Representative Defendants

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

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I. INTRODUCTION

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

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

The Court has been clearest about the defendant's representative role in the context of *Batson* challenges. The Fourteenth Amendment prohibits the discriminatory exercise of peremptory challenges to exclude prospective jurors based on impermissible criteria such as race.[1] The Court has permitted defendants to challenge such exclusions even when the defendants do not themselves possess the identity trait that was the basis for excluding the juror.[2] For example, a white defendant may challenge the exclusion of black jurors.[3] Defendants vindicate the prospective jurors' right to be free of discrimination.[4]

In other constitutional contexts the Court has assigned defendants a representative role without being as forthright about having done so. For example, the Fourth Amendment exclusionary rule serves only one end: deterring future police misconduct.[5] In a criminal proceeding, the only remedy

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[1] Batson v. Kentucky, 476 U.S. 79, 89 (1986).

[2] Powers v. Ohio, 499 U.S. 400, 415 (1991).

[3] This was the exact situation presented in *Powers*. *Id.* at 402–03.

[4] *See id.* at 414.

[5] *See, e.g.*, Davis v. United States, 564 U.S. 229, 246 (2011) ("Rather, we have said time and again that the *sole* purpose of the exclusionary rule is to deter misconduct by law enforcement."); Herring v. United States, 555 U.S. 135, 142 (2009) ("The exclusionary rule

available to defendants for an unconstitutional search or seizure is exclusion of unconstitutionally obtained evidence.[6] The Court has stated that exclusion is not designed to compensate defendants for the constitutional harm they suffered.[7] Rather, its purpose is to deter future violations generally.[8] This is to cast defendants as representative agents for third parties who might otherwise be subject to similar police mistreatment in the future.[9]

The Court has understood the Sixth Amendment rights to speedy and public trial as protecting the public's interests in an efficient and transparent criminal justice machinery.[10] Members of the public, however, do not have standing to vindicate those interests, leaving it to defendants to perform that role on their behalf.

The Court's reluctance to acknowledge defendants' representative role across these contexts owes to the Court's insistence that the criminal process is singularly about determining guilt or innocence.[11] While that one value explains

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

[6] *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (applying the exclusionary rule to the states).

[7] *See infra* Part III.B.

[8] *See id.*

[9] *See* Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 267 (1988).

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

[11] *See, e.g.*, *Herring*, 555 U.S. at 141 ("[T]he [exclusionary] rule's costly toll upon truth-seeking . . . presents a high obstacle for those urging [its] application.") (quoting Pa. Bd. of Prob. and Parole v. Scott, 524 U.S. 357, 364–65 (1998)); Rose v. Clark, 478 U.S. 570, 579 (1986) ("The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments."); Stone v. Powell, 428 U.S. 465, 488 (1976) (noting that the Fourth Amendment exclusionary rule was not applied in *Walder v. United States* because it was outweighed by "the public interest in determination of truth at trial") (characterizing Walder v. United States, 347 U.S. 62 (1954)); Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 416 (1966) (declining to retroactively apply the Fifth Amendment prohibition on adverse comment to a defendant's failure to testify because

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

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

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

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

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such an application was unrelated to "[t]he basic purpose of a trial [which] is the determination of truth").

[12] *See infra* notes 223–27 and accompanying discussion.

[13] *See id.*

[14] *See id.*

[15] *See id.*

[16] Such reflexive support has, at least until recently, been the political norm in the United States for more than a generation. *See* JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 49 (2003) (describing American harshness since the 1970s in comparison to contemporary Europe and American policy before 1970).

criminal courts, better judicial data collection, and more expansive disclosure requirements for criminal justice actors.

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

II. THE PAROCHIAL DEFENDANT

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

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

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[17] *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 27–30, 62, 67 (1993) (describing early American criminal justice practice as local, informal, and dominated by lay advocates and judges).

[18] *See* Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309, 1316–23 (2002).

[19] *See* Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, 30 CRIME & DELINQ. 568, 570, 572–77 (1984) (describing the evolution of modern prosecutors and criminal courts).

[20] *See generally id.* (describing the evolution of the role of aldermen, public prosecutors, police, and courts in criminal prosecution in the nineteenth century).

prosecutors,[21] judges, and defendants were all parochially self-interested.[22] Throughout the nineteenth century and even into the twentieth century, criminal cases were an adjutant of private dispute resolution. There is no exhaustive account of these practices given that most proceedings were not formally recorded anywhere. Criminal justice was hyper-local and, to that extent, historical accounts of practices in particular places can be revealing, even if not comprehensively so. Allen Steinberg's account of the rise of public prosecutors in nineteenth century Philadelphia is an example.[23]

Steinberg described how early in American history, private individuals—usually victims or their relations—prosecuted criminal cases themselves or through privately retained counsel.[24] And "judges" were typically laypersons, often politically connected and paid piecemeal by complainants.[25] These judges prodded most cases to settlement, leaving only a small portion to move on to grand jury review.[26] This system (such as it was) served a rural society, a state with minimally developed bureaucratic capacity, and where crimes tended to involve a perpetrator and a victim. Those basic features were completely transformed by dramatic urbanization and accompanying social change beginning in the late nineteenth century.[27]

The system of private prosecution gave way to our modern concepts of public prosecutors, police, and criminal courts in response to the changing needs of American cities. The vast inflow of immigrants, combined with pervasive worker unrest, created new social control exigencies for the middle and upper classes.[28] The same structural shifts had occurred in other large industrial

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

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

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

[24] *See id.* at 571.

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

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

[27] *See id.* at 584.

[28] *See* FRIEDMAN, *supra* note 17, at 19–20 ("The settlers of the seventeenth century came at first in dribs and drabs, then in greater numbers; eventually, they overwhelmed the natives and their law."); Steinberg, *supra* note 19, at 584; Samuel Walker, *Governing the American Police: Wrestling with the Problems of Democracy*, 2016 U. CHI. LEGAL F. 615, 625 ("[T]he police served the will of the dominant political ideologies in a discriminatory manner.").

cities,[29] and the response was the same: to create a municipal police force to manage the lower classes and new arrivals.[30] The police in turn began generating arrests for violations of criminal laws like public unrest, drunkenness, and vagrancy, which were inordinately committed by the lower classes.[31] Because these offenses did not involve discrete victims, there was no one to bring private prosecutions nor would there have been a bureaucratically plausible way to process the volume of arrests generated by the newly created municipal police.[32] Public prosecutors arose in response to these pressures.[33]

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

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

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[29] *See* ALEX S. VITALE, THE END OF POLICING 35–37 (2017) (discussing Manchester, London, Boston, and New York City).

[30] *See* ERIC H. MONKKONEN, POLICE IN URBAN AMERICA 1860–1920, at 55 (2004). *See generally* Steinberg, *supra* note 21, at 754 (studying the history of law enforcement in New York City).

[31] *See* Steinberg, *supra* note 19, at 572−73.

[32] *See id.* at 579.

[33] *See id.* at 582–83.

[34] *See* Ramsey, *supra* note 18, at 1332–34, 1336–37 (discussing public criticism of prosecutors' use of discretion in nineteenth century New York City); Steinberg, *supra* note 19, at 585–86 (discussing the same criticism in Philadelphia).

[35] *See* Ramsey, *supra* note 18, at 1336–37.

[36] *See, e.g.*, Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 963 (2009) (analogizing to agency cost problems in the corporate context); Daniel C. Richman, Old Chief v. United States*: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 960–65 (1997) (noting the difficulty in ascertaining the public's enforcement priorities); Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321, 329 (2002) ("What . . . accounts for the traditional prosecutor's tendency to maintain distance from the constituency she has been elected or appointed to represent?").

[37] *See* Bibas, *supra* note 36, at 961–63.

police,[38] prosecutors,[39] and the criminal courts.[40] Little attention has been paid to what consequence these reforms had on the social conception of defendants and why there was no corresponding institutionalization of the criminal defense function. Sealing the criminal defendant off in an envelope of parochial otherness likely served important symbolic functions. The defendant's selfishness and deviance perhaps underscored the rationality and integrity of prosecutors and courts, whose public charge was to sort guilty from innocent defendants.[41]

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

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

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[38] *See* ROBERT M. FOGELSON, BIG-CITY POLICE 11 (1977) (describing phases of reform of big-city police during the twentieth century).

[39] *See* Ramsey, *supra* note 18, at 1316–23; Steinberg, *supra* note 19, at 570–71.

[40] *See* MICHAEL WILLRICH, CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO xxviii–xxix (2003) (describing the modernization and centralizing Progressive Era reforms in Chicago courts).

[41] This, at least, appears to be how reformists who supported professionalization of the police, prosecutors, and courts viewed things. *See* Jeffrey S. Adler, *"It Is His First Offense. We Might as Well Let Him Go": Homicide and Criminal Justice in Chicago, 1875−1920*, 40 J. SOC. HIST. 5, 10 (2006) ("According to a local crime-beat reporter, jurors often concluded that 'both [the victim and the defendant] belong to the lowest of the low . . . .'").

[42] *See* MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON 256 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (describing eighteenth and nineteenth century French penal practices on the creation of the criminal as the "delinquent").

[43] *See id.*

[44] *See* DAVID RAY PAPKE, FRAMING THE CRIMINAL: CRIME, CULTURAL WORK AND THE LOSS OF CRITICAL PERSPECTIVE, 1830–1900, at 33–53 (1987) (discussing the development of crime journalism in the mid-nineteenth century and its responsiveness to changing social hierarchies and configurations).

[45] There was no constitutional obligation to fund indigent defense until 1963. *See* Gideon v. Wainwright, 372 U.S. 335, 342 (1963). Los Angeles created the first public defender's office in 1913, and New York City followed suit four years later. *See* Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419, 2424 (1996).

individualized representation echo notions of defendants' parochialism at the expense of more collective and transformative notions of the defense function.[46]

Framing criminal justice as a contest between a truth-seeking public agency and a solitary defendant has deep traction in scholarly literature. Take Herbert Packer's iconic "crime control-due process" dualism model.[47] He posited each model as an idealized account of criminal procedure. The former is fixated on "the repression of criminal conduct."[48] The latter values the creation of "impediments to carrying the accused" through the process because of concerns about the system's accuracy, coerciveness, and inegalitarian bent.[49] Scholars continue to embrace Packer's gloss on constitutional criminal procedure.[50] Packer tells us that the crime control model favors the quick screening of suspects and defendants, relying heavily on the professional judgments of police and prosecutors.[51] Crime control tolerates false positives, but only to the extent consistent with its underlying purpose of deterring crime.[52] In contrast, the due process model posits criminal justice as a kind of obstacle course that seeks to sustain "the primacy of the individual and the complementary concept of limitation on official power."[53]

Packer invokes a familiar libertarian framing that pits the State's aggregated power as a potential threat to individual freedom.[54] It is because the defendant stands alone that there is moral imperative for law to protect her—at play here is a deeply intuitive idea about law's role in leveling the field in favor of the weaker party to a contest. Packer suggests that, if unchecked, the State may use its coercive power against disfavored groups, if not everyone.[55] This suggests the possibility that the due process model takes the defendant as a kind of "every person," but the notion is left implicit and undeveloped in Packer's account.

Even progressive scholars preoccupied with the connection between defendants and communities have not explored the defendant's role as public representative. For example, scholars of restorative justice are preoccupied with the relationship between defendants and community.[56] But their concerns are socio-legal and therapeutic—they ask what dispute resolution, punishment, and

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[46] *See* Taylor-Thompson, *supra* note 45, at 2428–29 (describing the paradigm of individualized representation of defendants as the dominant model among public defenders).

[47] HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 153 (1968).

[48] *Id.* at 158.

[49] *Id.* at 163, 165–66, 168.

[50] Perhaps not felicitously. *See* Robert Weisberg, *Criminal Law, Criminology, and the Small World of Legal Scholars*, 63 U. COLO. L. REV. 521, 532 (1992).

[51] PACKER, *supra* note 47, at 158–60.

[52] *See id.* at 164–65.

[53] *Id.* at 165.

[54] *Id.* at 166 ("Power is always subject to abuse . . . . Precisely because of its potency in subjecting the individual to the coercive power of the state, the criminal process must . . . be subjected to controls . . . .").

[55] *Id.*

[56] *See* Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 227–29.

reintegration practices facilitate community healing and minimizes defendants' ostracism.[57] Questions about constitutional criminal procedure are marginal if not irrelevant.[58]

Jocelyn Simonson's recent work on community participation in criminal justice practices sits provocatively between restorative justice discourse and constitutional criminal procedure.[59] Her work takes the relationships between criminal defendants and communities as a starting point.[60] She rightly critiques an abstracted notion of "the People" that both excludes poor, minority communities and casts prosecutors and police as broadly representative.[61] She argues that criminal procedures should allow "communal resistance" and "popular interventions on behalf of defendants."[62] But she minimizes the practical significance of the defendant's representative role.[63]

The only effort at sketching the defendants' representative role was a partial one by Daniel Meltzer in 1988.[64] He saw it as less a frame for viewing defendants' significance in our criminal justice system than as an ironic foil for expanding Article III and prudential standing principles to enable more civil litigation.[65] He recognized that when defendants bring Fourth Amendment suppression motions or Fourteenth Amendment challenges to grand jury composition, they act in a representative capacity.[66] But he offered this in the way of critiquing the Supreme Court's cases limiting civil plaintiffs from challenging the government policy on third-party standing principles.[67] If the Court is willing to let criminal defendants represent third-party interest, he argued, surely it made sense to let upstanding plaintiffs do the same.[68]

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

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[57] *See id.*

[58] That is reason for skepticism about restorative justice practices. *See* Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 STAN. L. REV. 751, 760–61 (2000) (critiquing restorative justice processes that require early waiver of constitutional rights).

[59] *See* Jocelyn Simonson, *The Place of "The People" in Criminal Procedure*, 119 COLUM. L. REV. 249, 252–53 (2019).

[60] *See id.* at 286–88.

[61] *See id.* at 271–73, 279–82.

[62] *See id.* at 256–57, 299–303.

[63] *See id.* at 275–76 ("[W]hile [a] strand of Fourth Amendment jurisprudence does indeed imply that defendants are part of a broader 'people,' . . . the context of adjudicatory procedure does not support the inverse idea, that the 'people' support the defendant.").

[64] Meltzer, *supra* note 9, at 298.

[65] *See id.* at 295–300.

[66] *See id.* at 298.

[67] *See id.* at 327–28.

[68] *See id.*

III. CRIMINAL DEFENDANTS AND THIRD-PARTY INTERESTS

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

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

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

A. *Vindicating Jurors' Participatory Rights*

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

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[69] *See infra* Part IV.A.

[70] The sentiment is exemplified by Cardozo's famous quip about the "constable['s] . . . blunder[]," in People v. Defore, 150 N.E. 585, 587 (N.Y. 1926), that is often held out as underscoring the costs of the Fourth Amendment exclusionary rule. *See* Hudson v. Michigan, 547 U.S. 586, 614 (2006) (Breyer, J., dissenting) (invoking Cardozo).

[71] *See* Herring v. United States, 555 U.S. 135, 141 (2009); Rose v. Clark, 478 U.S. 570, 579 (1986); Stone v. Powell, 428 U.S. 465, 488 (1976); Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 416 (1966).

to possess the identity trait that was the alleged basis for excluding prospective jurors. Defendants' representative role underscores how the constitutional harms associated with juror exclusion often have little to do with defendants' selfish interests in selecting jurors inclined to acquit. Rather, it is that such discrimination degrades minorities' civic status and erodes the public's perception that criminal courts fairly administer justice.[72]

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

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

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

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[72] *See* Batson v. Kentucky, 476 U.S. 79, 89 (1986).

[73] Powers v. Ohio, 499 U.S. 400, 415 (1991).

[74] *Batson*, 476 U.S. at 89.

[75] *See id.* at 102–05 (Marshall, J., concurring).

[76] *See id.* at 108 (Marshall, J., concurring) (contending that peremptory challenges ought to be eliminated).

[77] *See id.* at 96–98.

[78] *See id.* at 87.

[79] *See* Jenny Carroll, *The Jury as Democracy*, 66 ALA. L. REV. 825, 848 (2015); Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 746–47 (1992).

[80] *See Batson*, 476 U.S. at 91.

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

[82] *See id.* at 104–05 (Marshall, J., concurring).

[83] *Id.* at 86 ("Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure.").

prevents racial stigmatization affecting both individuals. The shared identity trait satisfies the standing doctrine requirement that the representative have suffered an injury that bears close relation to that suffered by the third party.[84] But what about when the defendant and the juror do not share the same identity trait? Then, it would seem the defendant is acting more like a whistleblower with little at stake in the challenged conduct.[85]

In *Powers*, the Court recognized the defendants' representative role, but refused to cast them as whistleblowers. Instead, the Court insisted that racial discrimination against prospective minority jurors inflicts personal harm on white defendants.[86] Diminution in the likelihood of a not-guilty verdict does not constitute a cognizable constitutional harm. Rather, the Court explained that the harm lies in the defendants' loss of "confidence in the court and its verdict" when excluded jurors' objections cannot be heard.[87] The Court also suggested that white defendants' injury is no different than black defendants,' revising its account in *Batson*.

In *Powers*, the Court stated that defendants' race is just a matter of fact "relevant to discerning bias in some cases," but nothing more.[88] The passing analysis lacks conviction and rings false.[89] White defendants' "injury," if it can even be called that, would hardly suffice for standing in other contexts.[90] This gets at what appears to be an even deeper disconnect between defendants' motivations in any particular case and the harm that juror discrimination generates.

Defendants' motivations for challenging juror discrimination is the hope that the excluded juror(s) would be more inclined to find the defendant "not guilty." But there can be no right to that result, only to a process that fairly allows for the possibility of such a result.[91] This structural reality sits

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[84] *See* Powers v. Ohio, 499 U.S. 400, 411 (1991).

[85] *See infra* Part IV.A.

[86] *See Powers*, 499 U.S. at 411.

[87] The defendant's injury is explained unartfully: "The rejected juror may lose confidence in the court and its verdicts, as may the defendant if his or her objections cannot be heard." *Id.* at 414. It is unclear whether the pronouns "his or her" refer to the defendant or the juror. If they refer to the "defendant," as ordinary grammar seems to require, then it just begs the very question at the heart of the litigation: Why should the defendant get to object at all? The quote is clearer if "his or her" refers to the "juror." The idea then would appear to be that the juror's inability to object tears the civic fabric in a way that offends both the excluded juror and the defendant.

[88] *Id.* at 416. *Compare id., with Batson*, 476 U.S. at 86 (emphasis added) (citations omitted) ("The Equal Protection Clause guarantees the defendant that the State will not exclude members of *his* race from the jury venire on account of race . . . or on the false assumption that members of *his* race as a group are not qualified to serve as jurors . . . .").

[89] *See Powers*, 499 U.S. at 414 ("[T]here can be no doubt that [the defendant] will be a motivated, effective advocate for the excluded venirepersons' rights. . . . [Because] discrimination in the jury selection process may lead to the reversal of a conviction.").

[90] *See id.* at 426–29 (Scalia, J., dissenting).

[91] The nature of the harm—exclusion from participating in a civic process—suggests an analogy between jurors and voters. *See* Underwood, *supra* note 79, at 746–47.

uncomfortably with the formalistic, anti-discrimination norms that animate equal protection and fair cross-section jurisprudence.[92] The Court has reasoned that what makes racial and gender discrimination wrong is that the excluded jurors are no less able to impartially decide cases than white or male jurors.[93] But if true that minority and women jurors behave similarly to their white male peers, then why should a defendant have the right to be judged by the former?[94] If the Court were to recognize that minority and women jurors view defendants more favorably, it would justify prosecutors' use of peremptory challenges to strike them.[95] This contradiction is soluble if one takes defendants as representative actors who receive the possibility of a more favorable trial result as a bounty for having vindicated the excluded jurors' interests.[96]

A parallel contradiction underlying discrimination claims involving grand jurors is similarly resolved by recognizing the defendant's representative role, as Daniel Meltzer recognized.[97] Equal protection prohibits the intentionally discriminatory exclusion of minorities and women from grand juries.[98] Generally, procedural defects in grand jury proceedings are cured by conviction; conviction demonstrates the propriety of having indicted the defendant in the first place.[99] Not so where the State has discriminatorily excluded jurors.[100] Courts are to vacate convictions that are based on indictments handed down by grand juries constituted through the purposeful exclusion of women or minority jurors.[101] A convicted defendant's challenge is thus best understood, as Daniel Meltzer proposed a generation ago, as a representative one. The defendant seeks to vindicate the excluded jurors' participatory rights; the vacated conviction is just an incentive to litigate, not a remedy for the harm suffered.[102]

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

[93] *See Batson*, 476 U.S. at 87; Eric L. Muller, *Solving the* Batson *Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 101–02 (1996).

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

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

[96] *See id.* at 100–01.

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

[98] *See* Castaneda v. Partida, 430 U.S. 482, 493 (1977).

[99] *See* United States v. Mechanik, 475 U.S. 66, 73 (1986).

[100] *See* Vasquez v. Hillery, 474 U.S. 254, 261–62 (1986).

[101] *See id.*

[102] *See* Meltzer, *supra* note 9, at 259–60, 298.

Sixth Amendment fair cross-section claims also presuppose that defendants play a representative role. Unlike the Fourteenth Amendment, the Sixth Amendment expressly creates a right to an impartial jury.[103] Where excluded jurors themselves may bring an Equal Protection Clause challenge in their own name, they cannot bring a Sixth Amendment challenge. While the Amendment confers a right on the defendant, its scope and purpose are unclear unless one understands defendants' role as representative.[104]

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

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

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[103] *See* Taylor v. Louisiana, 419 U.S. 522, 526 (1975). The Court has understood this to require a jury that represents a fair cross-section of the community from which it is drawn. *Id.* at 537–38.

[104] *See* Duren v. Missouri, 439 U.S. 357, 370 (1979); *Taylor*, 419 U.S. at. 535–38.

[105] *See supra* notes 93–102 and accompanying discussion.

[106] *See id.*

[107] *See Duren*, 439 U.S. at 371 n.* (Rehnquist, J., dissenting) (arguing that the majority's fair cross-section analysis was "internally inconsistent").

[108] *See id.* at 373 n* (Rehnquist, J., dissenting) ("If impartiality is not lost because a particular class or group represented in the community is *unrepresented* on the petit jury, it is certainly not lost because the class or group is *underrepresented* on the jury venire.").

[109] *See id.* (arguing that the majority's fair cross-section analysis was more concerned with vindicating excluded jurors' equal protection rights than the defendant's right to an impartial jury). This paradox is homologous to that raised by Eric Muller in the *Batson* context. Muller, *supra* note 93, at 96 (raising the question of whether the *Batson* framework is workable given the Justices' views on the predictive power of race and gender).

[110] In *Taylor v. Louisiana* and *Duren v. Missouri*, for example, the Court permitted male defendants to challenge the exclusion of women from the venire. *Duren*, 439 U.S. at 360–63; Taylor v. Louisiana, 419 U.S. 522, 524–25 (1975).

be on any particular jury.[111] Requiring that members of protected groups be fairly included in venires creates the possibility that they will be included in petit juries, but does not guarantee that any given petit jury will represent a fair cross-section of the community. That defendants are charged with vindicating this interest makes sense here in the same way that it does in *Batson*.

The Court has cited excluded jurors' civic participation rights to justify its Sixth Amendment cross-section holdings.[112] It has also invoked its Equal Protection jurisprudence in Sixth Amendment cases suggesting that the two sources together ensure that jurors are not subject to discrimination throughout the processes of selecting grand and petit juries.[113] All of this indicates that both provisions protect overlapping participation interests that belong to excluded jurors. This, in turn, casts the defendant as a representative actor.

B. *Representing Potential Victims of Police Misconduct*

The modern exclusionary rule is best understood as a representative device that allows defendants to forestall future constitutional violations against innocent third-party civilians. The vast majority of Fourth Amendment claims are litigated in criminal courts for the remedy of exclusion—the suppression of evidence obtained as a result of the Fourth Amendment violation.[114] The Supreme Court has repeatedly stated that exclusion's sole purpose is to deter police officers from violating the Fourth Amendment in the future, not to compensate the criminal defendants' constitutional injury.[115] Rather, exclusion creates an incentive to litigate the constitutional issue.[116] Exclusion's ultimate beneficiaries are thus the unnamed members of the community who might otherwise be subject to the same unconstitutional police tactics in the future.

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[111] *See* Underwood, *supra* note 79, at 746 (noting that "the Equal Protection Clause applies with special force" to the criteria for jury service eligibility).

[112] *Taylor*, 419 U.S. at 530–31 (emphasizing that the fair cross-section requirement ensures community participation in the criminal justice system).

[113] *See Duren*, 439 U.S. at 365 n.24 (citing Alexander v. Louisiana, 405 U.S. 625, 627 (1972)).

[114] *See* Kenneth W. Starr & Audrey L. Maness, *Reasonable Remedies and (or?) the Exclusionary Rule*, 43 TEX. TECH L. REV. 373, 375 (2010) ("A quick look at most courts' dockets each year leaves no doubt that the [exclusionary] rule spawns much litigation.").

[115] *See* Davis v. United States, 564 U.S. 299, 231–32 (2011) (noting that the exclusionary rule is "a deterrent sanction" seeking to prevent "police misconduct"); United States v. Calandra, 414 U.S. 338, 347 (1974) ("[T]he [exclusionary] rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures . . . .").

[116] The Court has not explicitly spelled this out, but it is the clear implication of its characterization of exclusion as a "windfall" for the defendant designed to deter future police misconduct. *See Davis*, 564 U.S. at 248 (citing Stone v. Powell, 428 U.S. 465, 490 (1976)).

The Court does insist that the defendant have personally sustained Fourth Amendment injury as a precondition to obtaining exclusion.[117] This is to avoid a completely gratuitous reward for the defendant.[118] There is no formal requirement that the defendant's injuries be typical of those sustained by others.[119] The Court has however recently suggested that exclusion may be particularly appropriate where a defendant's Fourth Amendment injury is the product of systemic police misconduct and thus impacts a multitude.[120]

Even though not its original understanding,[121] the modern Court has come to view the exclusionary rule as serving deterrence alone. In *United States v. Calandra*, the Court stated that "[t]he purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim . . . [but rather] 'to deter—to compel respect for the constitutional guaranty'" in the future.[122] The Court has repeated this account of the exclusionary remedy in case after case.[123] The Court has never precisely explained the mechanism by which the deterrent effect should operate.[124] Presumably it is through expressive or pedagogical means.[125] By this theory, exclusion flags the officer's error for the prosecutor, other officers, and police administrators.[126] Once apprised of the constitutional

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[117] Rakas v. Illinois, 439 U.S. 128, 134 (1978) ("[I]t is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the [exclusionary] rule's protections.").

[118] *See id.* at 139 (noting that the standing inquiry only requires the proponent to factually allege an injury from which they individually have a legal right to relief).

[119] *See id.*

[120] *See* Utah v. Strieff, 136 S. Ct. 2056, 2063 (2016) (emphasizing that there was "no indication that this unlawful stop was part of any systemic or recurrent police misconduct").

[121] Exclusion was originally conceived as a constitutional analogue for the traditional, common law remedy of restitution. *See* Morgan Cloud, *The Fourth Amendment During the* Lochner *Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 591–92 (1996) ("The Court emphasized the central role played by property law concepts in Fourth Amendment analysis . . . ."). The analogy made sense given property rights' centrality to early Fourth Amendment jurisprudence. For example, in *Boyd v. United States*, an early and canonical Fourth Amendment case, the Supreme Court simply assumed that the Fourth Amendment required exclusion as a kind of disgorgement of ill-gotten gains. 116 U.S. 616, 638 (1886).

[122] United States v. Calandra, 414 U.S. 338, 347 (1974) (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).

[123] Hudson v. Michigan, 547 U.S. 586, 591 (2006) (discussing the Court's consistent view that the exclusionary rule requires deterrence benefits to outweigh the social costs of exclusion).

[124] *See* Stone v. Powell, 428 U.S. 465, 493–94 (1976) (stating that the exclusionary rule should be implemented at trial and enforced on direct appeal).

[125] *See* Meltzer, *supra* note 9, at 267 (noting that the exclusionary rule deters illegal searches by removing the incentive conduct them).

[126] *See* William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 910 (1991) (noting that the exclusionary rule forces officers to give back the gains from their misconduct).

violation and its consequence, rational police officers will avoid committing the same violation in future interactions with civilians.[127]

Not just any defendant can obtain exclusion for a Fourth Amendment violation that produced evidence against them. The Court requires that a defendant have sustained actual injury in order to seek suppression.[128] In creating this "standing" rule,[129] the Court noted that conceiving of deterrence too broadly would dangerously "enlarg[e] the class of persons who may invoke" the exclusionary rule.[130] The chief criticism of the exclusionary remedy has been that it confers a windfall upon guilty defendants.[131] Permitting defendants who have sustained no personal injury to vindicate others' Fourth Amendment harm was too great a windfall for the Court to countenance.[132]

The structure of Fourth Amendment exclusion makes the defendant a kind of anemic class representative.[133] Anemic because there is neither a mechanism for criminal courts to evaluate whether defendants' injuries actually track those sustained by others nor can criminal courts enjoin the police from engaging in the same constitutional misconduct in the future.[134] Also unlike a class representative, there is no legal obligation for a defendant to behave in the interests of future victims.[135] Many defendants will bargain away a prospective Fourth Amendment claim in the interests of obtaining a more favorable plea deal from the prosecutor.[136]

Ironically, the Court has laid the rhetorical basis for the defendant's representative role in opinions denying exclusion to defendants who have

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[127] Although there is good empirical reason to question this theory. *See* Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 315, 316 (2004) (reporting that about one-third of observed police searches were unconstitutional, none of which were reported to a court).

[128] Rakas v. Illinois, 439 U.S. 128, 134 (1978).

[129] The Court initially resisted characterization of the injury requirement as a "standing" requirement. *See id*. at 138 ("[T]he question necessarily arises whether it serves any useful analytical purpose to consider this principle a matter of standing . . . .]").

[130] *Id.*

[131] *See, e.g.*, Davis v. United States, 564 U.S. 229, 248 (2011) ("Such a result would undoubtedly be a windfall to this one random litigant."); Stone v. Powell, 428 U.S. 465, 490 (1976) ("The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice.").

[132] It also undercuts claims of "typicality" and "commonality" which define a class representative's role. *See* FED. R. CIV. P. 23(a).

[133] *See* Meltzer, *supra* note 9, at 267 (suggesting that general deterrence from exclusion turns criminal defendants into private attorneys general).

[134] *See id.* at 293–94 (discussing the challenge of crafting a deterrent remedy, given the lack of mechanisms for judicial control).

[135] *See id.* at 303 (noting that criminal defendants seeking exclusion are motivated by a personalized, individual benefit, rather than pursuing societal interests).

[136] *See infra* notes 253–62 and accompanying discussion.

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

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

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

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

[139] *Stone*, 428 U.S. at 493–94.

[140] *Id.* at 493.

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

[142] *Hudson*, 547 U.S. at 594.

[143] *Id.* at 588.

case involved only the method used to enter a home that held criminal evidence inside.[144]

The Court has denied exclusion in cases where searches followed unconstitutional arrests based on false database entries showing active arrest warrants for the defendants.[145] In *Herring* and *Evans*, unconstitutional stops based on quashed warrants (that the officers mistakenly thought valid at the time of the stop) yielded evidence of new criminal misconduct.[146] In allowing prosecutors to use the unlawfully seized evidence, the Court treated these cases as isolated instances of mistaken data entry.[147] This in turn suggested that suppressing evidence would yield little deterrence.[148] In *Herring*, the Court noted that things would be different if evidence suggested that "systemic errors" in the warrants database made it unreliable and thus reckless to rely on it.[149] An unreliable database would be one that failed to distinguish between wanted and innocent persons, leaving the latter subject to regular stops and searches. *Herring*'s implication is that a defendant acting for the benefit of these unnamed civilians should be entitled to suppression.[150]

Most recently, in *Utah v. Strieff*, the Court held that evidence discovered incident to arrest following an unconstitutional stop need not be suppressed if the officer discovers an outstanding bench warrant for the defendant during the stop.[151] The valid bench warrant is an "intervening circumstance" that interrupts the causal chain linking the constitutional violation to the incriminating evidence.[152] In the absence of such causal connection, exclusion is unnecessary.[153] The holding was based in part on the empirical assumption that police officers do not regularly make unconstitutional stops in order to check

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[144] *Id.*

[145] *See* Herring v. United States, 555 U.S. 135, 147–48 (2009); Arizona v. Evans, 514 U.S. 1, 4 (1995).

[146] *Herring*, 555 U.S. at 136–37; *Evans*, 514 U.S. at 4.

[147] *Herring*, 555 U.S. at 147–48; *Evans*, 514 U.S. at 15–16.

[148] *See Herring*, 555 U.S. at 147. The point here about defendant's non-representativeness is inferential. In the opinion, the Court focused on the question of whether police clerks could be deterred from behaving negligently. *See id.* Some commentators have worried that cases like *Herring* foretell exclusion's demise in all search and seizure cases. *See, e.g.*, Christopher Slobogin, *The Exclusionary Rule: Is It on Its Way Out? Should It Be?*, 10 OHIO ST. J. CRIM. L. 341, 343, 343 n.23 (2013) (noting this concern and citing scholarship to that effect).

[149] *Herring*, 555 U.S. at 146 (quoting *Evans*, 514 U.S. at 17) (O'Connor, J., concurring).

[150] *Evans*, 514 U.S. at 17 (O'Connor, J., concurring) (emphasizing that it would be unreasonable for the police to rely on a warrant system that "*routinely* leads to false arrests") (emphasis added).

[151] Utah v. Strieff, 136 S. Ct. 2056, 2063 (2016).

[152] *Id.*

[153] *Id.* at 2061 (noting that evidence obtained through an unconstitutional search is admissible if the connection between the search and the evidence is disrupted by an intervening circumstance).

for outstanding warrants.[154] The Court, however, echoed the language in *Herring*, stating that the result might have been different if the "stop was part of [some] systemic or recurrent police misconduct."[155] Of course, unlike in *Herring*, the warrant in *Strieff* was valid.[156] But it was for a traffic offense; existing data suggests that these are the most typical kinds of outstanding warrants.[157] Given how minor the infraction was, the distinction between "wanted" and "innocent" individuals should perhaps not be so terribly significant.

Given the defendant's representative role, exclusion would seem most urgent in cases where the police violation is representative of widespread and systemic practices indiscriminately impacting the guilty and innocent alike. It is in such cases where a defendant's experience would seem most representative and where the need for deterrence is greatest. Amici in *Strieff* presented such evidence, but it was based on characteristically spotty data and the Court paid it little heed.[158] Criminal defendants will often have difficulty fulfilling the representative role they are tasked with playing because individual criminal litigation offers only limited opportunities to collect evidence that reveals systemic misconduct in comparison to civil litigation.[159] This suggests that the exclusionary rule's deterrent function cannot be fully realized without procedural innovations in criminal courts.[160]

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

The Sixth Amendment enumerates what is required of "criminal prosecutions," including that trials be "speedy and public."[161] The Court has

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

[155] *Id.* at 2058.

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

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

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

[159] David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 713–14 (2006) (noting that criminal discovery relies on each party performing their own investigations, rather than the more mutual civil discovery process).

[160] *See infra* Part IV.B.

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

stated that these are "rights" that belong to individual defendants.[162] But this characterization is at odds with the Court's recognition that they are also process values in which the public has an interest separate from,[163] and sometimes even antagonistic to defendants' interests.[164] This tension is eased by conceptualizing the defendant as a representative actor.

1. *Public Trial*

The Constitution empowers both criminal defendants and the media to vindicate third-parties' interests in public trials under the Sixth and First Amendments respectively. The Court has read the two Amendments to protect substantially overlapping interests, citing opinions interpreting one amendment in cases implicating the other and vice versa.[165] Public trial describes a process value that inures to the benefit of the public.[166] Sometimes, defendants' interests align with the public's interest. But when they do not, defendants' rights to waiver are curtailed, preventing them from defeating the public's interests. This underscores the extent to which third-party interests underwrite the Sixth Amendment public trial right.

The Court has insisted that "public trial," like all other Sixth Amendment rights, "is personal to the accused."[167] This characterization is born out in cases where secrecy is in the service of judicial vindictiveness or caprice. For example, in *In re Oliver*, the Court found a Sixth Amendment violation where a state court judge summarily sentenced Oliver to jail for contempt following a secret trial.[168] Citing the Spanish Inquisition and Star Chamber as examples, the Court noted that secrecy allows courts to become "instruments of persecution."[169] "[C]ontemporaneous review in the forum of public opinion" serves as a check, ensuring fair outcomes for defendants.[170]

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[162] *See* Gannett Co. v. DePasquale, 443 U.S. 368, 379–80 (1979).

[163] *See* Press-Enter. Co. v. Superior Court of Cal., 464 U.S. 501, 508 (1984) ("[H]ow we allocate the 'right' to openness [at trial] as between the accused and the public, or whether we view it as a component inherent in the system benefiting both, is not crucial.").

[164] David Sklansky has recognized the extent to which many criminal procedure rights do not fit the mold of traditional negative rights. *See* David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1244 (2002) (arguing that many criminal procedure rights require "the government to do something affirmative"). He notes that quasi-affirmative rights often have "systemic implications" that courts often try to avoid. *Id.*

[165] *See, e.g.*, Waller v. Georgia, 467 U.S. 39, 44–45 (1984) (discussing First Amendment precedents in a Sixth Amendment decision).

[166] *See Press-Enter. Co.*, 464 U.S. at 508.

[167] *Gannett Co.*, 443 U.S. at 379–80.

[168] *In re* Oliver, 333 U.S. 257, 258–59 (1948) (trial was conducted off the record in a location not precisely clear without transcription).

[169] *Id.* at 269–70.

[170] *Id.* at 270.

In cases less extreme than *Oliver*, public trial's benefit for defendants and third parties are more symmetrical. A defendant may want the presence and support of family, friends, and other members of her community in court.[171] This will not necessarily have any discernible bearing on the outcome in a specific case but may make the process more dignified and humane for defendants. Generally, defendants' supporters will have their own interests in the courtroom being open.[172] But the Court has held that they do not have constitutional standing to compel open court.[173] Defendants must represent these third-party interests. But defendants do more than just that.

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

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

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[171] *See* Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2184–87 (2014) (discussing how criminal court audiences are largely composed of supporters of defendants, victims, and witnesses).

[172] *See id.* at 2186 (noting the significant effect criminal cases have on audience members, both individually and communally).

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

[174] Waller v. Georgia, 467 U.S. 39, 46 (1984).

[175] *Id.* at 47.

[176] *See id.* at 46 ("[A] public trial encourages witnesses to come forward and discourages perjury.").

[177] *See* Simonson, *supra* note 171, at 2182 (discussing audience members' democratic power to act on information they learn while observing court proceedings).

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

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

[180] *See Waller*, 467 U.S. at 45–46 ("[T]he explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public.").

in the public's interest when it exercises its First Amendment right to open courts.[181] If left to the First Amendment alone, there would be few occasions to vindicate the public's interest in open trials. The press will only bring challenges in high profile case that are newsworthy. For all other cases, the vast majority, there is only the Sixth Amendment.

If the right to public trial belonged exclusively to defendants, that right would presumably be theirs to waive as is typically true with other criminal procedure rights.[182] But that is not the case.[183] Defendants' right to waive public trial and close the courtroom is limited. Defendants are sometimes interested in waiving the right to open court in order to exclude hostile members of the public.[184] A defendant's detractors may be even more interested in an open trial than the defendant's supporters (if any). Detractors may amplify a defendant's humiliation, make conviction more likely, or punishment harsher.[185] The detractors may be members of the victim's community or family, or just fascinated by a crime's sordid facts. The Court has stated that "although a defendant can . . . waive his constitutional right to a public trial, he has no absolute right to compel a private trial."[186] Where the public's fascination with a case threatens to overwhelm fairness to the defendant, its rights to access must be balanced against due process, fair-trial values.[187] That balancing is carried out by the judge who is obliged to weigh the public's countervailing interest.[188]

2. *Speedy Trial*

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

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[181] *See* Caren Myers Morrison, *Privacy, Accountability, and the Cooperating Defendant: Towards a New Role for Internet Access to Court Records*, 62 VAND. L. REV. 921, 944–48 (2009) (summarizing cases).

[182] Waiving the Miranda right to counsel, for example, means that the police will interrogate without counsel. *But cf.* Singer v. United States, 380 U.S. 24, 34–35 (1965) ("The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right.").

[183] *See id.* at 35 ("[Defendant] has no absolute right to compel a private trial . . . .").

[184] *See* Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 677–78 (1996) (noting that guilty defendants are generally less enthusiastic about public trials than innocent defendants).

[185] *See id.* at 661 (noting that harm to the accused's reputation is inherent in criminal prosecutions, even when the trial is speedy, public, and fair).

[186] *Singer*, 380 U.S at 35.

[187] Gannett Co. v. DePasquale, 443 U.S. 368, 378 (1979) (noting that courts have a constitutional duty to safeguard defendants' due process rights by minimizing harm from "prejudicial pretrial publicity").

[188] *See* United States v. Cianfrani, 573 F.2d 835, 852 (3d Cir. 1978) (noting that courts considering motions for private hearings must consider the public's interest); United States v. Am. Radiator & Standard Sanitary Corp., 274 F. Supp. 790, 793–94 (W.D. Penn. 1967) (noting that courts weigh the public's interest in an open proceeding against the interests of the defendant as a matter of "judicial discretion").

defendants' interests.[189] When the latter is true, the defendants' waiver rights are similarly circumscribed.

The Supreme Court has characterized speedy trial as "generically different" from other constitutional rights.[190] "[T]here is a societal interest in providing a speedy trial which exists separate from, and at time in opposition to, the interest of the accused."[191] The public has an interest in seeing guilty defendants punished fairly, without extraneous opportunities to commit more crimes (while waiting for trial, and avoiding the costs associated with pre-trial detention).[192] This interest sometimes aligns with a defendant's interest in avoiding the psychic and physical (if detained) toll of living under the shadow of accusation.[193] Delay may also hamper a defendant's ability to stage an effective defense should evidence grow stale or disappear.[194]

But a defendant may also have an interest in delaying proceedings where, for example, she is out on bail and where delay threatens to undermine the State's case.[195]

The law reconciles these tensions by permitting speedy trial challenges where the defendant's interests align with the public's interests. The public has an interest in courts functioning efficiently,[196] but so too does it have an interest in culpable defendants being punished.[197] In *Barker v. Wingo*, the Court devised four factors for evaluating speedy trial claims. The *Barker* factors include: the length of delay, the reason for the delay, whether the defendant objected to the delay, and whether the defendant was prejudiced by the delay.[198] The factors allow courts to ensure that a defendant's interests are sufficiently aligned with the public's interest.[199] A defendant who satisfies the factors will have endured a harm herself and also represent the public's interest in an expeditious criminal justice system. The Court has noted the State's deliberate use of the delay to

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[189] *See* Barker v. Wingo, 407 U.S. 514, 519–20 (1972) (noting that the societal interest in a speedy trial is often in opposition to the interests of the defendant).

[190] *Id.* at 519.

[191] *Id.*

[192] *See id.* (noting that backlogged dockets provide criminal defendants the opportunity to "manipulate the system" and "commit other crimes").

[193] *See id.*

[194] *See Barker*, 407 U.S. at 533 ("[I]f a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense.").

[195] *See id.* at 521 (emphasizing that a delayed trial does not per se prejudice the accused's defense because witnesses for the prosecution may forget details or become unavailable).

[196] *Id.* at 519.

[197] *See supra* notes 137–44 and discussion.

[198] *Barker*, 407 U.S. at 530–32.

[199] *See* United States v. Frye, 372 F.3d 729, 739 (5th Cir. 2004) (emphasizing that the *Barker* analysis requires consideration of "societal interests in general").

harm the defendant is particularly offensive to the Sixth Amendment.[200] But so too is negligence and clogged courts.[201]

But what of the public interest where the prosecutor and defense agree to delay? Just as with the right to public trial, a defendant's waiving the right does not authorize its opposite.[202] Even where the State and defense agree, the court must still approve waiver. For example, in New York courts will not approve speedy trial waivers by plea, expressly noting the importance of protecting the public's interests in expeditious case processing.[203]

A speedy trial, perhaps more than the other rights discussed above, implicates the dysfunction of our resource-starved and overwhelmed criminal courts. Delay is an endemic feature of the criminal process in the United States.[204] Professional norms in these spaces accept significant delays; judges are thus likely to approve delay where the parties have done so.[205] Both defendants' and the public's speedy trial interests are likely under-protected in most places.[206] Given that speedy trial is tied up with other significant institutional design features, it would seem ripe for legislative intervention.

To the extent that has occurred, legislatures have generally entrenched the defendant's representative role rather than devising alternate means to protect parties' interests. Statutes typically prescribe specific bright-line cutoffs by which a defendant must receive a trial. For example, the Federal Speedy Trial Act provides that "the trial of a defendant . . . shall commence within seventy days."[207] The statute, however, contains numerous bases for tolling and

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[200] *Barker*, 407 U.S. at 531.

[201] *Id.* Since *Barker*, the Court has set a high bar for speedy trial claims based on clogged courts and overwhelmed public defenders, *see* Vermont v. Brillon, 556 U.S. 81, 85 (2009) ("[T]he [s]tate may bear responsibility if there is 'a breakdown in the public defender system.'"), and has not rendered a decision that provides an example of what kind of facts would satisfy that standard, *see* Boyer v. Louisiana, 569 U.S. 238, 241–42 (2013) (Sotomayor, J., dissenting) (denying cert. in case raising issue).

[202] *See* Amar, *supra* note 184, at 662 (noting that the Speedy Trial Clause does not contain a right to an unspeedy trial).

[203] *See* People v. Callahan, 604 N.E.2d 108, 113 (N.Y. 1992) (holding that plea bargains cannot impair the defendant's ability to appeal constitutional speedy trial claims, in part because doing so would compromise the public's interest in speedy trials); Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113, 178–79 (1999) (discussing *Callahan*). This only applies to speedy trial issues litigated and lost before the plea was entered. *See* People v. Alexander, 970 N.E.2d 409, 420 (N.Y. 2012) (holding that pending writs and motions need not be decided following a defendant's guilty plea).

[204] *See* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT 222–24 (1992) (discussing the institutional and strategic reasons for delay in criminal proceedings).

[205] *See id.* at 222 (noting that prosecutors and defense attorneys generally agree to a continuance whenever they are unable to resolve calendar differences).

[206] King, *supra* note 203, at 179–80 (arguing that liberally allowing defendants to waive their right to a speedy trial does not advance defendants' interests and reduces the public's interest to a mere "bargaining chip").

[207] 18 U.S.C. § 3161(c)(1) (2012).

extending that clock,[208] and charges the defendant with the burden of moving for and proving a statutory speedy trial violation.[209]

D. *Not Harmless*

The defendant's representative role offers a partial cipher for why the Court exempts juror discrimination, speedy trial, and public trial violations from "harmless error" review on appeal.[210] Constitutional errors need not be reversed automatically if they "did not contribute to the" guilty verdict.[211] The Court, however, has held that only trial errors are subject to such "harmless error" review while "structural errors" are not.[212] A "structural error" is one "affecting the framework within which the trial proceeds" as opposed to one that occurs "in the trial process itself" such that it can be evaluated in light of all of the other evidence presented by the state.[213] Discriminatory juror selection along with "speedy and public trial" rights have been treated as "structural."[214] Were they not, it would usually be impossible to demonstrate that most violations contributed to a guilty verdict.[215]

The distinction between "trial" and "structural" errors is confusing for a number of reasons that commentators have documented.[216] The Court has, for example, defined "structural errors" as ones whose effect on outcome are "hard to measure" or result in "fundamental unfairness" regardless of outcome.[217] A fair cross-section violation is an example of the former and "failure to give a

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[208] *Id.* § 3161(h).

[209] *Id.* § 3162(a)(2).

[210] Fourth Amendment suppression motions are subject to harmless error review. *See* Rose v. Clark, 478 U.S. 570, 576 (1986) (noting that the "harmless-error" standard has been applied to many constitutional errors and citing Fourth Amendment cases). This makes sense since, unlike juror discrimination, speedy trial, and public trial, suppression always involves evidence bearing on the defendant's guilt.

[211] Chapman v. California, 386 U.S. 18, 24 (1967).

[212] *See* Weaver v. Massachusetts, 137 S. Ct. 1899, 1907 (2017) (noting that structural errors "should not be deemed harmless beyond a reasonable doubt").

[213] Arizona v. Fulminante, 499 U.S. 279, 310 (1991).

[214] *See Weaver*, 137 S. Ct. at 1908, 1911 (noting that public trial violations are structural errors and successful claims of discriminatory jury selection receive automatic relief). The Supreme Court has not explicitly called *Batson* violation "structural," but lower courts have. *See, e.g.*, Crittenden v. Chappell, 804 F.3d 998, 1003 (9th Cir. 2015) ("[I]t is well established that a Batson violation is structural error."); Tankleff v. Senkowski, 135 F.3d 235, 248 (2d Cir. 1998) (holding that a *Batson* claim "is a structural error that is not subject to harmless error review").

[215] *See Weaver*, 137 S. Ct. at 1908 ("[A]n error has been deemed structural if the effects of the error are simply too hard to measure."). These values are only loosely tied to the determination of guilt or innocence. *See supra* Parts III.A, C.

[216] *See* Justin Murray, *A Contextual Approach to Harmless Error Review*, 130 HARV. L. REV. 1791, 1809, 1809 n.103 (2017) (summarizing literature).

[217] *See Weaver*, 137 S. Ct. at 1908.

reasonable-doubt instruction" an example of the latter.[218] That a constitutional violation's effect on outcome is difficult to measure implies that it is important for reasons other than its impact on the outcome. Similarly, "fundamental fairness" implies that the right is important beyond its bearing on the result. The two expressions simply re-beg the question of why a particular right is important.

The Court has acknowledged that some structural errors protect interests other than the reliability of a verdict.[219] But the Court has not forthrightly explained why some constitutional interests are more important than others. The analysis in the preceding sections suggests the presence of third-party interests may be significant. Third-party interests will often have had little or no bearing on the question of defendant's criminal culpability but depend on defendants to be vindicated.[220] If defendants are to vindicate significant third-party interests, it makes little sense to limit that role to the trial court alone. Were defendants not to continue playing that role on appeal, it would effectively undermine their ability to play the role at all. If a constitutional violation were not reversible on appeal, then there would be little (or no) reason for lower courts to be vigilant about those violations. There is, in other words, little practical option but to treat as "structural" those rights implicating third-party interests that defendants are charged with litigating in a representative capacity.

IV. THE REPRESENTATIVE DEFENDANT

The discussion in Part II sought to destabilize our settled understandings of defendants' role in our criminal justice systems. That, in turn, invites two questions: why have defendants been tasked with playing this role (against the grain of the public's perception of a defendant's role, no less) and is it normatively desirable to foist this role upon defendants as opposed to some other entity, if anyone at all?

The answers to these two questions are first, representative defendants help overcome some of the same structural impediments to the vindication of public harms that representative plaintiffs do in the civil context. That account goes far in answering the second question. It is normatively desirable for defendants to play this role because there is no other actor available to adequately vindicate these harms. Criminal defendants are also demographically representative of those in poor, minority communities that bear the punitive brunt of American criminal justice policy.

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[218] *See id.* at 1911 (citing Vasquez v. Hillery, 474 U.S. 254, 263 (1986); Sullivan v. Louisiana, 508 U.S. 275, 279 (1993)).

[219] *See id.* at 1908 (noting that one such example is the interest in allowing defendants to decide for themselves how best to protect their liberty).

[220] *See id.* at 1910 (noting that the right to a public trial protects some third-party interests unrelated to protecting defendants from unjust conviction).

A. *Representative Plaintiffs and Representative Defendants*

Law scholars have spilt considerable ink exploring questions related to representative plaintiffs but have by and large overlooked the question of representative defendants. This is both because of the civil-criminal divide,[221] and the structural differences between the remedies that representative plaintiffs and defendants may seek. Nonetheless, as Daniel Meltzer's singular treatment suggests, analyzing the parallels can be revealing.[222]

Courts and commentators have noted that representative actions by plaintiffs help overcome structural impediments that prevent individual plaintiffs or the government from vindicating significant harms. The impediments include information deficits, political capture, lack of regulatory/political will, and collective action challenges.[223] In the civil context, there are various representative devices for overcoming these impediments. Rules permitting class actions are one such procedural device.[224] Civil rules allow a plaintiff to litigate on behalf of unnamed parties where many individuals have suffered similar injuries inflicted by a defendant.[225] The representative plaintiff's injury must typify those suffered by the group at large and implicate legal and factual questions common to the group.[226] The representative plaintiff, if successful, is usually afforded some compensation in excess of that required for make-whole relief.[227] The extra sum is intended to compensate for initiating the suit and seeing it through.[228]

Permitting a representative plaintiff to litigate on behalf of unnamed third parties, at least in theory, solves the related problems of low-value harms and collective action problems. Where an individual's injury generates loss that is less than the anticipated cost of the injury, the rational plaintiff will not bring an individual suit.[229] Permitting claim aggregation creates incentives for individual plaintiffs who have sustained such injuries to identify one another and coordinate.[230] Allowing such plaintiffs to proceed as a group also promotes

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[221] *See* Sklansky & Yeazell, *supra* note 159, at 683, 688 (noting that although the civil and criminal bars are largely separate today, this was not always the case).

[222] Meltzer, *supra* note 9, at 295, 328 (discussing the role of civil plaintiffs and criminal defendants in obtaining deterrent remedies).

[223] *See* J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1149–50, 1153–58 (2012) (discussing how the above factors have limited the ability of regulatory agencies to redress private harms).

[224] *See* Bryant Garth et al., *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353, 356 (1988).

[225] *See* FED. R. CIV. P. 23 (governing class actions).

[226] *See id.* at 23(a).

[227] *See* JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 6:28 (16th ed. 2019) (noting "near-universal recognition that it is appropriate for the court to approve an incentive award payable from the class recovery" for class representatives).

[228] *See id.*

[229] *See id.* §1:1.

[230] *See id.*

judicial efficiency by saving courts from having to decide claims on a piecemeal basis.[231]

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

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

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[231] *See id.*

[232] *See, e.g.*, Associated Indus. of N.Y. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943) (holding Congress may "empower[] any person, official or not, to institute a proceeding . . . even if the sole purpose is to vindicate the public interest"); Glover, *supra* note 223, at 1156, 1158−59 (discussing private enforcement in employment, securities, consumer protection regulations); Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 186 ("Virtually all modern civil rights statutes rely heavily on private attorneys general.").

[233] *See* Glover, *supra* note 223, at 1153–58, 1154 n.57; Karlan, *supra* note 232, at 186.

[234] *See* John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 216, 235 (1983).

[235] *See id.* at 216−18.

[236] *See id.*

[237] *See* David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1925 n.31 (2014); Glover, *supra* note 223, at 1154–56.

[238] *See* Engstrom, *supra* note 237, at 1914–15 (noting the qui tam provisions of the False Claims Act authorize private individuals, called "relators," to bring suit).

[239] *See* David Freeman Engstrom, *Harnessing the Private Attorney General: Evidence from Qui Tam Litigation*, 112 COLUM. L. REV. 1244, 1269–73 (2012) (explaining how Federal Claims Act qui tam provisions function).

[240] *See id.*

[241] *See id.* at 1275–77 (summarizing critiques of incentives created for relators).

tam provision creates an incentive for the employee to use her insider knowledge to rectify the wrong perpetrated against the government.[242]

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

Similarly, absent an arrest and prosecution, individuals whose Fourth Amendment rights have been violated have no easy way of discovering the violation.[245] The victim may leave the encounter with an intuition that her rights were violated, but it may be difficult to say with certainty. For example, the Fourth Amendment authorizes probabilistic judgment on the part of police—the fact that no evidence of crime was discovered (or no arrest made) does not necessarily mean that the police violated the Fourth Amendment.[246] Police are constitutionally entitled to conduct a search or seizure provided that they have an appropriate quantum of suspicion.[247] An officer could have sufficient information to satisfy the constitutional standard of suspicion but be wrong as to the ultimate question of whether the targeted individual actually possessed evidence of a crime.[248]

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[242] *See id.*

[243] *See* Linda Greenhouse, *The Supreme Court's Gap on Race and Juries*, N.Y. TIMES (Aug. 6, 2015), https://www.nytimes.com/2015/08/06/opinion/the-supreme-courts-gap-on-race-and-juries.html [https://perma.cc/C2BP-W7S6] (arguing that while *Batson v. Kentucky* prohibited racial discrimination in jury selection by requiring prosecutors to provide race-neutral reasons for their peremptory challenges to strike jurors, prosecutors have learned to "game the system by providing explanations that are accepted as persuasive to judges who appear all too eager to be persuaded").

[244] *See* Powers v. Ohio, 499 U.S. 400, 405 (1991) (noting that a pattern of excluding minority jurors can create an inference of discriminatory intent).

[245] *See, e.g.*, Daniel Zwerdling, *Your Digital Trail: Does the Fourth Amendment Protect Us?*, NPR (Oct. 2, 2013), https://www.npr.org/sections/alltechconsidered/2013/10/02/228134269/your-digital-trail-does-the-fourth-amendment-protect-us [https://perma.cc/37BC-5E3Y] (discussing the ease with which the government can acquire information, particularly from computers, and the difficulty in tracking law enforcement's searches).

[246] *See* Illinois v. Gates, 462 U.S. 213, 238 (1983) (finding "probable cause" satisfied if observable facts suggest "a fair *probability* that . . . evidence of a crime will be found in a particular place") (emphasis added).

[247] *See id.* at 236.

[248] *See id.* at 246 ("[P]robable cause does not demand the certainty we associate with formal trials. It is enough that there [is] a fair probability [of finding evidence of wrongdoing].").

Nor must the police articulate the constitutional basis for the stop to the target contemporaneously with its execution.[249] The target, like an excluded juror, may have an intuition that her rights were violated, but have little opportunity to validate the intuition. Officers themselves may not commit to specific Fourth Amendment rationale for the stop and search until well after it occurs, if ever.[250] Officers will assert a rationale when crafting a narrative account of the encounter in an arrest report, but in the absence of an arrest, such a report may never be created.

For most speedy trial violations and many public trial violations, it may be difficult to identify third party beneficiaries specifically. The harm may be diffuse. The public has a general interest in the expeditious processing of criminal cases, but delays in any specific case will only compromise that interest on the margins—no one without a tie to the case will be any wiser for the delay.[251] The same is true for violations of Sixth Amendment public trial. For those who have no tie to a case, but only an informational interest in learning what is going on in criminal courts generally, they will be no wiser for the public trial violation in a specific case.[252]

The second reason why representative defendants are analogous to representative plaintiffs is that both make up for the absence of incentives for individuals to bring civil suits. Even when members of the public are aware that their constitutional rights have been violated, there are prohibitive logistical, legal, and financial barriers to challenging the violations. The Supreme Court noted in *Powers v. Ohio*: "Potential jurors . . . have no opportunity to be heard at the time of their exclusion. Nor can [they] easily obtain declaratory or injunctive relief when discrimination occurs . . . ."[253] The excluded juror's "small financial stake" will not justify the high costs of litigating a violation.[254]

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[249] *See* Radley Balko, *The Supreme Court's Fourth Amendment Irrelevance*, WASH. POST (May 16, 2015), https://www.washingtonpost.com/news/the-watch/wp/2015/05/16/the-supreme-courts-fourth-amendment-irrelevance/ [on file with *Ohio State Law Journal*] (portraying Ms. Cooke's interaction with police in which she was offered no explanation for a Fourth Amendment violation from law enforcement at the time of the violation).

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

[251] *See* Mary Lee Luskin & Robert C. Luskin, *Why So Fast, Why So Slow: Explaining Case Processing Time*, 77 J. CRIM. L. & CRIMINOLOGY 190, 190–92 (1986) (discussing the effects of case delays on the defendant).

[252] The importance of public trials cannot be understated. *See* Mary Jo White, Chair, U.S. Sec. and Exch. Comm'n, The Importance of Trials to the Law and Public Accountability, 5th Annual Judge Thomas A. Flannery Lecture (Nov. 14, 2013), https://www.sec.gov/news/speech/2013-spch111413mjw [https://perma.cc/MH3Y-CPP6] (noting that "the administration of justice . . . fare[s] best in the open for the public to see and to take stock of what a defendant did and what its government is doing").

[253] Powers v. Ohio, 499 U.S. 400, 414 (1991).

[254] *Id.* at 415.

The same financial impediments will exist for most Fourth Amendment and public trial violations. The financial loss associated with a brief, unconstitutional street or traffic stop is relatively low in comparison to prospective litigation costs.[255] Even where an individual is confident that she was the victim of a Fourth Amendment violation, civil litigation is unlikely because it is cost prohibitive.[256] The material harm is typically modest, the odds of recovery uncertain, and the costs of litigation high. Most Fourth Amendment violations on the street entail a relatively brief stop or a privacy intrusion that does not significantly harm the target.[257] The odds against winning will also be high absent egregious facts that are easily corroborated.[258] In civil suits, officers enjoy qualified immunity, meaning that they can only be held liable for violations of constitutional rules that were clearly established at the time of the violation.[259] This coupled with the challenge of overcoming the officer's factual account makes recovery challenging in Fourth Amendment cases.[260] All of this is to say, that the net present value of any given Fourth Amendment claim is likely low, making litigation an unattractive financial proposition. The same would be true for a defendant's supporters (and detractors) who were excluded from a part of the criminal proceeding, if they were permitted to challenge the exclusion at all.[261]

Obtaining forward-looking civil relief for Fourth and Fourteenth Amendment violations is also challenging because civil plaintiffs must demonstrate likelihood of a future injury of the same variety that they have sustained in the past.[262] Injunctive relief against future discrimination against jurors or illegal searches and seizures requires that the plaintiffs show that it is likely that they personally will be subjected to such unlawful treatment again.[263]

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

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[255] Nirej Sekhon, *Mass Suppression: Aggregation and the Fourth Amendment*, 51 GA. L. REV. 429, 454 (2017). For this reason, many civil cases against the police tend to involve "serious injury or death." *Id.*

[256] *Id.*

[257] *Id.*

[258] *See* Balko, *supra* note 249.

[259] Saucier v. Katz, 533 U.S. 194, 201–02 (2001) (defining the "clearly established" standard); Sekhon, *supra* note 255, at 454 n.154.

[260] *See* Sekhon, *supra* note 255, at 454 n.154.

[261] *See* Amar, *supra* note 184, at 678–81 (discussing how the public trial is a right for defendants and the people generally, as public trials enhance goals of accountability, "truth-seeking, confidence-enhancing, [and] innocence-protecting").

[262] Los Angeles v. Lyons, 461 U.S. 95, 105–06 (1983).

[263] *Id.*

remedies designed to reshape policy making.[264] When plaintiffs launch structural reform litigation, the point is to prompt large-scale change in an institution's decision making and behavior.[265] The remedies afforded representative plaintiffs reflect that purpose and can immerse courts in managing an institution's decision making at a granular level.[266] This has led some commentators to argue that these types of suits should be significantly curtailed or prohibited.[267] In contrast, other commentators suggest we retool our descriptive account of courts, recognizing the extent to which they make policy, not just resolve discrete legal disputes.[268]

In contrast to representative plaintiffs, representative defendants cannot obtain damages or injunctive relief. There are some instances where a third-party beneficiary receives an immediate benefit as a result of a criminal defendant's representative action. For example, where a defendant successfully challenges juror exclusion in the trial court or prevents a courtroom's closure to the public, the third party realizes immediate relief. But it will often be true that it is only defendants who benefit directly. For example, where juror exclusion is vindicated on appeal, the defendant will receive a new trial, but the excluded juror will derive no immediate benefit.[269] Similarly, if a defendant successfully excludes highly probative evidence that was obtained in violation of the Fourth Amendment, she might avoid conviction. But there is no direct benefit to any third party who has suffered a similar enforcement tactic in the past. Nor is there any guarantee that police will refrain from engaging the same misconduct in the future.

That criminal defendants' actions generate deterrent effects presupposes that judicial decisions are internalized by prosecutors and police. Whether they actually do so is another question.[270]

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[264] *See* FED. R. CIV. P. 23(b); Jill E. Fisch, *Class Action Reform,* Qui Tam*, and the Role of the Plaintiff*, 60 L. & CONTEMP. PROBS. 167, 167–68 (1997) (discussing the damages calculation in a case).

[265] *See* William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 637–40 (1982).

[266] *E.g.*, MALCOM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE 41 (1998) (describing prison reform litigation).

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

[268] *See id.* at 3, 6.

[269] *E.g.*, William T. Pizzi & Morris B. Hoffman, *Jury Section Errors on Appeal*, 38 AM. CRIM. L. REV. 1391, 1392 (2001) (discussing the remedy for a jury selection error found on appeal).

[270] *See generally* Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 373–90 (reviewing limited empirical literature regarding the deterrent effects of Fourth Amendment exclusion); Gilad Edelman, *Why Is It So Easy for Prosecutors to Strike Black Jurors?*, NEW YORKER (June 5, 2015), https://www.newyorker.com/news/news-desk/why-is-it-so-easy-for-prosecutors-to-strike-black-jurors [https://perma.cc/RRU4-BK5D] (discussing the difficulty in uncovering racial bias in prosecutors' juror strikes and the inadequacy of existing remedies). This should not be taken to mean that lasting deterrence is straightforwardly achieved through structural litigation either. *See* CHARLES R. EPP, MAKING RIGHTS REAL 15 (2009) (discussing theories for

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

B. *If Nothing Is the Next Best*

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

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

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

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achieving policy change in police use of force); Timothy D. Lytton, *Using Litigation to Make Public Health Policy: Theoretical and Empirical Challenges in Assessing Product Liability, Tobacco, and Gun Litigation*, 2004 J.L., MED. & ETHICS 556, 556 (2004) (noting that little is known about the effects of mass tort litigation on product safety, tobacco-related illnesses, and gun violence).

[271] *See* DAVID E. OLSON & SEMA TAHERI, POPULATION DYNAMICS AND THE CHARACTERISTICS OF INMATES IN THE COOK COUNTY JAIL 4 (2012).

[272] *See* Coffee, *supra* note 234, at 236, 249–50.

[273] *See* MAYER BROWN LLP, U.S. CHAMBER INST. FOR LEGAL REFORM, DO CLASS ACTIONS BENEFIT CLASS MEMBERS? AN EMPIRICAL ANALYSIS OF CLASS ACTIONS 1 (Dec. 2013), https://www.instituteforlegalreform.com/uploads/sites/1/Class-Action-Study.pdf [https://perma.cc/7E3W-PP7Y] (arguing they provide "far less benefit to individual class members than proponents of class actions assert," but there have been "few [empirical studies] to examine class action resolutions in any rigorous way").

[274] SEAN FARHANG, THE LITIGATION STATE 16 (2010).

[275] *See id.* at 34–42.

[276] *See id.* at 43–44.

bureaucracy, is often politically implausible.[277] The costs of private enforcement must thus be evaluated in light of the actual, next-best option, which may be no enforcement at all.

The biggest cost of relying on representative defendants is lost convictions. The Court has long lamented having to pay this cost for deterring constitutional violations.[278] The Court's ambivalence has morphed into outright hostility in recent decades.[279] An increasingly conservative Supreme Court has emphasized that a criminal trial's purpose is singular: to ascertain the defendant's guilt or innocence.[280] This undercuts the range of third-party interests discussed in Part II. In each of those contexts, defendants have been empowered to challenge their convictions for fear that the underlying constitutional value will go unprotected otherwise.[281]

It is difficult to imagine alternative regulatory institutions arising to vindicate the constitutional values described in Part II. Debate regarding alternative institutions has been most pitched regarding police regulation. Some commentators argue that more readily accessible civil relief would more effectively deter police than exclusion does.[282] Others have argued that more intensive administrative regulation, whether internal police-managed or external civilian-managed, would be more effective than the exclusionary rule.[283] There appears to be little appetite in any legislature for making civil relief against the police for Fourth Amendment violations more readily available. Despite considerable experimentation with civilian review of police, there is little to

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[277] *See id.*

[278] *See supra* note 70.

[279] Particularly in the Fourth Amendment context. *See supra* notes 139–49 and accompanying discussion.

[280] *See* Herring v. United States, 555 U.S. 135, 141 (2009) (noting that the exclusionary rule can impact "truth-seeking"); Rose v. Clark, 478 U.S. 570, 579 (1986) ("The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments."); Stone v. Powell, 428 U.S. 465, 488 (1976) (noting that the Court will admit unlawfully seized evidence for impeachment purposes because of the greater public interest in determining truth); Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 416 (1966) (noting that "[t]he basic purpose of a trial is the determination of truth").

[281] *See* Powers v. Ohio, 499 U.S. 400, 415 (1991) (finding that, without a defendant to vindicate racial discrimination in the exercise of peremptory challenges, the excluded juror would "possess[] little incentive to set in motion the arduous process needed to vindicate his own rights"); Gannett Co. v. DePasquale, 443 U.S. 368, 384 (1979) (observing American criminal justice presupposes that public's interests in speedy and public trial is "fully protected by the participants in the litigation"); Mapp v. Ohio, 367 U.S. 643, 655 (1961) (finding without exclusionary rule, the Fourth Amendment "would be 'a form of words,' valueless and undeserving of mention in a perpetual charter of inestimable human liberties").

[282] *See, e.g.*, Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1, 22–23 (2001); Richard E. Myers II, *Fourth Amendment Small Claims Court*, 10 OHIO ST. J. CRIM. L. 571, 590–91 (2013).

[283] *See* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 423–29 (1974).

suggest it has resulted in appreciable deterrence of constitutional (or other) violations.[284] And the police themselves have also proven resistant to self-regulation, at least around searches and seizures that do not implicate excessive force questions.[285] The pervasiveness and strength of police unions also dim the prospect of more vigorous legislative and regulatory approaches materializing anytime soon.[286]

With juror discrimination, open trials, and speedy trials, the constitutional norms directly implicate the work of courts. It is hard to imagine an institution outside the courts playing a regulatory role. Courts depend upon the parties that appear before them to raise issues. The public's underlying interests in these constitutional values will be best protected if all the parties before the court have significant incentives to raise these issues. For criminal defendants to have incentive to do so, tethering the constitutional norm to the possibility of avoiding conviction is the most obvious carrot. While there is undoubtedly a social cost here, it may not be as dramatic as the Court has often suggested.[287] Most criminal cases are not grisly, headline grabbers. For low-level narcotics crimes, property crimes, and so on, a lost conviction is not such a terrible cost to bear. Indeed, criminal court judges may view such cases as fungible and be prepared to dismiss for all manner of reasons unrelated to innocence, not least of which is simply clearing their dockets.[288]

There is a deep moralistic undercurrent to the Supreme Court's skepticism of defendants representing third-party interests in criminal cases. In its view, allowing a defendant to avoid conviction for a reason other than acquittal is a "windfall."[289] This is to take the defendant as morally undeserving simply by virtue of having been accused. This assumption does not sit comfortably with due process notions of innocent until proven guilty.

The view that criminal defendants are unrepresentative is also sociologically out of step with the experience of millions of people. Poor men of color are more likely to have been criminal defendants at some point in their lives. A recent study concluded that, as of 2010, nearly one-third of all adult

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[284] Stephen Clarke, *Arrested Oversight: A Comparative Analysis and Case Study of How Civilian Oversight of the Police Should Function and How It Fails*, 43 COLUM J.L. & SOC. PROBS. 1, 17, 22, 44 (2009).

[285] *See* GEORGE L. KELLING & CATHERINE M. COLES, FIXING BROKEN WINDOWS 180–83 (1996); Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 504–08 (1990).

[286] Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 747–58 (2017).

[287] Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 8 AM. B. FOUND. RES. J. 585, 589 (1983) (stating that the Burger Court "questioned whether the costs [of the exclusionary rule] were as great as the critics claimed").

[288] *See* Sekhon, *supra* note 255, at 461–62, 462 n.190.

[289] *See supra* note 116 and accompanying discussion.

male African Americans had a felony conviction.[290] That means that the proportion who had at some point been a criminal defendant in their lives is even higher if one includes both felonies and misdemeanors.[291] The majority of criminal defendants—some 80%—are poor.[292] Extrapolating from these demographic realities suggests that in many poor, minority communities the experience of having been a criminal defendant is broadly representative of at least male experience.[293]

V. IMPLICATIONS

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

A. *Balancing the Public's Perception of Criminal Justice*

Greater awareness of defendants' representative role might prompt the public to view defendants as an extension of "the people" rather than as antagonistic to them. This in turn could help temper the harshness that has defined American criminal justice.[294] That harshness has been driven in part by two generations worth of political rhetoric that equate "the people" with victimhood.[295] The current political moment is fertile for reframing criminal defendants and criminal justice more generally. The decreased salience of crime in Americans' perceptions of social problems might make them receptive to

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[290] Sarah K. S. Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 DEMOGRAPHY 1795, 1814 (2017).

[291] *See* Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 737 (2018) (estimating 13.2 million misdemeanors filed every year in United States).

[292] Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031, 1034 n.12 (2006).

[293] For example, in 2011, one-third of admissions to Cook County jail in Chicago were from one African American section of town, the South Side. OLSON & TAHERI, *supra* note 271, at 4; *Race and Ethnicity in South Chicago, Chicago, Illinois (Neighborhood)*, STAT. ATLAS, https://statisticalatlas.com/neighborhood/Illinois/Chicago/South-Chicago/Race-and-Ethnicity#figure/race-and-ethnicity [on file with *Ohio State Law Journal*] (finding 78.5% of South Chicago's population is "Black"). Two-thirds of the total admissions were of African Americans. OLSON & TAHERI, *supra* note 271, at 4. Arrest does not necessarily mean that one will become a defendant, but it is a pretty good proxy. *See id.* at 7.

[294] *See generally* WHITMAN, *supra* note 16, at 49–67 (describing American harshness from 1970s on in comparison to contemporary European and American policy before 1970).

[295] *See* JONATHAN SIMON, GOVERNING THROUGH CRIME 77 (2007).

rethinking where "the people" sit in a criminal courtroom.[296] Eroding the public's reflexive association with victims and the State's prosecutorial function would make the ground even more fertile than it already is for criminal justice reform.[297]

The representative defendant is a corrective to the victim-centered conception of criminal justice that took hold in the late-twentieth century. That shift had begun to take clear shape by the late 1960s,[298] and congealed in response to the increased salience of crime in American politics.[299] As historians and criminologists have documented, those perceptions were a function of not only increased crime rates,[300] but broad social and economic dislocations.[301] De-industrialization, increased physical mobility, foreign wars, and the civil rights movement had destabilized America's post-war social order.[302] Many white voters' anxiety found expression in the language of crime control.[303] President Johnson's declaration of "war on crime" was a direct response to these anxieties.[304] His war on crime quickly collapsed into the thinly racialized "law and order" platform that had emerged on the political right in the 1960s and gained deep traction with President Nixon's election in 1968.[305] In the decades to follow, being tough on crime became a rhetorical cornerstone of American politics.[306]

Embedded in the law and order platform was a critique of criminal justice actors as overly committed to an ineffective rehabilitative ideal that rewarded offenders with undeserved leniency.[307] Related was a transparency critique:

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[296] *Americans' Concerns About National Crime Abating*, GALLUP (Nov. 7, 2018), https://news.gallup.com/poll/244394/americans-concerns-national-crime-abating.aspx [https://perma.cc/5P4Y-D3PC] (finding an 11% drop in Americans viewing crime as a very or extremely serious problem from 2017 to 2018).

[297] *See* Caren Myers Morrison, *Foreword: Criminal Justice Responses to the Economic Crisis*, 28 GA. ST. U. L. REV. 953, 958 (2012).

[298] *See* SIMON, *supra* note 295, at 91 (describing public anxiety during the 1960s).

[299] *See* DAVID GARLAND, THE CULTURE OF CONTROL 90–92 (2001) (attributing the crime rate increase after 1960 to structural factors in American society).

[300] *See id.* at 90.

[301] *See id.* at 81–89; SIMON, *supra* note 295, at 22–25; WHITMAN, *supra* note 16, at 49.

[302] *See* ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME 32 (2016) (arguing that President's Johnson's "War on Poverty" and subsequent "War on Crime" shared the same assumptions regarding poor African Americans' criminality and the same goal of controlling them).

[303] *See id.*

[304] *See id.*

[305] *See* MICHAEL W. FLAMM, LAW AND ORDER 174–75 (2005); HINTON, *supra* note 302, at 134–40.

[306] *See, e.g.*, SIMON, *supra* note 295, at 58–59 (describing Bill Clinton's defeat of George H.W. Bush in 1992 presidential election).

[307] *See* GARLAND, *supra* note 299, at 35, 59 (finding the "gap between 'bark' and 'bite'" sustainable so long as public did not notice it); WHITMAN, *supra* note 16, at 54. The rehabilitative ideal came under attack from the left as well; that critique focused on the

leniency was the product of an opaque and clubby culture among criminal justice professionals.[308] A host of reforms were advanced with a strong and steady drift toward greater harshness. Mandatory minimum sentences, the expansion of narcotics offenses, and increased funding for police and prosecutors were hallmarks of tough on crime politics.[309] The notion of "victims' rights" dovetailed readily with this policy agenda.[310]

The victims' rights movement arose in the late 1970s as part of America's shift towards harsher criminal justice policy.[311] Victims' rights advocates sought to make the criminal justice process more responsive to victims' interests.[312] These advocates viewed prosecutors as the best positioned and most amenable to advancing their cause.[313] The impetus for the victims' rights movement came from the perception that criminal justice traded victims' interest in favor of bureaucratic expediency which worked to the advantage of defendants.[314] The movement spawned a host of legal and policy innovations that reshaped the practice of criminal justice.[315] The right to make victim impact statements during sentencing, the creation of public victim compensation funds, and the creation of victim outreach professionals in prosecutors' offices are all examples of victims' rights reforms.[316]

More than any policy reform however, the victims' rights movement created a victimological zeitgeist that came to define how the public viewed itself. The

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unequal distribution of leniency to the disadvantage of socially marginal groups. *See* GARLAND, *supra* note 299, at 56–57; WHITMAN, *supra* note 16, at 54.

[308] *See* GARLAND, *supra* note 299, at 56–57.

[309] *See* WHITMAN, *supra* note 16, at 56–58; Lauren-Brooke Eisen, *The 1994 Crime Bill and Beyond: How Federal Funding Shapes the Criminal Justice System*, BRENNAN CTR. FOR JUSTICE (Sept. 9, 2019), https://www.brennancenter.org/our-work/analysis-opinion/1994-crime-bill-and-beyond-how-federal-funding-shapes-criminal-justice [https://perma.cc/XJ9P-QXVR].

[310] *See* GARLAND, *supra* note 299, at 11–12.

[311] *See* MARIE GOTTSCHALK, CAUGHT 149 (2015); WHITMAN, *supra* note 16, at 54.

[312] *See, e.g.*, *Our Work*, NAT'L CTR. FOR VICTIMS OF CRIME, https://victimsofcrime.org/about-us/our-work [https://perma.cc/2UJE-Z688] (detailing the National Center for Victims of Crime's mission and advocacy).

[313] *See, e.g.*, U.S. DEP'T OF TRANSP., PROSECUTORS WORKING WITH VICTIM ADVOCATE GROUPS 1 (June 2010), https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/811244.pdf [https://perma.cc/8GXX-GEMK] (describing the U.S. Department of Transportation's policies for working with victims of impaired driving accidents).

[314] *See* GARLAND, *supra* note 299, at 11 ("Any untoward attention to the rights or welfare of the offender is taken to detract from the appropriate measure of respect for victims.").

[315] *See, e.g.*, Jill Lepore, *The Rise of the Victims'-Rights Movement*, NEW YORKER (May 14, 2018), https://www.newyorker.com/magazine/2018/05/21/the-rise-of-the-victims-rights-movement?verso=true [https://perma.cc/Y6MA-JW6M] (describing the achievements of the victims' rights movement).

[316] *See Victims' Rights*, NAT'L CTR. FOR VICTIMS OF CRIME, https://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/victims%27-rights [https://perma.cc/Q9YX-E27E]; *What Is a Victim Advocate?*, NAT'L CTR. FOR VICTIMS OF CRIME, https://victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/what-is-a-victim-advocate- [https://perma.cc/U5RL-EJJQ].

figure of the victim came to typify the vulnerability of the average citizen,[317] with the prosecutor and police cast as their representatives.[318]

Jonathan Simon has argued that this broad, public identification with victims accounts for how the American State has "govern[ed] through crime."[319] By stoking public fear of crime, the State "nudges out other kinds of opportunities" to frame public policy dilemmas in nonpunitive terms.[320] Over generations, the public has come to view a host of social problems in criminal justice terms rather than social welfare, public health, or other terms.[321] In this paradigm, not only does criminal justice grow harsher, its vocabulary comes to dominate how the public conceptualizes a range of others, most of whom are poor and minority.[322] Defendants come to stand in as the antithesis of the people.[323]

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

B. *Enabling the Representative Defendant*

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

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317 GARLAND, *supra* note 299, at 11 ("The victim is now . . . a much more representative character, whose experience is taken to be common and collective, rather than individual and atypical."); SIMON, *supra* note 295, at 77 (finding citizenry is classified "into types of actual and potential [crime] victims").

318 *See* SIMON, *supra* note 295, at 33, 76.

319 *Id.* at 5.

320 *Id.* at 21.

321 *See id.* at 76.

322 *See* Dana Hatic, *Institutionalized Othering in Terms of Criminal Justice, Race, and Gender*, CTR. FOR INTERFAITH REL. (May 16, 2015), https://centerforinterfaithrelations.org/institutionalized-othering-in-terms-of-criminal-justice-race-and-gender/ [https://perma.cc/V34S-JKE7] (discussing the impact of "othering" and "otherness" in criminal justice reform efforts).

323 *See* GARLAND, *supra* note 299, at 11 ("A zero-sum policy game is assumed wherein the offender's gain is the victim's loss . . . .").

transparently and vigorously effect their representative role. Effectively executing the defendant's representative role has implications for how defense counsel is funded and the availability of procedural tools to enable that role. Such changes may in turn prod deeper thinking about the kinds of systemic harms defendants and their counsel should be empowered to challenge in criminal courts.

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

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

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

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

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[324] *See supra* Part III.A.

[325] *See* Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CALIF. L. REV. 383, 410–20 (2007).

[326] *Id.*

[327] *See id.* at 425–26.

[328] *Id.*

[329] *See* Sekhon, *supra* note 255, at 478.

[330] *See id.*

[331] *See id.*

greater the likelihood that police will learn of it and internalize its lesson.[332] As I have discussed at length elsewhere, what constitutes a "pattern" of police misconduct may be different in the criminal context than it would be in civil context and procedural rules ought to reflect those differences.[333]

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

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

For example, the Supreme Court has hinted that dismissal might not be an appropriate remedy for a selective enforcement claim brought under the Fourteenth Amendment in a criminal case.[334] Defendants who bring selective enforcement or prosecution claims contend that they would never have been subject to criminal prosecution were it not for the prosecutor's or police's racially discriminatory exercise of discretion.[335] The Court is generally loathe to "suppress" the person—in that vein, the Court has held that the Due Process Clause does not compel such a remedy where an individual's presence in court was brought about unconstitutionally.[336] But equal protection claims implicate unique third-party interests and thus warrant that defendants receive a dismissal remedy.

When a criminal defendant brings an equal protection challenge by virtue of her membership in a protected group, the practice typically inures to the disadvantage of the protected group. First, the challenged practice heaps additional stigma on group members by virtue of their membership. In *Batson*, the Court noted that "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community."[337] Similarly, selective enforcement based on race reproduces stereotypical notions of black (or other minority) criminality that stigmatizes the larger group.[338] But community members would not have standing to challenge the selective enforcement without themselves having been enforced against. Nor are those engaged in criminal misconduct likely to reveal themselves in order to

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

[333] *See* Sekhon, *supra* note 255, at 478.

[334] *See* United States v. Armstrong, 517 U.S. 456, 461 n.2 (1996). Of the few published lower court opinions available, some have suggested that dismissal is an appropriate remedy. *See, e.g.*, United States v. Mumphrey, 193 F. Supp. 3d 1040, 1046–47 (N.D. Cal. 2016) (summarizing authority).

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

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

[337] Batson v. Kentucky, 476 U.S. 79, 87 (1986).

[338] *See* BERNARD E. HARCOURT, AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE 152–55 (2007); *see also Mumphrey*, 193 F. Supp. 3d at 1055 (noting selective enforcement's harm to society).

seek injunctive relief.[339] Any deterrent effect must be achieved through litigation in criminal cases. Dismissal should be the remedy.

Systemic Data and Discovery. Effectively bringing systemic challenges in criminal cases requires the availability of data regarding systemic practices. With proper incentives,[340] defense counsel may be more diligent in gathering information regarding police, prosecutor, and court practices that harm defendants as a class and the public. For example, defenders might be able to identify patterns of Fourth Amendment violations by recording and cross-referencing clients' accounts of stops over time. Defenders might also, over time, track prosecutors' use of peremptory challenges in different cases along with the overall demographic profile of jury venires. A defender agency that took defendants' representative role seriously would, in fact, track all information available to it that might give rise to constitutional, or any other systemic, claims.

If defense counsel were to pursue its representative role more aggressively, this could help create incentives for prosecutors and courts to collect systemic data more meticulously. The Constitution, of course, requires prosecutors to produce any evidence that is materially exculpatory.[341] It is undecided whether that obligation extends to evidence that is germane to Fourth Amendment suppression, but it may be.[342] That obligation, however, does not extend to prosecutor and police enforcement and charging practices.[343] Nor does it apply to information generated by courts themselves.[344] To the extent that judicial practices such as selecting jury venires and closing courtrooms have constitutional significance, courts need not collect and analyze this information let alone disclose results to defense counsel in criminal cases. This disserves defendants and the third-party interests they represent. Courts should be more transparent with information regarding their own systemic practices, supplying it liberally to defense counsel and the public.

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

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[339] German Lopez, *The Great Majority of Violent Crime in America Goes Unsolved*, VOX (Mar. 1, 2017), https://www.vox.com/policy-and-politics/2017/3/1/14777612/trump-crime-certainty-severity [https://perma.cc/C8RA-NK46] (discussing the percentages of crimes going unsolved).

[340] *See infra* notes 349–55 and accompanying discussion.

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

[342] *See* United States v. Harmon, 871 F. Supp. 2d 1125, 1152 (D.N.M. 2012), *aff'd*, 742 F.3d 451, 457−58 (10th Cir. 2014) (describing circuit split on the issue).

[343] *See* United States v. Armstrong, 517 U.S. 456, 461 n.2 (1996); *Brady*, 373 U.S. at 87 (finding that the prosecutor must only turn over exculpatory evidence alone).

[344] *Brady*, 373 U.S. at 87 (stating the obligation placed on the prosecutor).

II.[345] Allowing defendants and prosecutors to bargain those rights away may undermine third parties' interest in seeing the issue litigated and resolved. Routinely forsaken speedy and public trial rights may contribute to a slow and opaque criminal justice system. Waived suppression claims forgo deterrence. And for pleas entered following jury selection, improperly excluded jurors' interests will not be vindicated.

Legislatures and courts could restrict defendants' ability to waive such rights, effectively taking them off the table for plea bargains. New York has already done this in a limited way for speedy trial issues litigated before a plea.[346] Some jurisdictions allow defendants to appeal Fourth Amendment suppression issues following a plea.[347] Limiting waivers should not interfere with either defendants' or prosecutors' core incentives to plea bargain in most cases: defendants seek to avoid harsher post-trial punishment and prosecutors seek to avoid expending resources on trial practice.[348] Limiting waiver of course supposes that defense counsel, who are ordinarily resource strapped, will follow through on litigating non-waivable constitutional issues. Additional incentives may be needed to get them to do so.

Defender Funding. The suggestions above would have already-strapped public defenders take on additional advocacy responsibilities. That will require additional financial support for defenders. Public acceptance of the defendant's representative role could help bolster arguments for that funding. In the civil context, specific financial incentives have been created to induce private attorneys to take up representative actions—fee shifting statutes and contingent fee arrangements are examples.[349] There are, of course, no parallel arrangements for defense counsel. Many public defenders scarcely have the resources necessary to represent their individual clients, let alone to vindicate third-party interests.[350] Specific resources could be made available to defenders who take up specified representative actions. But, in the main, public defenders should simply be funded adequately.

The adequacy of states' support for public defenders has been a persistent dilemma since the Supreme Court declared a Sixth Amendment right to counsel.[351] *Gideon v. Wainwright* obliges states to fund public defense, but the Court has left it to states, which have taken very different approaches to

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345 *See supra* Part II.

346 *See supra* note 203.

347 *See* FED. R. CRIM. P. 11(a)(2) (permitting conditional plea with government consent).

348 *See* Russell D. Covey, *Plea Bargaining and Price Theory*, 84 GEO. WASH. L. REV. 920, 924–25 (2016).

349 *See supra* notes 234–40 and accompanying discussion.

350 *See* Richard A. Oppel, Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html [https://perma.cc/J2LR-BPR3].

351 *See* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases: Still a National Crisis?*, 86 GEO. WASH. L. REV. 1564, 1565–66, 1565 n.5 (2018).

financing criminal defense.[352] At one end of the spectrum, some states have created defender agencies while at the other, states have left it to private attorneys who are paid piecemeal by the case.[353] The latter arrangement is widely regarded as the least effective. And that is doubly true for facilitating defendants' representative role. The attorney who receives a fixed fee per case,[354] regardless of outcome, has little incentive to do anything but the bare minimum.

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

VI. CONCLUSION

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

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[352] *See id.* at 1579–80.

[353] *See id.* at 1580.

[354] *See id.* at 1590.

[355] *See* Lauren Sudeall Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197, 1198, 1201, 1220 (2013) (advocating for an equal protection-driven approach to defense funding).