they are convicted.[345]

Studies suggest that trial penalties tend to be significant.[346] Estimates of trial penalties at the federal level range between 50% and 60%—that is, defendants who go to trial tend to receive sentences 50% to 60% higher than they would have if they had instead pleaded guilty.[347] Empirical studies of trial penalties in state courts also suggest that defendants who go to trial are more like-

340 Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 801 (2003); *see also* Hugh M. Emory, *The Guilty Plea as a Waiver of Rights and as an Admission of Guilt*, 44 TEMP. L.Q. 540, 540 (1971) ("A plea of guilty in a criminal case . . . is a waiver of three constitutional rights; the protection against self incrimination, the right to a jury trial, and the right of the accused 'to be confronted by the witnesses against him.'" (citations omitted)).

341 Clark Neily, *Jury Empowerment as an Antidote to Coercive Plea Bargaining*, 31 FED. SENT'G REP. 284, 284, 286–87 (2019) (describing the mechanisms through which "American-style plea bargaining fairly bristles with potentially coercive tools and tactics").

342 Brian D. Johnson, *Trials and Tribulations: The Trial Tax and the Process of Punishment*, 48 CRIME & JUST. 313, 314 (2019).

343 Emma Andersson & Jeffery Robinson, *The Insidious Injustice of the Trial Penalty: "It Is Not the Intensity but the Duration of Pain That Breaks the Will to Resist,"* 31 FED. SENT'G REP. 222, 222 (2019).

344 Mary Price, *Weaponizing Justice: Mandatory Minimums, the Trial Penalty, and the Purposes of Punishment*, 31 FED. SENT'G REP. 309, 312 (2019).

345 *See id.* (noting that mandatory minimums and longer sentencing guidelines are two key prosecutorial tools that contribute to coercive plea-bargaining practices).

346 Johnson, *supra* note 342, at 314.

347 Andrew Chongseh Kim's empirical research indicates that the trial penalty is approximately 64% in federal cases. Andrew Chongseh Kim, *Underestimating the Trial Penalty: An Empirical Analysis of the Federal Trial Penalty and Critique of the Abrams Study*, 84 MISS. L.J. 1195, 1199 (2015). Brian Johnson's research offers a similar estimate: a roughly 50% trial penalty for defendants who refuse to plead guilty in federal cases. Brian D. Johnson, *Plea-Trial Differences in Federal Punishment: Research and Policy Implications*, 31 FED. SENT'G REP. 256, 257 (2019); Norman L. Reimer & Martin Antonio Sabelli, *The Tyranny of the Trial Penalty: The Consensus That Coercive Plea Practices Must End*, 31 FED. SENT'G REP. 215, 220 (2019). He further notes that defendants who go to trial face somewhere between a two to six times greater likelihood of imprisonment. Johnson, *supra* note 342, at 314.

ly to be sentenced to imprisonment and face longer sentences.[348] According to State Court Processing Statistics, defendants who plead guilty receive sentencing discounts that approach 66%.[349] The threat of a major trial penalty can pressure innocent defendants to plead guilty.[350]

Second, prosecutors may overcharge defendants—and threaten to penalize them with harsher sentences—if they go to trial.[351] As part of this strategy, prosecutors charge defendants with over-lapping crimes that inflate the potential sentence if they are convicted.[352] Prosecutors may then drop or reduce charges if the defendant pleads guilty.[353] Overcharging is a valuable tool for prosecutors because it makes dropped charges, sentencing discounts, and plea bargains appear much more valuable for defendants.[354] Harsh over-charging practices make defendants believe that they have everything to lose and little to gain if they refuse to plea bargain. Charge-stacking allows defendants to avoid the penalty of a much harsher sentence on the condition that they plead guilty and do not exercise their constitutional rights.

Third, prosecutors may pressure defendants with exploding offers, meaning generous plea deals that expire quickly.[355] Prosecutors threaten to remove a

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[348] *See* Johnson, *supra* note 342, at 324–28 (presenting data from empirical studies across different states regarding the differences between trial and plea conviction outcomes—specifically, in sentence length and likelihood of imprisonment).

[349] *See* John R. Sutton, *Structural Bias in the Sentencing of Felony Defendants*, 42 SOC. SCI. RSCH. 1207, 1219 (2013) (conducting an analysis of State Court Processing Statistics and estimating sentencing discounts to be roughly 66%); *see also* Johnson, *supra* note 342, at 343 (summarizing evidence of sentencing discounts of approximately 40% in state cases (citing Shawn D. Bushway, Allison D. Redlich & Robert J. Norris, *An Explicit Test of Plea Bargaining in the "Shadow of the Trial,"* 52 CRIMONOLOGY 723, 740 (2014))); Jeffrey T. Ulmer & Mindy S. Bradley, *Variation in Trial Penalties Among Serious Violent Offenses*, 44 CRIMINOLOGY 631, 652 (2006) (estimating trial penalties for jury convictions to be roughly 57%); Miko M. Wilford, Gary L. Wells & Annabelle Frazier, *Plea-Bargaining Law: The Impact of Innocence, Trial Penalty, and Conviction Probability on Plea Outcomes*, 46 AM. J. CRIM. JUST. 554, 566–67 (2021) (noting that the trial penalty had a more apparent impact on innocent defendants than guilty).

[350] *See, e.g.*, Chris Ochoa & Carlita Salazar, *How the Threat of the Trial Penalty Coerces the Innocent to Plead Guilty: A First-Hand Account of an Exoneree*, 31 FED. SENT'G REP. 299, 299–302 (2019) (describing the author's experience being wrongfully convicted via plea bargain, under threat of being sentenced to the death penalty if he refused the plea deal and was convicted at trial).

[351] *See* Kyle Graham, *Overcharging*, 11 OHIO ST. J. CRIM. L. 701, 702–06 (2014) (explaining that "overcharging" is a term used to "communicate three different criticisms of prosecutorial practices" and defining the concept in each of these three contexts). The term "overcharging" is also referred to as "charge-stacking" or "piling-on."

[352] Crespo, *supra* note 16, at 1313.

[353] *Id.* at 1312–13.

[354] *See* Alschuler, *supra* note 16, at 85–86 (noting that "fifty charges are not usually filed against a single defendant because the prosecutor is interested in securing fifty convictions," but are instead filed as leverage in plea negotiations with the defendant); Terry Skolnik, *Use of Force and Criminalization*, 85 ALB. L. REV. 663, 674–75 (2022) ("The prospect of dropped charges makes plea deals more enticing for defendants.").

[355] *See* Cynthia Alkon, *Hard Bargaining in Plea Bargaining: When Do Prosecutors Cross the Line?*, 17 NEV. L.J. 401, 407 (2017) (defining "exploding offers" in the context of plea bargaining);

lucrative sentencing discount unless the defendant pleads guilty within a short period and renounces their constitutional rights—a practice that exerts significant pressure on individuals.[356] For instance, some studies suggest that many youth and adult defendants in New York City had less than twenty-four hours to accept a plea offer, while others had less than one hour.[357] Prosecutors tend to issue exploding offers early in the pre-trial process, where parties face the greatest information deficits and have received the least evidentiary disclosure.[358] Such offers are particularly pernicious because they are made at the time when both parties have minimally investigated the defendant's case.[359] In the most egregious cases, defendants receive exploding offers and are pushed to plead guilty before they even meet their attorneys.[360] In such contexts, prosecutors penalize defendants with a harsher sentence if they attempt to exercise their right to counsel and receive legal advice.

### C. Gamesmanship

Third, government actors may engage in gamesmanship that circumvents constitutional rights and gradually weakens them.[361] Gamesmanship occurs when governmental actors employ an unjust—but lawful—tactic to bypass constitutional rights.[362] Typically, gamesmanship is associated with morally

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Mike Work, Note, *Creating Constitutional Procedure:* Frye, Lafler, *and Plea Bargaining Reform*, 104 J. CRIM. L. & CRIMINOLOGY 457, 481 (2014) (same).

[356] *See* Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 MARQ. L. REV. 213, 242–43 (2007) (comparing the prosecutorial use of exploding offers in plea-bargain negotiations to the sales tactics of "today-only" and "going-out-of-business" sales).

[357] Tina M. Zottoli, Georgia M. Winters, Tarika Daftary-Kapur & Conor Hogan, *Plea Discounts, Time Pressures, and False-Guilty Pleas in Youth and Adults Who Pleaded Guilty to Felonies in New York City*, 22 PSYCH. PUB. POL'Y & L. 250, 255–56 (2016).

[358] *See* Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1281–82 (2008) ("Prosecutors typically make such exploding offers very early[;] . . . these offers force defendants to make critical decisions under intense pressure and in the absence of full information."); Alkon, *supra* note 355, at 408 (noting that "exploding offers are often made with no reason beyond pressuring the defendant to take the deal"); *see also* Skolnik, *supra* note 354, at 674–75 ("During plea bargaining, the greatest sentencing discounts tend to be offered at the earliest points in the criminal justice process; the period where defendants have the least amount of evidentiary disclosure.").

[359] *See* Jenia I. Turner, *Plea Bargaining* (noting that "the current practice of plea bargaining in the U.S. is conflicting with the search for truth" because of factors including "incomplete investigations, [and] inadequate disclosure"), *in* 3 REFORMING CRIMINAL JUSTICE: PRE-TRIAL AND TRIAL PROCESSES 75 (Erik Luna ed., 2017).

[360] O'Hear, *supra* note 172, at 453.

[361] *See* Bennett L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 531 (2007) (discussing gamesmanship by prosecutors in the context of *Brady* claims).

[362] *See, e.g.*, John D. King, *Gamesmanship and Criminal Process*, 58 AM. CRIM. L. REV. 47, 58 (2021) ("The concept of gamesmanship carries within it the implication of something unfair: certainly not cheating, but behavior that might fall short in the eyes of some competitors as 'fair play.'").

questionable tactics, unfair play, or lack of decorum.[363] Actors who engage in gamesmanship exploit a rule's loopholes to gain an inequitable advantage over their adversaries.[364] Gamesmanship allows a party to bend (but not break) the rules, and to win without cheating.[365] Parties who engage in gamesmanship attempt to outwit their opponent, rather than outperform them using physicality, mental ability, talent, or skill.[366] Gamesmanship is often contrasted with cheating.[367] Cheating occurs when individuals secretly violate the rules of the game to gain an unfair advantage.[368] As Nicholas Dixon observes, cheaters seek to avoid "detection and punishment."[369] In contrast, individuals who engage in gamesmanship violate the "spirit of the game" but do not break its rules, or breach the game's underlying moral or ethical principles.[370] Two examples elucidate gamesmanship in the criminal justice process: the explosion of municipal ordinances in response to the rise of void for vagueness doctrine,[371] and consent searches that circumvent the Fourth Amendment's probable cause and warrant requirements.[372]

Consider first how lawmakers engaged in a form of gamesmanship after the Supreme Court struck down vagrancy laws as unconstitutionally vague.[373] Historically, officers enforced vagrancy statutes as a preventive tool to control

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[363] *Id.* at 48–49.

[364] *See* Mary D. Fan, *The Police Gamesmanship Dilemma in Criminal Procedure*, 44 U.C. DAVIS L. REV. 1407, 1409 (2011) ("Police gamesmanship . . . involves tactics that undermine the purpose of rules implementing constitutional protections by pushing on blind spots, blurry zones, or gaps in rules and remedies."); José Luis Pérez Triviño, *Strategic Intentional Fouls, Spoiling the Game and Gamesmanship*, 6 SPORT, ETHICS & PHIL. 67, 74 (2012) (defining gamesmanship as "a slippery concept we use to refer to the use of dubious although not technically illegal methods of obtaining a competitive advantage . . . if it is considered that it forms part of the game").

[365] The connection between gamesmanship and winning without cheating was advanced in STEPHEN POTTER, THE THEORY AND PRACTICE OF GAMESMANSHIP: OR, THE ART OF WINNING GAMES WITHOUT ACTUALLY CHEATING (1947). *See also* Mark Hamilton, *Coaching, Gamesmanship, and Intimidation* (discussing questionable tactics used by basketball coaches—including "threaten[ing] officials, players, and reporters"—that are overlooked as long as that coach is successful at winning games), *in* THE ETHICS OF COACHING SPORT: MORAL, SOCIAL, AND LEGAL ISSUES 138 (Robert L. Simon ed., 2013).

[366] *See, e.g.*, Robert Blecker, *Penalties: Punishments, Prices, or Rewards?*, 63 N.Y. L. SCH. L. REV. 251, 270 (2018) (noting that some view gamesmanship "as disrespecting the sport—undermining a genuine athletic test and contest of essential skills the sport was meant to display"); Brannon P. Denning & Michael B. Kent, Jr., *Anti-Evasion Doctrines in Constitutional Law*, 2012 UTAH L. REV. 1773, 1803–04 (defining "doctrinal arbitrage" as a process through which "governmental actors . . . elevat[e] official form over constitutional substance").

[367] Nicholas Dixon, *On Winning and Athletic Superiority*, 26 J. PHIL. SPORT 10, 14–15 (1999).

[368] *Id.* at 13.

[369] *Id.* at 12.

[370] *Id.* at 14–15.

[371] *See infra* notes 373–383 and accompanying text.

[372] *See infra* notes 384–401 and accompanying text.

[373] Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); Stuntz, *supra* note 22, at 559–60. This argument was first advanced by William Stuntz. Stuntz, *supra* note 22, at 559–60.

low-level incivilities and maintain public order.[374] These laws regulated individuals' status or condition—such as being unemployed—as well as various acts—such as wandering without providing an "account of oneself".[375] Scholars observe that these statutes were enforced discriminatorily against individuals who officers perceived as socially undesirable, such as indigent or unhoused persons, sex workers, members of the LGBTQ community, interracial couples, and more.[376] In the 1972 decision *Papachristou v. City of Jacksonville*, the Supreme Court struck down an unconstitutionally ambiguous vagrancy statute that prohibited a vast array of conduct.[377] The Court decided that the law was "void for vagueness" because it failed to provide fair notice of what was illegal, and conferred virtually unlimited police discretion.[378] In response to the *Papachristou* decision, cities enacted a litany of narrowly tailored municipal ordinances that regulated much of the same conduct that vagrancy laws once prohibited but survived constitutional scrutiny.[379]

Lawmakers' response to the *Papachristou* decision exemplifies a distinct form of constitutional gamesmanship: "ruling out the rule of law."[380] Lawmakers who engage in this tactic enact so many narrowly tailored laws that individuals cannot understand what conduct is illegal and will inevitably commit a

[374] P. Michael Lahan, Comment, *Trends in the Law of Vagrancy*, 1 CONN. L. REV. 350, 352–53 (1968).

[375] William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1, 6, 8 (1960); *see also* Ronald W. Crenshaw, *The Vagrancy Statute: To Be or Not to Be?*, 15 S.D. L. REV. 351, 351–52 (1970) (discussing common-law and statutory definitions of "vagrancy").

[376] *See, e.g.*, Risa L. Goluboff, *Dispatch from the Supreme Court Archives: Vagrancy, Abortion, and What the Links Between Them Reveal About the History of Fundamental Rights*, 62 STAN. L. REV. 1361, 1368–69, 1380 (2010) (noting that vagrancy statutes could be used to discriminate against people who "engage in unconventional behavior" and against people who are simply "unconventional, even 'undesirable'" people); TERRY SKOLNIK, HOMELESSNESS, LIBERTY, AND PROPERTY 31 (2025) (noting that because vagrancy laws were often vague, "the State had broad discretion to control different types of conduct, and regulate individuals and groups that were considered to be socially undesirable").

[377] 405 U.S. at 156 n.1, 162.

[378] *Id.* at 162; *see* Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 288–89 (2003) (discussing the *Papachristou* holding and the evolution of the vagueness doctrine).

[379] *See, e.g.*, Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TUL. L. REV. 631, 647–49 (1992) (discussing legal challenges against laws that target homeless individuals, and noting that "[m]ost courts . . . have rejected vagueness challenges, finding that laws against sleeping in public and camping on public lands give clear notice of the conduct they proscribe"); Donald Saelinger, Note, *Nowhere to Go: The Impacts of City Ordinances Criminalizing Homelessness*, 13 GEO. J. ON POVERTY L. & POL'Y 545, 550–51 (2006) (noting that after *Papachristou*, "cities began to embrace more narrowly-tailored laws restricting the access of the homeless to public spaces"); *see also* Lawrence Rosenthal, *Gang Loitering and Race*, 91 J. CRIM. L. & CRIMINOLOGY 99, 102–03 (2000) (discussing the evolution of ordinances targeting "gang loitering" in conjunction with the constitutional vagueness doctrine).

[380] Kim Forde-Mazrui, *Ruling Out the Rule of Law*, 60 VAND. L. REV. 1497, 1497, 1500–01 (2007).

transgression.[381] Ambiguous vagrancy ordinances are constitutionally suspect because they violate basic rule of law concerns.[382] For instance, a vague law fails to provide fair warning about what specific conduct is unlawful, and provides officers with unlimited enforcement discretion.[383] The explosion of municipal ordinances violated these same rule of law constraints—but they did so in compliance with the constitutional parameters established in *Papachristou*. The legislative branch is inclined to rule out the rule of law because it can bypass the void-for-vagueness doctrine's constitutional safeguards.

Consent searches offer a second example of gamesmanship in the criminal justice process.[384] The Fourth Amendment mandates that searches and seizures must be reasonable.[385] Absent an applicable exception or exigent circumstances, officers must meet the probable cause requirement and obtain a warrant to search an individual's home, car, cellphone, computer, and so on.[386] Furthermore, warrantless searches are presumptively unreasonable.[387]

The Fourth Amendment's reasonableness requirement imposes heavy administrative burdens on police officers. They bear informational and compliance costs to satisfy the probable cause requirement and obtain a warrant. For instance, officers may be required to gather information, receive authorization from their superiors, conduct surveillance, speak with informants or witnesses, draft an affidavit, respond to a magistrate's questions, and more.[388] These requirements slow down police investigations and drive up their financial

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[381] *See id.* at 1502–03 (summarizing discourse about the incentives and effects of the vagueness doctrine—specifically, that legislatures will respond by enacting multiple narrow statutes); Josh Bowers, *Annoy No Cop*, 166 U. PA. L. REV. 129, 151 (2017) (noting that although laws must be precise in order to be valid, "our understanding of those rules and their reach responds likewise to force on the ground and to other legal and extralegal impulses"); Jordan Blair Woods, *Traffic Without the Police*, 73 STAN. L. REV. 1471, 1480–82 (2021) (noting the expansive range of laws in the context of traffic violations).

[382] *See* Michael J. Zydney Mannheimer, *Vagueness as Impossibility*, 98 TEX. L. REV. 1049, 1051 (2020) (explaining that "penal statutes that are unduly vague violate due process" because they do not give sufficient notice, and they delegate too much discretion to law enforcement).

[383] Tammy W. Sun, *Equality by Other Means: The Substantive Foundations of the Vagueness Doctrine*, 46 HARV. C.R.-C.L. L. REV. 149, 155 (2011).

[384] *See, e.g.*, Margaret Raymond, *The Right to Refuse and the Obligation to Comply: Challenging the Gamesmanship Model of Criminal Procedure*, 54 BUFF. L. REV. 1483, 1491–504 (2007) (describing ways gamesmanship in the criminal justice system has eroded constitutional rights against seizure, including overbroad characterization of police encounters as "consensual").

[385] *See* U.S. CONST. amend. IV ("The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated . . . ."); Clancy, *supra* note 181, at 977 (noting that "[r]easonableness is the measure of both the permissibility of the initial decision to search and seize and the permissible scope of those intrusions").

[386] Tracy Hresko Pearl, *On Warrants & Waiting: Electronic Warrants & The Fourth Amendment*, 99 IND. L.J. 1, 7 (2023).

[387] Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 FLA. L. REV. 509, 516 (2015).

[388] *See, e.g.*, Adam M. Gershowitz, *The Post-*Riley *Search Warrant: Search Protocols and Particularity in Cell Phone Searches*, 69 VAND. L. REV. 585, 597–98 (2016) (describing steps police officers must take to fulfill the "particularity requirement" to obtain a warrant).

costs.[389] Onerous administrative burdens may disincentivize officers from conducting searches. Some research demonstrates that officers are less likely to conduct searches in jurisdictions that impose heavier administrative burdens that flow from consent decrees.[390]

Consent searches are a form of gamesmanship that avoid these inconvenient constitutional obstacles. Officers who conduct a consent search are not required to satisfy the reasonable suspicion or probable cause requirements.[391] The Supreme Court has decided that consent searches are lawful even when officers do not warn a suspect that they can refuse to be searched.[392] Furthermore, the Court has concluded that consent's validity hinges on voluntariness rather than the defendant's knowledge or informed consent.[393] This explains why warrantless searches can be lawful even when the defendant did not know that they could refuse to consent to a search.[394] Consent searches avoid other hurdles. Whereas search warrants require officers to fill out affidavits, warrantless searches are lawful when they are obtained through verbal consent.[395] Additionally, consent searches are useful for police officers for another reason: they may be the only way that officers can obtain certain evidence.[396] Consent searches are advantageous because they avoid the information, compliance, and psychological costs that flow from the Fourth Amendment's probable cause and warrant requirements.

Given these advantages, it is no surprise that consent searches have largely eclipsed search warrants in street-level policing. Roseanna Sommers and

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[389] William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 888 (1991); *see also* Tonja Jacobi & Jonah Kind, *Criminal Innovation and the Warrant Requirement: Reconsidering the Rights-Police Efficiency Trade-off*, 56 WM. & MARY L. REV. 759, 767 (2015) (listing some of the administrative costs associated with obtaining a warrant).

[390] *See, e.g.*, Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1666–68 (2012) (discussing data that suggests high administrative costs to obtain a warrant may have a "self-screening effect" on the likelihood that law enforcement officers will conduct a search).

[391] Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 YALE L.J. 1962, 1966 (2019).

[392] Ohio v. Robinette, 519 U.S. 33, 39–40 (1996); Schneckloth v. Bustamonte, 412 U.S. 218, 227, 231–32 (1973); *see also* Matthew Phillips, Note, *Effective Warnings Before Consent Searches: Practical, Necessary, and Desirable*, 45 AM. CRIM. L. REV. 1185, 1187 (2008) (discussing the Court's *Schneckloth* decision regarding consent searches).

[393] *See* Ric Simmons, *Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773, 777–79 (2005) (discussing the history of the voluntariness requirement, and noting that "in practice the courts only look to the conduct of the police"—and not to the state of mind of the defendant—"in determining whether consent was 'voluntary'").

[394] Nirej Sekhon, *Willing Suspects and Docile Defendants: The Contradictory Role of Consent in Criminal Procedure*, 46 HARV. C.R.-C.L. L. REV. 103, 106 (2011); *see* Simmons, *supra* note 393, at 777–79 (on the evolution of the voluntariness requirement in courts).

[395] Nancy Leong & Kira Suyeishi, *Consent Forms and Consent Formalism*, 2013 WIS. L. REV. 751, 752.

[396] Susan A. Bandes, *Police Accountability and the Problem of Regulating Consent Searches*, 2018 U. ILL. L. REV. 1759, 1762 (citing *Schneckloth*, 412 U.S. at 227).

Vanessa Bohns note that 90% of warrantless searches are the product of consent.[397] And as they observe, persons of color are disproportionately subject to consent searches.[398] These searches are not only valuable to law enforcement because of their ubiquity, but also because individuals consent to searches at surprisingly high rates.[399] For example, empirical research demonstrates that roughly 99.8% of individuals agreed to a consent search of their vehicle by the Los Angeles Police Department (LAPD) in 2006.[400] More recent studies from January 2020 to October 2022 suggest that approximately 96% of individuals stopped by the LAPD agreed to a consent search of their vehicle.[401] As a form of gamesmanship, consent searches allow police officers to routinely bypass the Fourth Amendment's probable cause and warrant requirements.

### *D. Overregulation*

Fourth, in response to broad constitutional safeguards, lawmakers may overregulate conduct so that individuals are less able to exercise their fundamental rights. There are two principal forms of overregulation: administrative-burden maximization and statutory aggregation. First, the government may maximize administrative burdens—such as eligibility requirements, certification processes, red tape, and reporting obligations—to discourage individuals from exercising their rights.[402] This form of overregulation drives up the compliance costs of an entity or organization that helps individuals exercise their fundamental rights.[403]

"TRAP" laws—which stand for the "targeted regulation of abortion providers"—are an example.[404] Following the Court's protection of the right to an abortion in *Roe v. Wade*, many jurisdictions enacted statutes that subjected

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[397] Sommers & Bohns, *supra* note 391, at 1966.

[398] *Id.* at 1968–69; Roseanna Sommers & Vanessa K. Bohns, *Consent Searches and Underestimation of Compliance: Robustness to Type of Search, Consequences of Search, and Demographic Sample*, 21 J. EMP. LEG. STUD. 4, 5 (2024).

[399] Skolnik, *supra* note 18, at 524–27 (providing an overview of existing studies).

[400] *Id.* at 527; Sommers & Bohns, *supra* note 391, at 1988; Megan Dias, Derek A. Epp, Marcel Roman & Hannah L. Walker, *Consent Searches: Evaluating the Usefulness of a Common and Highly Discretionary Police Practice*, 21 J. EMP. LEG. STUD. 35, 56 (2024).

[401] Dias et al., *supra* note 400, at 56–57.

[402] *See, e.g.*, Gillian E. Metzger, *Abortion, Equality, and Administrative Regulation*, 56 EMORY L.J. 865, 865 (2007) (discussing administrative burdens on abortion access via state and federal regulations).

[403] *See* HERD & MOYNIHAN, *supra* note 29, at 82–87 (discussing various costs TRAP laws impose on abortion providers).

[404] Hope Silberstein, Note, *Taking on TRAP Laws: Protecting Abortion Rights Through Property Right*s, 2017 U. CHI. LEGAL F. 737, 737. As above in Part IV.A, although there is no longer a recognized constitutional right to an abortion, the analogy here is meant to demonstrate how overregulation can be used as mechanism to erode constitutionally protected rights. *See supra* note 302 and accompanying text.

abortion providers to heavy administrative regulations.[405] Such laws impose onerous administrative requirements on abortion providers that do not apply to other medical professionals: licensing requirements, penalties for non-compliance, regulatory standards that govern an abortion clinic's architecture and building standards, and various training requirements for patients and staff.[406] Proponents of TRAP laws contend that these statutes aim to protect women's health and safety.[407] In contrast, opponents of TRAP laws argue that these statutes were promulgated as a pretext to curtail the once-recognized right to abortion.[408]

This first form of over-regulation can combine various mechanisms that erode rights: funding cuts, administrative burdens, and gamesmanship. As lawmakers cut funding to abortion clinics, they also increased the administrative burdens on medical providers as a form of gamesmanship that circumvents the right to an abortion. TRAP laws caused many abortion clinics to close because they could not bear the financial and administrative weight of these regulations.[409] Given the weight of TRAP laws' administrative burden on providers, many states only have one abortion clinic.[410]

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[405] 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Linda Greenhouse & Reva B. Siegel, Casey *and the Clinic Closings: When "Protecting Health" Obstructs Choice*, 125 YALE L.J. 1428, 1432, 1446 (2016). Since *Dobbs*, many states have adopted complete bans or highly restrictive limits on abortion. Kelly M. Jones & Mayra Pineda-Torres, *TRAP'd Teens: Impacts of Abortion Provider Regulations on Fertility & Education*, 234 J. PUB. ECON., June 2024, at 1, 1. But TRAP laws are still relevant today—among states that have not adopted a full ban, there are states that continue to regulate access to abortion through TRAP laws. *Id.* at 2.

[406] *See, e.g.*, Thomas B. Colby, *The Other Half of the Abortion Right*, 20 U. PA. J. CONST. L. 1043, 1046 (2018) (noting that TRAP laws "subject abortion providers to more extensive and burdensome regulations than comparable medical practitioners"); Reva B. Siegel, *Why Restrict Abortion? Expanding the Frame on* June Medical, 2020 SUP. CT. REV. 277, 306–07 (listing some of the regulations imposed under TRAP laws); Laura Young, Note, *Falling into the TRAP: The Ineffectiveness of 'Undue Burden' Analysis in Protecting Women's Right to Choose*, 34 PACE L. REV. 947, 947–49 (2014) (same).

[407] *See* Young, *supra* note 406, at 950, 955 (noting that TRAP laws "are ostensibly promulgated to protect maternal health").

[408] Aziza Ahmed, *The Future of Facts: The Politics of Public Health and Medicine in Abortion Law*, 92 U. COLO. L. REV. 1151, 1156 (2021).

[409] *See* Rebecca J. Mercier, Mara Buchbinder, Amy Bryant & Laura Britton, *The Experiences and Adaptations of Abortion Providers Practicing Under a New TRAP Law: A Qualitative Study*, 91 CONTRACEPTION 507, 507 (2015) (reporting that "in states with the most extreme [TRAP] laws, multiple clinics have closed"); Hannah Tuschman, Note, *Challenging TRAP Laws: A Defense of Standing for Abortion Providers*, 34 BERKELEY J. GENDER L. & JUST. 235, 253–54 (2019) (discussing the impact of TRAP laws on clinic closures across various states, and noting that "[w]hile clinics close for a variety of reasons, legislation aimed at restricting abortion providers is by far the greatest contributing factor").

[410] *See, e.g.*, Michele Goodwin, Whole Woman's Health v. Hellerstedt*: The Empirical Case Against Trap Laws*, 25 MED. L. REV. 340, 341 (2017) (noting that "in Kentucky, Mississippi, Missouri, North Dakota, South Dakota, West Virginia, and Wyoming only one abortion clinic remains"). This was before the decision in *Dobbs* allowed all states to ban abortion completely. 142 S. Ct. at 2284.

Second, lawmakers who wish to overregulate conduct may resort to statutory aggregation to circumvent constitutional rights. The concept of "statutory aggregation" implies that lawmakers enact so many laws that individuals will inevitably violate them. Statutory aggregation allows police officers and prosecutors to use legal transgressions as a pretext to conduct criminal investigations that bypass constitutional rights.[411]

Voluminous traffic codes elucidate this second form of overregulation. Scholars observe that traffic codes regulate a broad array of conduct for drivers, passengers, cyclists, and pedestrians.[412] These codes prohibit such a broad range of behavior that even prudent drivers will inevitably commit a traffic offense.[413] Police officers value expansive traffic codes because they can use motor vehicle offenses as a pretext to stop drivers and conduct criminal investigations.[414] In 1996, in *Whren v. United States*, the Supreme Court authorized such pretextual stops.[415] In that decision, the majority of the Court decided that police officers can pull over a vehicle and conduct a criminal investigation, provided they have probable cause that the driver committed a traffic offense.[416] Yet the greater the number of traffic offenses—and the higher the likelihood that drivers will violate them—the more easily officers can pull over drivers as a pretext to investigate crimes.

Officers value statutory aggregation because it facilitates various types of gamesmanship that bypass constitutional rights. Officers exploit voluminous traffic codes to pull over drivers, conduct a plain-view search of the vehicle, and seize drugs or weapons that are visible to law enforcement.[417] Or, officers may wait until drivers commit some low-level traffic offense, stop the vehicle,

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[411] *See* Luna, *supra* note 22, at 707, 717, 726 (discussing some effects of "superfluous statutes" as a mechanism for overcriminalization).

[412] Bradley R. Haywood, *Ending Race-Based Pretextual Stops: Strategies for Eliminating America's Most Egregious Police Practice*, 26 RICH. PUB. INT. L. REV. 47, 53, 75 (2022).

[413] *See* David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 SUP. CT. REV. 271, 273 ("[V]irtually everyone violates traffic laws at least occasionally . . . .").

[414] David A. Harris, *"Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544, 550, 559 (1997).

[415] 517 U.S. 806, 819 (1996); *see* Peter Shakow, *Let He Who Never Has Turned Without Signaling Cast the First Stone: An Analysis of* Whren v. United States, 24 AM. J. CRIM. L. 627, 628 (1997) (noting that the Court's decision in *Whren* "allows the police unfettered discretion to stop motorists for any traffic violation as a pretext to investigate other unrelated offenses").

[416] Brian J. O'Donnell, Note, Whren v. United States*: An Abrupt End to the Debate Over Pretextual Stops*, 49 ME. L. REV. 207, 208 (1997); *see also* Geoffrey S. Kay, Note, Whren v. United States*: The Constitutionality of Pretextual Stops*, 58 LA. L. REV. 369, 376 (1997) (noting that in *Whren*, the Court decided that "because the officer *could* have stopped [the defendant] for the traffic violation based on probable cause, the seizure was reasonable under the Fourth Amendment").

[417] Skolnik, *supra* note 18, at 519–20.

and request a consent search.[418] This tactic is particularly advantageous given the Supreme Court's embrace of pretextual stops, its lax approach to consent searches, and the likelihood that individuals will allow officers to search their vehicles or person. Given the nexus between overregulation and gamesmanship, officers can do all of this without violating individuals' constitutional rights.

## V. CONSTITUTIONAL DEFLATION

Constitutional deflation is the fourth phenomenon that erodes constitutional rights. As an adjudicative phenomenon, deflation refers to how courts progressively weaken certain fundamental rights through the process of constitutional decision-making.[419] Deflation occurs for the following reasons. In the contexts of criminal law and constitutional criminal procedure, courts must resolve legal claims that reconcile state power with individual interests.[420] As part of this process, the judiciary establishes the lawful boundaries of governmental authority and interprets the nature and scope of fundamental rights.[421] For instance, courts determine that the government had the authority to legislate in particular ways, implement specific policies, or employ certain enforcement mechanisms.[422] Courts also decide whether governmental action implicates a constitutional right, or falls within some exception to constitutional safeguards that would normally apply.[423] Deflation occurs as lawmakers, prosecutors, and police officers attempt to expand their power, push against constitutional boundaries, and exploit exceptions that weaken fundamental rights.[424] In response to these pressures, courts incrementally broaden governmental power in a manner that erodes constitutional rights.

Section A of this Part discusses the role of institutional competence and permissive exceptions in this phenomenon.[425] Section B then discusses the re-

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[418] Jordan Blair Woods, *Decriminalization, Police Authority, and Routine Traffic Stops*, 62 UCLA L. REV. 672, 728–29 (2015).

[419] Paciocco, *supra* note 37, at 89–91; *see also* David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1210–11 (discussing the apparent expansion of civil rights in the 1970s, followed by a "current of retrenchment" where those rights became more difficult to enforce because of new procedural barriers to litigation).

[420] Paciocco, *supra* note 37, at 89–91.

[421] *Id.*

[422] *Id.*

[423] *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757–58, 768–69 (1994) (describing the inconsistencies between the Fourth Amendment and the Supreme Court's interpretation of it, including a multitude of broadly applying exceptions that erode the protections it was meant to afford).

[424] *See* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 923–25 (2005) (discussing the "managerial empire-building hypothesis" in application to government officials).

[425] *See infra* notes 427–459 and accompanying text.

sults of a criminal justice system that provides both narrower rights and weaker remedies.[426]

### A. Institutional Competence and Permissive Exceptions

Two interrelated factors contribute to constitutional deflation: the judiciary's role and institutional competence, and permissive exceptions. First, the judiciary's unique role and institutional competence restrict courts' capacity to maintain the strength of certain constitutional rights over time. Courts lack the power of the purse, which restricts their ability to tax, spend, or allocate resources to protect rights.[427] Judges have limited information-gathering capacities and are bound by the information that the parties and amici curiae present.[428] Courts cannot form legislative committees or subcommittees, engage in notice and comment procedures, proactively seek out expert evidence, or leverage the bureaucracy's expertise to address complex public policy issues.[429] Furthermore, judges lack a strong coercive capacity to enforce their decisions. Courts cannot enforce their authority through fiat or decree.[430] Instead, they depend on the other branches of government's voluntary cooperation, and rely on individuals' willingness to comply with judicial decisions.[431] Judges can be reluctant to expand rights to devise remedies that can produce backlash, harsh political opposition, or outright defiance.[432] These considera-

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[426] *See infra* notes 460–493 and accompanying text.

[427] *See, e.g.*, Tara Leigh Grove, *Sacrificing Legitimacy in a Hierarchical Judiciary*, 121 COLUM. L. REV. 1555, 1597 (2021) (noting that the judicial branch "must rely on other actors to enforce and obey their decrees"); Gregory A. Caldeira, *Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 AM. POL. SCI. REV. 1209, 1209–10 (1986) (discussing the Court's "rather demonstrable vulnerability before the president and Congress," which results in part because it has no spending power).

[428] Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607, 1613–15 (2016).

[429] *See id.* (discussing the limitations on courts' information-gathering abilities); Terry Skolnik, *Hot Bench: A Theory of Appellate Adjudication*, 61 B.C. L. REV. 1271, 1306–08 (2020) (contrasting the judiciary's limited ability to gather information with the more varied and expansive mechanisms available to the executive and legislative branches).

[430] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865 (1992) (plurality opinion) ("[T]he Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees."), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Thomas W. Merrill, *A Modest Proposal for a Political Court*, 17 HARV. J.L. & PUB. POL'Y 137, 139 (1994) (quoting *Casey*, 505 U.S. at 865).

[431] Alison Higgins Merrill, Nicholas D. Conway & Joseph Daniel Ura, *Confidence and Constraint: Public Opinion, Judicial Independence, and the Roberts Court*, 54 WASH. U. J.L. & POL'Y 209, 215–18 (2017) (noting that "[t]he recent decline in public confidence in the Court has . . . contributed to erosion of the Court's independence during . . . Chief Justice Roberts' tenure" and explaining some of the implications of this trend).

[432] CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 59 (1999); *see also* Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 373–74 (2007) (discussing a shift in "progressive attitudes

tions help explain why courts' unique role and institutional competence limit their ability to manage complex public policy schemes, order resource reallocation, or expand rights extensively.[433]

Deflation occurs in part because courts are unable to redistribute resources and funding in a manner that maintains the strength of certain rights. The effectiveness of some constitutional rights hinges on governmental funding and resource allocation decisions.[434] For instance, governmental funding dictates the level of staffing, investigation, and litigation for public defenders—all of which dictate how thoroughly these attorneys can protect and vindicate indigent defendants' fundamental rights.[435] Similarly, governmental funding and resource allocation decisions impact defendants' right to a speedy trial.[436] These types of governmental decisions shape whether there is sufficient court personnel, logistics, and resources to ensure a trial within a reasonable time.[437] Yet courts' inability to control resource allocation and funding within the justice system hinders their capacity to protect certain constitutional rights.[438]

Deflation also occurs because judges do not want to violate the separation of powers or usurp lawmakers' function—justifications that are rooted in the judiciary's concerns about their role, institutional competence, and limited capacity to adjudicate a high volume of cases.[439] Case law on the Eighth Amendment right to be free from cruel and unusual punishments illustrates this point.[440] Outside of capital punishment contexts and life imprisonment without

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toward constitutional adjudication," because of a "fear that [progressive] adjudication may cause backlash of the kind they attribute to *Roe v. Wade*, which they believe gave birth to the New Right" (citation omitted)).

[433] *See, e.g.*, Cross, *supra* note 38, at 880 (discussing the various actors, resources, and circumstances necessary for "positive constitutional rights" to be recognized in the legal system).

[434] Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 807 (2004).

[435] Heidorn, *supra* note 320, at 160, 173.

[436] Alan L. Schneider, Note, *The Right to a Speedy Trial*, 20 STAN L. REV. 476, 501 (1968); *see also* Allen Daniel Applbaum, Note, *As Time Goes by: Pretrial Incarceration Under the Bail Reform Act of 1984 and the Speedy Trial Act of 1974*, 8 CARDOZO L. REV. 1055, 1068 (1987) ("Ideally, the government provides an accused with an immediate trial . . . . But limited financial resources, crowded court calendars, and complex cases often make it difficult for the government to provide trials with such ideal swiftness." (citation omitted)).

[437] *See, e.g.*, Thomas W. Church et al., *Justice Delayed: The Pace of Litigation in Urban Trial Courts*, 2 STATE CT. J., Fall 1978, at 3, 6, 47 (discussing data from court delays in various cities, and noting that "[t]he literature of court delay is replete with references to overworked judges and understaffed courts").

[438] Brown, *supra* note 434, at 801–02, 806.

[439] *See, e.g.*, ANDREW COAN, RATIONING THE CONSTITUTION: HOW JUDICIAL CAPACITY SHAPES SUPREME COURT DECISION-MAKING 15–17, 19 (2019) (introducing and developing a "judicial capacity model of Supreme Court decision-making"); Eric Berger, *Comparative Capacity and Competence*, 2020 WIS. L. REV. 215, 215–16 (citing COAN, *supra*).

[440] The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

parole, the Supreme Court has rejected Eighth Amendment challenges based on a punishment's severity.[441] The Court's reasoning is rooted partly in concerns regarding the separation of powers and the judicial branch's role in a constitutional democracy.[442]

The Supreme Court's plurality decision in *Ewing v. California* offers a compelling example.[443] In *Ewing*, the defendant—a repeat offender—was convicted of stealing a pair of golf clubs and was sentenced to life imprisonment in conformity with California's Three Strikes Law.[444] In a plurality decision that upheld the law, Justice O'Connor acknowledged that the legislative branch's sentencing scheme was controversial and raised concerns regarding its financial cost and effectiveness.[445] But as she explained: "We do not sit as a 'superlegislature' to second-guess these policy choices."[446] The *Ewing* decision—which built on prior case law that showed a reticence to strike down non-capital punishments—reinforced the Eighth Amendment's limited application to death penalty cases and life-without-parole sentences.[447]

The second factor that contributes to constitutional deflation is the normalization of permissive exceptions that weaken rights. Governmental actors, in turn, gravitate toward these exceptions to bypass constitutional safeguards.[448] To illustrate this point, consider how various permissive exceptions

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[441] *See* William W. Berry III, *Cruel and Unusual Non-Capital Punishments*, 58 AM. CRIM. L. REV. 1627, 1628 (2021) (noting that modern Supreme Court jurisprudence has "erected a gross disproportionality standard that seems insurmountable in most cases, even for draconian and excessive sentences").

[442] *See* James J. Brennan, *The Supreme Court's Excessive Deference to Legislative Bodies Under Eighth Amendment Sentencing Review*, 94 J. CRIM. L. & CRIMINOLOGY 551, 577–78 (2004) ("The Court's first proportionality principle cautions that criminal punishment determinations are normally the province of legislative bodies.").

[443] 538 U.S. 11, 27–28 (2003) (plurality opinion).

[444] *Id.* at 14–20; *see also* Robert Clinton Peck, Note, Ewing v. California*: Upholding California's Three Strikes Law*, 32 PEPP. L. REV. 191, 200–04 (2004) (summarizing the facts and analyzing the *Ewing* Court's plurality opinion).

[445] *Ewing*, 538 U.S. at 27–28.

[446] *Id.* at 28.

[447] Rummel v. Estelle, 445 U.S. 263, 272 (1980); Sara J. Lewis, Note, *The Cruel and Unusual Reality of California's Three Strikes Law:* Ewing v. California *and the Narrowing of the Eighth Amendment's Proportionality Principle*, 81 DENV. U. L. REV. 519, 519 (2003).

[448] *See, e.g.*, William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 854–56 (2001) (discussing legislation that created more expansive reasons for law enforcement officers to legitimately stop individuals, and the resulting dilution of Fourth Amendment protections against search and seizures); Skolnik, *supra* note 18, at 531–32 (defining and explaining "investigation cascades," a process by which "officers exploit a police power's lax or non-existent legal threshold to exercise a more intrusive power that has a more demanding legal threshold"); William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1822–23 (1998) [hereinafter Stuntz, *Race, Class, and Drugs*] (discussing the interaction between four key search and seizure rules in practice).

weaken the Fourth Amendment's constitutional protection.[449] As discussed above, the Supreme Court has noted that police officers generally require probable cause and a warrant to search individuals and their property.[450] Though, courts have recognized a litany of permissive exceptions where police officers can conduct a search without having to satisfy these requirements: stop-and-frisk searches, exigent circumstances, plain-view searches, searches incidental to arrest, inventory searches, and more.[451] Because ninety percent of searches are obtained through consent, the probable cause and search warrant requirements have shifted from the rule to the exception.[452]

Beyond evading constitutional safeguards, police officers value permissive exceptions for other reasons. For one, permissive exceptions drive down the financial costs of police investigations and prosecutions. Traffic stops that exploit the plain-view search doctrine—and evade the warrant requirement—are cheaper than drafting affidavits or conducting wiretaps.[453] Pedestrian stops that result in frisk searches and damning evidence are cheaper than obtaining and executing search warrants.[454] And GPS devices and beepers that track vehicles—which courts have decided do not constitute a "search"—are cheaper than physical surveillance.[455]

The fact that permissive search exceptions are a cheap and lawful way to detect damning evidence provides downstream leverage to prosecutors, which cuts costs even further. Prosecutors can leverage damning evidence that was obtained through permissive exceptions to stack charges against defendants.[456]

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[449] *See* Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 500–03 (1991) (discussing exceptions to the warrant requirement, a list so extensive that "[t]he body of exceptions . . . has consumed the warrant requirement").

[450] Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 18 (1991).

[451] *Id.* at 18–29; Michael Gentithes, *Exigencies, Not Exceptions: How to Return Warrant Exceptions to Their Roots*, 25 U. PA. J. CONST. L. 60, 60–01 (2023).

[452] Sommers & Bohns, *supra* note 391, at 1966.

[453] *See* William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1282–83, 1285 (1999) [hereinafter Stuntz, *Distribution of Fourth Amendment Privacy*] (contrasting police tactics investigating drug activity in poor versus affluent communities, and noting that "Fourth Amendment law makes that cost gap substantially larger than it otherwise might be"); William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2154 (2002) (noting that "removing the warrant requirement from a category of searches makes those searches cheaper" because absent the warrant requirement, "[p]olice need not fill out the application, wait for an available magistrate, and present their argument"); Stuntz, *Warrants and Fourth Amendment Remedies*, *supra* note 389, at 891 (noting that the warrant requirement "forces police officers to go to some substantial trouble before engaging in searches (thereby encouraging them not to do so without good reason)").

[454] Stuntz, *Distribution of Fourth Amendment Privacy*, *supra* note 453, at 1282–83; Stuntz, *Race, Class, and Drugs*, *supra* note 448, at 1820–21.

[455] Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 499–500 (2011).

[456] *See, e.g.*, Skolnik, *supra* note 18, at 532, 547 ("Police officers may stack charges on top of one another so that prosecutors can exert greater leverage in the plea bargaining process.").

Overcharging, in turn, increases prosecutors' ability to secure cheap guilty pleas that avoid expensive trials.[457] Additionally, permissive exceptions maximize efficiency in police investigations. Consent searches and traffic stops take far less time than burdensome investigations that involve undercover officers, informants, surveillance, and warrants.[458] Officers can use permissive exceptions to conduct a greater number of cheap and efficient investigation tactics—such as traffic stops—compared to more expensive and slower ones that are more targeted—such as wiretaps.[459] Permissive exceptions allow officers to scale the use of certain investigative tactics that exploit constitutional loopholes.

### *B. Narrower Rights and Weaker Remedies*

Constitutional deflation affects constitutional rights *and* remedies. Beyond the weakening of Fourth Amendment protections and the right to be free from cruel and unusual punishments, two other examples elucidate the phenomenon of constitutional deflation in criminal procedure: the narrowing of the speedy trial right and the weakening of the exclusionary rule.[460] As discussed more below, a common feature explains why the right to a speedy trial and the exclusionary rule have eroded incrementally. More specifically, courts are reluctant to interpret rights and grant remedies that allow factually guilty defendants to walk free.[461] This reluctance, in turn, encourages judges to embrace permissive exceptions that narrow rights and weaken remedies.

Consider first how the constitutional right to a speedy trial has gradually eroded. The Sixth Amendment, state constitutions, and the Speedy Trial Act protect the right to an expedient trial.[462] The Supreme Court has remarked that the right to a speedy trial is a basic and fundamental right that is justified on

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[457] Stuntz, *supra* note 22, at 520; *see also* Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2309 (2006) ("[P]lea bargaining influences the prosecutor's choice of cases . . . . Most importantly, it substantially reduces the resources needed for each case.").

[458] Stuntz, *Race, Class, and Drugs*, *supra* note 448, at 1819–24.

[459] *Id.*

[460] *See* Shon Hopwood, *The Not So Speedy Trial Act*, 89 WASH. L. REV. 709, 712–13, 738–39 (2014) (discussing the narrowing of the right to a speedy trial); Christopher Slobogin, *The Exclusionary Rule: Is It on Its Way Out? Should It Be?*, 10 OHIO ST. J. CRIM. L. 341, 341–43 (2013) (discussing the weakening of the exclusionary rule).

[461] *See, e.g.*, Yackley, *supra* note 40, at 440–41 (noting the Court's consideration of "the grave cost of excluding relevant evidence" via the exclusionary rule); Amar, *supra* note 40, at 644–46 (noting similar concerns with the exclusionary rule and the speedy trial right).

[462] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."); Speedy Trial Act of 1974, Pub. L. 93-619, 88 Stat. 2076 (codified as amended at 18 U.S.C. §§ 3161–3174)); *see* Gregory P.N. Joseph, *Speedy Trial Rights in Application*, 48 FORDHAM L. REV. 611, 612–13 (1980) (discussing the Sixth Amendment, and noting that "the constitutions of every state except Nevada, New York, and North Carolina contain parallel provisions, most of which are virtual replicas of the sixth amendment's speedy trial language"); *see also* Hopwood, *supra* note 460, at 712–13 (discussing the enactment of the Speedy Trial Act).

various grounds.[463] First, expedient trials aim to ensure that defendants can mount an adequate defense.[464] Due to long delays, defense witnesses may die, forget important details, or misremember events—all of which can adversely impact the defendant's case.[465] Second, expedient trials aim to protect defendants against pre-trial detention that increases the pressure to plead guilty.[466] Third, speedy trials attempt to reduce the level of anxiety, humiliation, and contempt that defendants face while they wait to be tried and have their case resolved.[467]

Courts consider four factors when they evaluate whether a defendant's right to a speedy trial was violated: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."[468] Although some courts infer prejudice when trial delays are particularly long, speedy trial claims tend to fail when the defendant does not establish that they suffered actual prejudice from the delay.[469]

Despite its importance, the right to a speedy trial fails to protect many defendants against excessive delays.[470] In some jurisdictions, defendants must wait several years for their trial.[471] In an examination of compliance rates with New

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[463] Hopwood, *supra* note 460, at 712 (citing Klopfer v. North Carolina, 386 U.S. 213, 226 (1967)).

[464] *See* Anthony G. Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 STAN. L. REV. 525, 533 (1975) (noting that delays may impact the availability of evidence and witness recollections); Steven M. Wernikoff, *Sixth Amendment—Extending Sixth Amendment Speedy Trial Protection to Defendants Unaware of Their Indictments*, 83 J. CRIM. L. & CRIMINOLOGY 804, 813 (1993) (discussing prejudice resulting from trial delays).

[465] Hopwood, *supra* note 460, at 713.

[466] Richard S. Frase, *The Speedy Trial Act of 1974*, 43 U. CHI. L. REV. 667, 667 (1976); Hamburg, *supra* note 221, at 236.

[467] Sara Hildebrand & Ashley Cordero, *The Burden of Time: Government Negligence in Pandemic Planning as a Catalyst for Reinvigorating the Sixth Amendment Speedy Trial Right*, 67 VILL. L. REV. 1, 13–14 (2022); *see also* Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183, 206 (2014) (discussing incentives and outcomes related to investigative efficiency by police).

[468] Brandon Marc Draper, *Revenge of the Sixth: The Constitutional Reckoning of Pandemic Justice*, 105 MARQ. L. REV. 205, 219 (2021) (quoting Barker v. Wingo, 407 U.S. 514, 530 (1972)).

[469] *See* Tatiana Hamilton, *Statutory Rights—Speedy Trial: Considering Good Cause Delay and Proper Procedure When the Defendant Invokes His Statutory Right to a Speedy Trial*, 95 N.D. L. REV. 207, 214–16 (2020) (discussing the North Dakota Supreme Court's analysis of prejudice from delay in various criminal cases).

[470] *See, e.g.*, Kat Albrecht, Maria Hawilo, Thomas F. Geraghty & Meredith Martin Rountree, *Justice Delayed: The Complex System of Delays in Criminal Court*, 53 LOY. U. CHI. L.J. 747, 757 (2022) ("The speedy-trial right is fundamental, but empirical research has demonstrated that its consistent enforcement have [sic] been notoriously difficult.").

[471] *Id.* at 753, 755; Hopwood, *supra* note 460, at 724. Kat Albrecht and colleagues observe that in 2016, over 1,000 detainees incarcerated in Cook County Jail, Illinois—over 90% of whom were persons of color—waited over two years for the start of their trial. Albrecht et al., *supra* note 470, at 753. Some boroughs in New York City are equally slow to try defendants. Daniel Hamburg notes that "[i]n January 2013, seventy-three percent of all felony cases in the Bronx exceeded New York's 180-day speedy trial limit, including more than 800 felonies still open at two years or more." Hamburg, *supra*

York City's speedy-trial rates in 2013, William Glaberson concluded that "[t]he number of felony cases citywide that exceed the courts' own guidelines for excessive delay—180 days in most felony cases—has more than doubled since 2000, even as the total number of felony cases has dropped by nearly a quarter."[472]

The judiciary's limited institutional competence and permissive exceptions help explain how the right to a speedy trial has deflated incrementally. Begin with institutional competence. The right to a speedy trial depends on the government's allocation of various resources to adjudicate defendants' cases.[473] Yet courts are reluctant to overstep their institutional competence and order the other branches of government to allocate justice system resources that can reduce delays.[474] Like how courts may be reticent to order the government to increase funding to public defenders, judges may not order lawmakers to reallocate resources toward the justice system to reduce delays.[475] Instead, dismissal with or without prejudice—one of the strongest judicial remedies—is the exclusive redress for oppressive delay.[476] But, dismissals without prejudice can allow factually guilty defendants to walk free.[477] This explains why courts are reluctant to order this remedy.[478]

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note 221, at 226–27. Defendants in Queens, New York, faced similarly long delays. *Id.* at 226 n.20. In 2012, the delay for a felony jury trial in Queens was approximately 625 days. *Id.*

[472] William Glaberson, *Faltering Courts, Mired in Delays*, N.Y. TIMES (Apr. 13, 2013), https://www.nytimes.com/2013/04/14/nyregion/justice-denied-bronx-court-system-mired-in-delays.html [https://perma.cc/5D3U-E2YP].

[473] *See, e.g.*, Sklansky, *supra* note 53, at 1238–39 (discussing the government's costs incurred during a criminal trial); Brooks Holland, *The Two-Sided Speedy Trial Problem*, 90 WASH. L. REV. ONLINE 31, 33, 39–40 (2015), https://digitalcommons.law.uw.edu/cgi/viewcontent.cgi?article=1004&context=wlro [https://perma.cc/Z9TW-DH6Y] (discussing resource constraints as a significant cause of trial delays).

[474] *See, e.g.*, Brown, *supra* note 434, at 806 ("Some constitutional rights are unfunded mandates to legislatures . . . . Courts have been unwilling (and may be politically unable) to govern . . . funding decisions so as to reinforce legal guarantees.").

[475] *See* Lauren Sudeall Lucas, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1736–37 (2005) (discussing the inefficacy of a Louisiana Supreme Court remedy for indigent defendants impacted by severe underfunding of the public defense system); Martin Guggenheim, *The People's Rights to a Well-Funded Indigent Defender System*, 36 N.Y.U. REV. L. & SOC. CHANGE 395, 399, 405–07 (2012) (noting the reliance of judges on the investigative functions of counsel, but discussing the largely unsuccessful Sixth Amendment challenges to underfunded public defense systems).

[476] Patrick Ellard, Note, *Learning from Katrina: Emphasizing the Right to a Speedy Trial to Protect Constitutional Guarantees in Disasters*, 44 AM. CRIM. L. REV. 1207, 1215–16 (2007).

[477] Hildebrand & Cordero, *supra* note 467, at 17.

[478] *See* Darren Allen, Note, *The Constitutional Floor Doctrine and the Right to a Speedy Trial*, 26 CAMPBELL L. REV. 101, 121 (2004) (noting that scholars have observed that speedy-trial protections seem available only for the most egregious violations).

Permissive exceptions also explain why the right to a speedy trial has deflated significantly.[479] Courts have decided that although the defendant can establish a presumptively oppressive delay, the government can rebut this presumption and justify delays that exceed statutory limits or guidelines.[480] Permissive exceptions that authorize a continuance include the lack of available counsel, good cause, prosecutorial due diligence, high caseloads, and budgetary limitations.[481] Furthermore, courts may grant a dismissal without prejudice that authorizes prosecutors to refile an indictment.[482] In the federal system and in most states, oppressive delays tend to result in a remedy that falls short of dismissal without prejudice.[483] Together, the judiciary's lack of institutional competence to reallocate resources and the embrace of permissive exceptions have weakened the right to a speedy trial considerably.

The exclusionary rule offers a second example of how constitutional remedies can deflate in a manner that weakens rights. Recall how in *Mapp v. Ohio*, the Supreme Court decided that courts have the power to exclude unconstitutionally obtained evidence.[484] Yet judges have recognized an array of permissive exceptions that have watered down the exclusionary rule.[485] For instance, courts can admit unconstitutionally obtained evidence when officers conducted an unlawful search but acted in good faith.[486] Examples include good faith re-

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[479] *See* Phyllis Goldfarb, *When Judges Abandon Analogy: The Problem of Delay in Commencing Criminal Prosecutions*, 31 WM. & MARY L. REV. 607, 626–27 (1990) (listing many different reasons for government delay of a trial that courts have accepted).

[480] *See* Doggett v. United States, 505 U.S. 647, 656–58 (1992) (allowing presumption of oppressive delay in certain circumstances); Goldfarb, *supra* note 479, at 616, 625–27 (discussing the balancing test applied to speedy trial claims); Justin Daraie, Note, *Criminal Law—the Road Not Taken: Parameters of the Speedy Trial Right and How Due Process Can Limit Prosecutorial Delay*, 9 WYO. L. REV. 171, 179–82 (2009) (discussing *Doggett* and subsequent litigation at different court levels regarding trial and pre-trial delays).

[481] *See, e.g.*, Joseph, *supra* note 462, at 645 (discussing exceptions to the speedy trial rule); Colleen Cullen, *The Nonexistent Speedy Trial Right*, 51 PEPP. L. REV. 661, 672–74 (2024) (same); Goldfarb, *supra* note 479, at 626–27 (same); Hamilton, *supra* note 469, at 221 (discussing good cause delay).

[482] Jeffrey A. Butts, *Speedy Trial in the Juvenile Court*, 23 AM. J. CRIM. L. 515, 530 (1996).

[483] *See* Cullen, *supra* note 481, at 671–711 (summarizing and discussing speedy trial rights at the federal and state levels).

[484] 367 U.S. 643, 655–56 (1961); *see* Robert B. McKay, Mapp v. Ohio*, the Exclusionary Rule and the Right of Privacy*, 15 ARIZ. L. REV. 327, 331–34 (1973) (discussing the context, holding, and impact of *Mapp*).

[485] Slobogin, *supra* note 460, at 341–43 (discussing the expansion of the good faith reliance exception to the warrant requirement); Mark E. Cammack, *The Rise and Fall of the Constitutional Exclusionary Rule in the United States*, 58 AM. J. COMPAR. L. 631, 642–43 (2010) (discussing the expansion of the independent source doctrine). Note that the following exceptions are all mentioned in Cammack, *supra*.

[486] George C. Thomas III, Mapp v. Ohio*: Doomed from the Beginning?*, 12 OHIO ST. J. CRIM. L. 289, 300 (2014); *see* Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1085–87 (2011) (discussing the evolution of the good faith exception, including the importance of police misconduct deterrence in the Court's analysis).

liance on search warrants that were subsequently quashed, and good faith arrests based on inaccurate police database information.[487] Judges can also admit unconstitutionally obtained evidence whose discovery was inevitable, meaning "an independent or alternate investigation would have led to the evidence . . . ."[488] Moreover, courts are reluctant to suppress unconstitutionally obtained evidence that is supported by an independent lawful source (for instance, when officers obtain a search warrant and seize evidence that was discovered initially through an unlawful search).[489] The Supreme Court has also decided that the exclusionary rule does not apply in contexts where officers breached the "knock and announce" requirement when they searched a home.[490]

Notice why courts embrace permissive exceptions that contribute to constitutional deflation. Judges are reluctant to interpret rights and impose remedies that let factually guilty defendants escape justice.[491] More guilty defendants would be acquitted if the Fourth Amendment contained fewer exceptions, and if the exclusionary rule were more robust. Similarly, more guilty defendants would evade conviction if courts interpreted the speedy trial right broadly, and dismissal with prejudice was the rule rather than the exception. When charges are dismissed or evidence is excluded, victims—who exert little control over police or prosecutorial conduct—are unable to obtain justice.[492] Research indicates that the public is strongly opposed to rights and remedies that appear to let guilty defendants off the hook based on perceived technicalities.[493] Constitutional deflation may occur partly as an adaptive mechanism that aims to maximize the criminal trial's truth-seeking function, and uphold the public's confidence in courts.

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[487] Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1942 (2014).

[488] Robert M. Bloom, *Inevitable Discovery: An Exception Beyond the Fruits*, 20 AM. J. CRIM. L. 79, 81 (1992).

[489] Cammack, *supra* note 485, at 643.

[490] Craig M. Bradley, *Reconceiving the Fourth Amendment and the Exclusionary Rule*, 73 LAW & CONTEMP. PROBS. 211, 214 (2010).

[491] *See* Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 434–35 (2012) ("When courts see [Fourth Amendment] rights asserted by defendants as a means to exclude evidence strongly indicating their guilt, they are likely to view the claims of these unsympathetic proponents more skeptically."); Jenia Iontcheva Turner, *Effective Remedies for Ineffective Assistance*, 48 WAKE FOREST L. REV. 949, 952 (2013) (noting that courts tend to decline to exclude highly probative evidence absent severe deterrence effects, "because [exclusion] may allow guilty defendants to walk free").

[492] Daniel E. Lungren, *Panel II: The Accused as Victim—The Case of Criminal Law: Victims and the Exclusionary Rule*, 19 HARV. J.L. & PUB. POL'Y 695, 697 (1996).

[493] Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 629 (2011); *see* Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 436–37 (noting that "the [exclusionary] rule probably does more damage to public respect for the courts than virtually any other single judicial mechanism because it . . . involves prosecutors, defense attorneys and judges in charade trials in which they all know the defendant is guilty").

## CONCLUSION

This Article argues that four interrelated phenomena explain why constitutional rights erode in the criminal justice system: administrative burdens, subtractability, bypassing, and deflation. The phenomena of administrative burdens and subtractability, in turn, elucidate how defendants who exercise their constitutional rights can impose negative externalities onto other defendants—especially indigent ones—that decrease the quality of justice. More specifically, the unaccounted-for costs of constitutional rights can contribute to under-investigation and under-litigation, worsen delays, lengthen pre-trial detention, and increase incentives to plead guilty. The arguments advanced in this Article also illuminate how—and why—constitutional rights can become self-defeating. Notably, defendants who exercise their constitutional rights do not fully internalize the costs of their actions. Instead, the cumulative effect of each defendant's constitutional claims can produce systemic undesirable effects that harm other defendants.

This Article also offers a starting point to understand why certain constitutional rights and remedies in the criminal justice system weaken over time. Previous Parts of this Article highlight how two features of certain constitutional rights contribute to this tendency. First, some rights require courts to allocate resources or engage in complex public policy determinations that exceed their role or institutional competence—characteristics that stem partly from the judiciary's unique role within a democracy and judges' limited information-gathering capacities. Second, certain remedies allow factually guilty defendants to walk, which can deprive victims of justice and reduce the public's confidence in courts. These realities may help explain why some constitutional rights and remedies degrade in ways that others do not.

The arguments advanced in this Article also lay the foundation for future research that explores the erosion of constitutional rights more generally. Once we see how and why constitutional rights degrade, we cannot unsee it. And we may begin to see how constitutional rights result in administrative burden, subtractability, bypassing, and deflation in a range of contexts that have nothing to do with criminal law and procedure. These phenomena may be hiding in plain sight. And they may shape the landscape of constitutional rights and remedies in other areas of law.