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THE SYSTEMIC-FAILURE DOCTRINE

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INTRODUCTION

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

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

² Compare Joanna C. Schwartz, The Case Against Qualified Immunity, 93 NOTRE DAME L. REV. 1797, 1800 (2018) (arguing that the Supreme Court should move away from its affinity for qualified immunity without fearing a “parade of horribles were qualified immunity eliminated”), with Joanna Schwartz, The Supreme Court is Giving Lower Courts a Subtle Hint to Rein in Police Misconduct, THE ATLANTIC (Mar. 4, 2021), https://www.theatlantic.com/ideas/archive/2021/03/the-supreme-courts-message-on-police-misconduct-is-changing/618193 [https://perma.cc/H2TB-54T9] (noting that “in the past few months, following a summer of protests against police violence, the Supreme Court seems to be quietly changing its message” on qualified immunity).
the-wall topics like defunding local police departments. And, of course, much of that attention has come as criticism. Many Americans resist the position that American criminal justice is beset by systemic racism or breakdown. Much skepticism about “systemic” breakdown is rooted in a perception that police-involved shootings are infrequent nationwide and a hunch that systemic breakdowns in criminal justice are hard to square with the nation’s racial progress since the Civil Rights Movement.


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

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

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

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

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

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

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

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

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

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

\(^{14}\) See infra Section III.A.
\(^{15}\) See infra Part III.
on narrow grounds and under indisputably egregious facts. Part III turns to that set of cases that fall just outside the confines of the systemic-failure doctrine where civil plaintiffs seek systemic relief for systemic injury, as opposed to individualized relief. As a general matter, the Court has used Article III standing principles instead of reaching the question of whether theoretical avenues of relief exist. Given the practical shortcomings of the systemic-failure doctrine, Part IV anticipates potential counterarguments to the scope of the systemic-failure doctrine and gestures toward several avenues of reform that would actualize the doctrine for defendants.

I. SYSTEMIC FAILURE AS A CRIMINAL JUSTICE CONCEPT

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

A. Academic Accounts

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

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

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

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


\textsuperscript{18} Id. at 874-95.

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

\textsuperscript{20} See Barry Friedman & Elizabeth G. Janszky, Policing’s Information Problem, 99 TEX. L. REV. 1 (2020).

\textsuperscript{21} Id. at 45-70.
prosecutors, or officers, interact with the broken systems of criminal justice that the authors seek to rectify. It follows that courts do not play a major role in these administratively focused accounts.

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

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

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23 *Id.* at 144; see also infra Section II.B (discussing *Herring* as part of the Court’s systemic-failure jurisprudence). Under the good-faith exception to the exclusionary rule, an unreasonable search may not trigger the Fourth Amendment exclusionary rule if police acted “in objectively reasonable reliance” on, for example, a faulty warrant. *Herring*, 555 U.S. at 142.
25 *Id.* at 591-94.
based approaches have also been recognized as particularly useful in addressing the systemic aspects of prosecutorial misconduct. For instance, the Northern California Innocence Project conducted the largest study of its kind to document the scope of prosecutorial misconduct in the state of California, reviewing more than 4,000 state and federal appellate rulings, media reports, and trial decisions.\textsuperscript{28} The empirical findings of the study revealed previously unknown patterns of recidivism, discipline, and adjudication of prosecutorial-misconduct claims.\textsuperscript{29} Many of these data-focused approaches reveal important considerations about how Supreme Court doctrine influences the phenomenon of systemic failure in criminal justice, but their conclusions focus primarily on the practical effects of the doctrine, and not the motivations or practices behind it.\textsuperscript{30}

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

\begin{footnotesize}
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\item \textsuperscript{29} See id. at 16 (summarizing the study’s findings).
\item \textsuperscript{30} Notably, the Supreme Court has shown limited solicitude to large-scale empirical studies cited by litigants. See, e.g., McCleskey v. Kemp, 481 U.S. 279 (1987) (rejecting the Baldus Study as definitive evidence that Georgia’s capital-punishment regime violates the Equal Protection Clause). Although scholars such as Tracey Meares and Bernard Harcourt argue that greater reliance on empirical studies can enhance the transparency of the judiciary’s criminal-procedure jurisprudence, they recognize that the Court’s current approach is “often marred by spotty or inconsistent application of balancing tests and by pseudo-empirical statements . . . [w]ithout seriously taking account of empirical research.” Meares & Harcourt, \textit{supra} note 16, at 735, 739.
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the framing of police reform by empowering local communities to control police governance.\(^{32}\) Simonson broadly looks to the experiences and recent history of policed communities to understand the system-wide threads that unite their various reform efforts. Bell similarly draws upon sociological research on segregation to put forward a framework for anti-segregation specific to policing.\(^{33}\) As much as the subjects and normative foci of these scholars’ work vary, they are united by how they diagnose and critique the systemic failures from a perspective of people and communities who are themselves subject to failing systems of criminal justice. In comparison to administrative law and data-driven accounts of systemic failure, these studies provide a more internal view of systemic failure in criminal justice.\(^{34}\) Because they draw more directly from the experiences and narratives of those within the criminal justice system and those fighting against it, these theories have always had a close relationship with non-academic, popular accounts of the criminal justice system. These popular and movement accounts of the phenomenon are discussed in the next Section.

**B. Popular Accounts**

At the same time that academics have been analyzing and theorizing systemic failure, similar themes have permeated popular discussions of criminal justice.\(^{35}\) In the summer of 2020,


\(^{33}\) Bell, supra note 31, at 659-87.

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

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

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


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


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

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

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48 See, e.g., Heather Mac Donald, Opinion, The Myth of Systemic Police Racism, WALL ST. J. (June 2, 2020, 1:44 PM ET) (citing David J. Johnson, Trevor Tress, Nicole Burkel, Carley Taylor & Joseph Cesario, Officer Characteristics and Racial Disparities in Fatal Officer-Involved Shootings, 116 PROC. NAT'L ACAD. SCI. U.S. 15877, 15880 (Aug. 6, 2019)), https://www.wsj.com/articles/the-myth-of-systemic-police-racism-11591119883 [https://perma.cc/C8DR-S6D8]; Riley, supra note 47 (“Police shootings have fallen precipitously since the 1970s. Upward of 95% of black homicides in the U.S. don't involve law enforcement. Empirical studies have found no racial bias in police use of deadly force, and that the racial disparities that do exist stem from racial differences in criminal behavior.”); French, supra note 47 (“Shootings of unarmed men dominate headlines, but they (thankfully) represent a small slice of the whole pie. . . . In the vast majority of cases, police were confronting armed men, and while not every shooting of an armed man is justified (just as not every shooting of an unarmed man is unjustified), it is just not the case that the police have truly declared ‘open season’ on anyone. . . .”).

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


57 Some scholars, such as Carlos Manuel Vázquez, have interpreted the Supreme Court’s Eleventh Amendment jurisprudence as possibly implying that qualified immunity is not merely a prudential doctrine but a constitutional one. See Carlos Manuel Vázquez, Sovereign Immunity, Due Process, and the Alden Trilogy, 109 YALE L.J. 1927, 1949 n. 128 (2000); cf. Seminole Tribe v. Florida, 517 U.S. 44, 71 n.15 (1996) (assuming arguendo, but not holding, that “immunity enjoyed by state and federal
Examining these popular and activist accounts of systemic failure alongside academic examinations reveals a complex picture of solutions for criminal justice. Yet, at the same time as activists and scholars have tackled these issues, the Supreme Court has recognized and developed avenues for defendants to obtain redress for systemic failures in criminal justice.

II. The Practice and Theory of Systemic-Failure Doctrine

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

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

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

A. Armstrong Selective-Prosecution Claims

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

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

59 See Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (“[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”); Wayte v. United States, 470 U.S. 598, 607 (1985) (noting that “the decision to prosecute is particularly ill-suited to judicial review”); United States v. Goodwin, 457 U.S. 368, 380 n.11 (1982); see also Heckler v. Chaney, 470 U.S. 821, 832 (1985) (limiting judicial power over the “special province” of prosecutorial discretion in administrative enforcement actions).
60 417 U.S. 21, 27 (1947).
exercising a statutory right to appeal. Although some welcomed the Blackledge doctrine as a meaningful constraint on unbridled prosecutorial discretion, the Supreme Court has essentially limited vindictive-prosecution relief to cases that are factually on point with Blackledge. The Court has provided only narrow grounds for relief based on malicious prosecutions, where prosecutors' personal animus toward a defendant motivates an otherwise unfounded criminal charge.

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

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


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


65 The Court’s selective-prosecution doctrine—which regulates prosecutors’ decision to selectively charge one individual instead of those similarly situated—resembles the Court’s charge-selection doctrine, which regulates prosecutors’ decision to charge a particular defendant with one of two statutorily identical violations. In United States v. Batchelder, 442 U.S. 114 (1979)—decided a few short years before Wayte, McCleskey, and Armstrong, discussed below—the Court held that where prosecutors have probable cause to believe that a defendant has violated more than one criminal statute, the prosecutor is free to file charges under either statute “so long as it does not discriminate against any class of defendants.” Batchelder, 442 U.S. at 124. Squeezed in a footnote, but nonetheless foreshadowing the reasoning of the Armstrong doctrine, the Batchelder Court noted, “The Equal Protection Clause prohibits selective enforcement ‘based upon an unjustifiable standard such as race, religion, or other arbitrary classification.’” Id. at 125 n.9 (citing Oyler v. Boles, 368 U.S. 448, 456 (1962)). The charge-selection doctrine itself was an outgrowth of the Court’s early holding in Yick Wo v. Hopkins, 118 U.S. 356 (1886), pertaining to
Supreme Court heard the appeal of a defendant who was convicted for knowing and willful failure to register for the Selective Service after the FBI and United States Attorney’s Office implored the defendant to register under its “beg” policy. The defendant raised a selective-prosecution claim on the ground that he and other “vocal opponents of the registration program” were “impermissibly targeted” for the exercise of their First Amendment rights, and the district court granted discovery, requiring the government to release documents and make officials available to testify. Fusing its earlier charge-selection and vindictive-prosecution doctrines and its contemporaneous sex-discrimination framework, the Court committed “to judge selective prosecution claims according to ordinary equal protection standards.” The Court nevertheless denied Wayte’s claim, noting that all similarly situated non-registrants were treated equally under the FBI’s enforcement regime. The Court established the requirements of making a prima facie case of selective-prosecution: a defendant challenging prosecutorial policy must show (1) the prosecution’s policy had a discriminatory effect; and (2) the prosecution’s policy was motivated by discriminatory purpose. In other words, the defendant first had to make a showing of discriminatory effect by demonstrating empirically an “adverse effect[] upon an identifiable group,” and the defendant also had to show that prosecutors took “a particular course of action at least in part ‘because of,’ not merely ‘in spite of’” this discriminatory effect. Wayte was the Court’s first signal that a finding of a particular type of systemic failure in criminal justice was required: a prosecutorial policy that had a verifiably

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

67 Id. at 604.
68 Id. at 608 (citing Batchelder, 442 U.S. at 125 (charge-selection case); then citing Bordenkircher, 434 U.S. at 364 (vindictive-prosecution case); then citing Oyler, 368 U.S. at 456 (selective-prosecution claim); then citing Pers. Adm’r of Mass. v. Feeney, 442 U.S. 256 (1979) (establishing heightened equal-protection scrutiny for suspect classification on the basis of sex); then citing Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (requiring discriminatory purpose in addition to discriminatory effect to raise an equal-protection claim); and then citing Mayor of Washington, D.C. v. Davis, 426 U.S. 229 (1976) (same)).
69 Wayte, 470 U.S. at 610.
70 Id. at 610 (quoting Feeney, 442 U.S. at 279).
discriminatory effect on a group of individuals beyond the defendant himself.

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

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

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72 Id.
73 Id. at 1167-68.
74 517 U.S. at 458.
75 Id. at 458-59.
76 Id. at 459.
Specialist” working at the Federal Public Defender’s Office, who presented a study that in the year 1991, all twenty-four cases under either § 841 or § 846 had black defendants.77 The district court granted their motion, but the government opposed the ruling and moved for reconsideration, attaching affidavits and evidence explaining why it prosecuted Armstrong and Hampton.78 After the government refused further cooperation, the district court dismissed the case.79 The government unsuccessfully appealed to the Ninth Circuit, which affirmed en banc.80

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

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77 Id.
78 Id. at 459-60.
79 Id. at 460.
80 Id.
81 Id. at 464-65 (emphasis added).
82 Id. at 468.
83 Id. at 457, 470. The Court also extended Armstrong protection to classifications based on “religion, or other arbitrary classification.” Id. at 464 (citing Oyler v. Boles, 368 U.S. 448, 456 (1962)).
defendants to credibly show that some flaw in criminal process amounts to a violation of their personal constitutional rights.\textsuperscript{84}

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

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

\textsuperscript{84} See infra Sections II.B, II.C.
\textsuperscript{85} Id. at 470.
\textsuperscript{86} Id. at 459 n.1.
\textsuperscript{87} Id. at 461 n.2.
\textsuperscript{88} United States v. Armstrong, 48 F.3d 1508, 1516 (9th Cir. 1995) (en banc).
\textsuperscript{89} Id. at 1516.
\textsuperscript{90} Id.
prosecution claims—by one estimate only eight persons between 1886 and 1978 had made the necessary showing—the Ninth Circuit in Armstrong provided a glimmer of hope to some defendants.91

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

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

Receiving even shorter shrift were the newspaper article and affidavit offered up by Armstrong and Hampton, which the Court

92 Armstrong, 517 U.S. at 469-70.
93 Id. at 470.
94 Id. at 469-70.
95 Id. at 470.
96 Id. at 457, 459 n.1.
deemed “not relevant.”97 A public affidavit reported that the Federal Defender’s Office had exclusively represented black defendants like Hampton and Armstrong in section 841 and 846 cases; the Court dismissed the affidavit as “hearsay . . . report[ing] personal conclusions based on anecdotal evidence.”98 The majority’s differential treatment of evidence sources reveals that a selective-prosecution claim stands on stronger footing, in the Court’s view, when it samples the nation or an entire criminal “system” and is supplied by a trusted law-enforcement agency.

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

97 Id. at 470.
98 Id.
100 Id. at 862-64.
101 Id. at 864.
102 See, e.g., McAdams, supra note 17, at 618-23 (arguing that Armstrong renders many selective-prosecution claims “impossible to prove”); cf. Tracey L. Meares, Three Objections to the Use of Empiricism in Criminal Law and Procedure-and Three Answers, 2002 U. ILL. L. REV. 851, 866 (2002) (arguing for the importance of empirical information in the creation of criminal procedure while acknowledging courts'
In the wake of *Armstrong* and *Bass*, selective-prosecution discovery is difficult to achieve. Courts scrutinize *Armstrong* claims both to ensure that any statistical showings are methodologically sound and to guarantee that comparisons to similarly situated non-prosecutions are apples-to-apples.

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

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

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

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

\(^{105}\) See United States v. Thorpe, 471 F.3d 652 (6th Cir. 2006) (rejecting an *Armstrong* challenge to the Eastern District of Michigan U.S. Attorney’s Office “Project Safe Neighborhoods,” a firearm-prosecution initiative, because the defendant did not show that non-prosecutions were under the same statutory provision of the indictment even if they were within the scope of Project Safe Neighborhoods).
defendant’s protected class remains disputed. In United States v. Lewis, where the defendant brought a selective-prosecution claim based on his dual status as black and Muslim, the First Circuit rejected Lewis’s putative pool of “similarly situated” suspects as “non-African American, non-Muslim persons” suspected of the same offense. The First Circuit reasoned, the pool must be conscribed to those “outside the protected class who ha[ve] committed roughly the same crime under roughly the same circumstances.” The First Circuit remanded, requiring that Lewis present evidence of non-prosecutions of “non-African-Americans and/or non-Muslims who had committed multiple misrepresentation offenses in connection with firearms paperwork, who posed a danger of violence, and who may have had links to terrorism” in order to sustain his claim.

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

106 See Kohler-Hausmann, supra note 70, at 1184-87 and accompanying text (describing a theoretical objection to the counterfactual-style requirements of Wayte and Armstrong as fashioning an unrealistic “similarly situated” person).
107 517 F.3d 20, 26 (1st Cir. 2008).
108 Id. at 27 (emphasis added).
109 Id. at 26.
110 820 F.3d 93, 99-100 (4th Cir. 2016). In the police sting operation in Hare, members of the crew planned to rob a cocaine “stash house” that did not actually exist but was “fabricated by undercover federal agents as part of [the] sting operation.” Id. at 95.
111 Id.
too idiosyncratic and too specific for the court’s liking to grant Armstrong discovery.

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

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

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112 Armstrong, 517 U.S. at 459.
113 People v. Superior Court (Baez), 94 Cal. Rptr. 2d 706, 707-10 (App. 6th Dist. 2000).
114 United States v. Jones, 159 F.3d 969, 977-78 (6th Cir. 1998).
115 Id. at 978.
116 United States v. Washington, 869 F.3d 193, 218-20 (3d Cir. 2017) (citing United States v. Davis, 793 F.3d 712 (7th Cir. 2015)).
Armstrong’s “strict discovery standard” applied to selective-prosecution claims, this “collision between equal protection principles and the criminal justice system” ought not apply to selective-enforcement claims: defendants need only show “some evidence” of discriminatory effect, not also intent, to win selective-enforcement discovery.\footnote{117}{Id. at 213-14.}

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

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

In Mapp v. Ohio, the Supreme Court extended to the states the exclusionary rule announced in Weeks v. United States—“that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible.”\footnote{118}{Mapp v. Ohio, 367 U.S. 643, 655 (1961) (citing Weeks v. United States, 232 U.S. 383 (1914)).} As the Mapp Court reiterated, the exclusionary rule serves as a “deterrent safeguard” against law enforcement officers violating the Fourth Amendment.\footnote{119}{Id. at 648.} After Mapp, Justices seeking to limit the exclusionary rule suggested that such limits would not necessarily undermine the deterrent objective of the rule, and questioned whether the rule in fact deters police misconduct.\footnote{120}{See, e.g., United States v. Leon, 468 U.S. 897, 906-13 (1984); United States v. Janis, 428 U.S. 433, 446-54 (1976); United States v. Calandra, 414 U.S. 338, 348-52 (1974); Coolidge v. New Hampshire, 403 U.S. 443, 491 (1971) (Harlan, J., concurring); Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 415 (1971) (Burger, J., dissenting).}

One such effort related to police officers acting in good faith who nevertheless ran afoul of the Fourth Amendment’s dictates. In Stone v. Powell, for example, Justice White’s dissent advocated for a “substantial[ ] modifi[cation]” to the exclusionary rule “to prevent its application
in those many circumstances where the evidence at issue was seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this belief.”

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

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

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123 Id. at 903.
124 Id. at 903 & n.2.
125 Id. at 922 n.23.
126 Id. at 926.
127 Id. at 918; see also 1 JOSHUA DRESSLER, ALAN C. MICHAELS & RIC SIMONS, UNDERSTANDING CRIMINAL PROCEDURE: INVESTIGATION 362 (7th ed. 2017) (noting that this reasoning in “Leon could be used to support the outright abolition of the exclusionary rule”).
would not swallow the exclusionary rule, but he also recognized the importance of establishing the exception as the result of the Court’s decades-long “question[ing]” of the exclusionary rule’s “balancing approach.”

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

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

129 Id. at 908-09.
132 Id. at 14-15.
years” according to one officer’s testimony—was too infrequent to provoke worry for the Court.\footnote{\textit{Id.} at 15.}

But the Court’s holding in \textit{Evans} left open two interrelated questions: (1) what if it is \textit{law enforcement}, not courts, that manage an error-filled database and (2) what if those errors recur systematically, not just “every three or four years”? The Court squarely answered these questions in \textit{Herring v. United States}.\footnote{555 U.S. 135 (2009).} Bennie Dean Herring went to the Coffee County, Alabama Sheriff’s Department to obtain some of his belongings from his impounded truck.\footnote{\textit{Id.} at 137.} At the station, an officer asked a clerk to check for outstanding arrest warrants; finding none, the clerk, at the officer’s behest, sent a request to adjacent Dale County.\footnote{\textit{Id.}} The Dale County database returned an active arrest warrant for Herring due to his failure to appear in court on a felony charge. Herring was then arrested, and during a search incident to arrest, officers found methamphetamine and a firearm in his possession.\footnote{\textit{Id.}} But the Dale County warrant had been recalled months earlier and the police database was in error.\footnote{\textit{Id.}}

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

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

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

\textsuperscript{141} Id. at 146 (citing Arizona v. Evans, 514 U.S. 1, 17 (1995) (O’Connor, J., concurring) (“Surely it would not be reasonable for the police to rely . . . on a recordkeeping system . . . that routinely leads to false arrests.” (second emphasis added)); Hudson v. Michigan, 547 U.S. 586, 604 (2006) (Kennedy, J., concurring in part and concurring in judgment) (“If a widespread pattern of violations were shown . . . there would be reason for grave concern.” (emphasis added)).
\textsuperscript{142} Id. at 137-38.
\textsuperscript{143} Id.
\textsuperscript{144} 597 F.3d 995, 1005-06 (9th Cir. 2010).
\textsuperscript{145} Id.
\textsuperscript{146} Id.
exception satisfied. Multiple officers’ willingness to leave Cha in the lurch without any demonstrated care was sufficiently egregious for the Ninth Circuit to affirm the district court’s suppression order under *Herring*’s systemic-negligence exception to the good-faith exception. The court expressed particular concern that “there was no departmental training or protocol instructing the officers that a warrant must be secured reasonably quickly after a premises has been seized.”

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

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147 *Id.*
148 *See id.* The Ninth Circuit further held that the seizure was also “deliberate [and] culpable,” providing another basis for suppression in addition to systemic negligence. *Id.* at 1004-06.
149 *Id.* at 1006.
151 *Id.* at 538.
152 *Id.* at 537.
153 *Id.* at 540.
154 *Id.* at 548.
155 *Id.*
physician would have known that the search was unlawful,”
suggesting that the officers would not even have been eligible for
the good-faith exception in the first place.\footnote{156} The Sixth Circuit also
invoked \textit{Rochin v. California} and the fundamental-fairness
doctrine under which police intrusions that “shock[] the
conscience,” such as stomach pumping in \textit{Rochin}, are found to
violate due process.\footnote{157} Retrofitting the fundamental-fairness
doctrine from the mid-twentieth century to modern-day
reasonableness analysis, the court held that the rectal exam in
\textit{Booker} “shocks the conscience” and so violates fundamental
fairness under the Due Process Clause, which necessarily rendered
the rectal exam an unreasonable search for Fourth Amendment
purposes.\footnote{158}

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

After Havatone’s arrest but before the Arizona Supreme
Court’s decision in \textit{Havatone}, the U.S. Supreme Court decided in

\begin{footnotes}
\footnote{156 Id.}
\footnote{157 Id. at 545-46.}
\footnote{158 Id. (citing \textit{Rochin v. California}, 342 U.S. 165 (1952); \textit{Winston v. Lee}, 470 U.S. 753 (1985)).}
\footnote{159 See \textit{State v. Havatone}, 389 P.3d 1251, 1253 (Ariz. 2017); \textit{ARIZ. REV. STAT. ANN} § 28-1321(A), (C) (2020); \textit{NEV. REV. STAT. ANN} § 484C.160(1), (3) (West 2020).}
\footnote{160 \textit{Havatone}, 389 P.3d at 1253.}
\footnote{161 Id.}
\footnote{162 Id.}
\end{footnotes}
Missouri v. McNeely that nonconsensual, warrantless blood draws in DUI cases required exigent circumstances beyond the natural dissipation of alcohol in the blood. As the Havatone court pointed out, even decades before McNeely, the Supreme Court in Schmerber v. California made clear that warrantless blood draws from DUI suspects were never per se exigent but rather required a totality of the circumstances showing of exigency. The Arizona Supreme Court held that the implied-consent statutes could only be constitutional after a showing of exigent circumstances under a totality of the circumstances, and the state failed to make such a showing in Havatone’s case. The court reasoned that the police department should have known that Schmerber and its progeny cast doubt on implied-consent statutes authorizing warrantless nonconsensual blood draws, and the department’s routine and “rote application” of the statute in contravention of this precedent was not objectively reasonable. The department thus could not rely on the good-faith exception because “recurring or systemic negligence’ [was] present” in the form of the department’s erroneous “policy and training,” which failed to reflect Schmerber and McNeely.

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

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164 Havatone, 389 P.3d at 1257 (citing Schmerber v. California, 384 U.S. 757 (1966)).
165 Id. at 1255-56.
166 Id. at 1259.
167 Id. at 1256, 1264 (internal quotation marks omitted).
168 975 F.3d 788 (9th Cir. 2020).
169 Id. at 823 (emphasis added).
known to be frequently incorrect,” reasoning that the “database generally is accurate and that widespread use of its reports indicates th[at it must] be trusted.”

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

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

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170 United States v. Brown, 618 F. App’x 743, 745 (4th Cir. 2015) (per curiam).
171 786 F.3d 1299, 1301-02 (10th Cir. 2015).
172 Id. at 1302, 1304.
173 Id. at 1309.
175 Id. at 229.
176 Id.
Amendment violation.\textsuperscript{177} Applying \textit{Herring}, the Fourth Circuit deemed the police negligence at issue insufficiently systemic to warrant relief for Davis.\textsuperscript{178}

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

\textbf{C. Brillon’s Systemic-Breakdown Calculation Under the Speedy Trial Clause}

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

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{177} Id. at 253.
\item \textsuperscript{178} Id. at 252-53.
\item \textsuperscript{179} U.S. CONST. amend. VI.
\item \textsuperscript{180} Klopfer v. North Carolina, 386 U.S. 213, 223 (1967).
\item \textsuperscript{182} LAFAVE ET AL., supra note 62, § 18.1(b).
\item \textsuperscript{183} See United States v. Marion, 404 U.S. 307, 318 (1971) (explaining that the right to a speedy trial becomes applicable after a person is charged or accused of crime).
\end{itemize}
\end{footnotesize}
In Barker v. Wingo, the Supreme Court established a four-part balancing test to determine whether pretrial delay constitutes a violation of a defendant’s constitutional right.\(^{184}\) First, as a threshold matter, the defendant must demonstrate a “presumptively prejudicial” pretrial delay.\(^{185}\) In practice, delays approaching one year are deemed presumptively prejudicial.\(^{186}\)

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

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

\(^{184}\) 407 U.S. 514, 530 (1972).

\(^{185}\) Id.

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

\(^{187}\) Barker, 407 U.S. at 531.

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

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


\(^{191}\) Barker, 407 U.S. at 534-35 (“Barker did not want a speedy trial.”).
effort to assert his right to trial, even without his counsel’s full approval, was sufficient to satisfy this factor.192

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

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

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192 880 F.3d 602, 616, 619 (2d Cir. 2018); see also Logan v. State, 16 N.E.3d 953, 963 (Ind. 2014) (noting the defendant “persistently and emphatically asserted his right to a speedy trial”).
193 Barker, 407 U.S. at 532.
194 Id.
195 Id. at 533.
196 See Doggett, 505 U.S. at 647.
197 Id. at 651.
198 Brillon, 556 U.S. at 90-91 (2009) (quoting Coleman v. Thompson, 501 U.S. 722, 753 (1991)); see also Polk County v. Dodson, 454 U.S. 312, 318 (1981) (quoting AM. BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE § 4-3.9 (2d ed. 1980)) (noting that attribution of delay to the defendant follows from defense counsel’s delays regardless of whether counsel is “privately retained, appointed, or serving in a legal aid or defender program”). The Court in Brillon noted that “assigned counsel ordinarily is not considered a state actor” except when making “hiring and firing” decisions on behalf of the state. 556 U.S. 81, 91 & n.7 (2009).
sought in order to provide professional assistance in the defendant’s interests,” the delay is attributed to the defendant.199

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

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

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

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199 Flores-Gomez v. State, 455 P.3d 1212, 1217 (Wyo. 2020) (citing State v. Ollivier, 312 P.3d 1, 14 (Wash. 2013) (collecting cases from state and lower federal courts)).
200 556 U.S. at 84.
201 Id.
202 Id. at 92.
203 Id. at 91-92 (internal quotation marks and citation omitted).
204 Id. at 93.
205 See id. at 92.
206 See id. at 93.
207 Id. at 93-94.
noted that the “general rule attributing to the defendant delay caused by assigned counsel is not absolute,” and “[d]elay resulting from a systemic breakdown in the public defender system could be charged to the State.”208 Brillon himself could not benefit from this systemic-breakdown avenue because the record failed to present any “institutional problems caus[ing] any part of the delay in his case.”209 The majority also invoked dicta from Polk County v. Dodson, a case where the Court denied a § 1983 suit alleging a civil-rights violation when a public defender withdrew on the ground that a defendant’s appellate claims were frivolous.210 The Dodson Court noted the regrettable “unprecedented strains, including increased demands for legal assistance” in Iowa’s public defender system.211

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

208 Id. at 94 (emphasis added) (internal quotation marks and citations omitted).
209 Id.
210 Id. (citing Polk Cnty. v. Dodson, 454 U.S. 312 (1981); see also Anders v. California, 386 U.S. 738, 744 (1967) (holding that an attorney who wishes to withdraw from a case after conviction on the ground that the appeal would be frivolous must file a brief referring to anything in the record that might support an appeal); see also Jones v. Barnes, 463 U.S. 745, 753-54 (1983) (noting that counsel is not required to raise every nonfrivolous issue in an Anders brief).
211 Dodson, 454 U.S. at 324.
212 694 S.E. 2d 350, 354-56 (Ga. 2010).
213 Id. at 355.
214 Id. (internal quotation marks and citations omitted).
where there is funding to ensure that some attorney could potentially work for the defendant.

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

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

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

\(^{215}\) See 2010-709 (La. App. 3 Cir. 12/8/10); 54 So. 3d 146, 149-52.
\(^{216}\) Id. at 37.
\(^{217}\) 315 P.3d 1, 38 (Cal. 2013); see also *State v. Ochoa*, 406 P.3d 505, 514 (N.M. 2017) (holding that although a multiday government furlough affecting public defenders was “institutional in origin,” it did not constitute systemic breakdown under *Brillon* because it was not “so debilitating as to justify attributing the delay to the government”).
\(^{218}\) *Williams*, 315 P.3d at 38.
\(^{219}\) 238 Cal. Rptr. 2d 14, 42 (Ct. App. 2018).
failure to push for probable-cause hearings or complete trial preparation and its “relay race of substituting counsel.” In the Butler court’s view, systemic breakdown may be shown when there is “a perfect storm of institutional dysfunction.” The funding of the public defender’s office had particular salience in Boyer v. Vannoy. There, Boyer’s Barker claim was ultimately unsuccessful, but the Fifth Circuit did weigh a two-year delay against the government when Jonathan Boyer and his public defender repeatedly (over the course of seven years) motioned for additional funding for counsel.

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

III. SYSTEMIC FAILURE OUTSIDE THE DOCTRINE

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

220 In re Butler, 269 Cal. Rptr. 3d 649, 658 (Ct. App. 2020).
221 Id. at 662.
222 863 F.3d 428, 442-45 (5th Cir. 2017). Although Boyer’s Barker claim was ultimately unsuccessful, the Fifth Circuit did weigh the funding delay in Boyer’s favor. Id. at 445.
II concerns claims of relief by individual defendants, while the doctrine in this Part involves claims for class-wide systemic relief. In these cases, standing doctrine provides a way for the Court to restrict relief for systemic failure when the remedy lacks a limiting principle. Distinguishing these two lines of cases helps illuminate the Court’s motivation in providing for relief of systemic failure under certain circumstances.

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

But however necessary this recognition is, it is not sufficient to explain why the Court has fashioned the doctrine as it has. In the cases described below—many of which concern prisoners’ claims against state agencies and officers—the Court has acknowledged systemic failures in criminal justice but declined the opportunity to offer individual defendants an opportunity for relief. Examining these cases reveals that even when the Court recognizes a systemic failure, it will not make relief available unless it can locate a limiting principle. The Court has repeatedly emphasized that,
without a limiting principle, such relief threatens to throw the system into chaos.\footnote{See, e.g., Brown v. Plata, 563 U.S. 493, 550 (2011) (Scalia, J., dissenting); Lewis v. Casey, 518 U.S. 343, 385-86 (1996) (Thomas, J., concurring).}

\section*{A. Failures Excluded from the Systemic-Failure Doctrine}

The distinctive features of the systemic-failure doctrine are most easily identified by investigating those cases falling just outside the theoretical protections of this doctrine. These cases, though identifying “systemic” failures in criminal justice, afforded no prospective relief for individual defendants in the way Armstrong, Herring, and Brillon did. The most infamous of these cases is McCleskey v. Kemp.\footnote{481 U.S. 279 (1987); see supra Section II.A.} Warren McCleskey, a black death-row inmate in Georgia, was convicted of the murder of a white police officer in 1978.\footnote{Id. at 285-91.} Following his loss on direct appeal at the Georgia Supreme Court and the U.S. Supreme Court’s denial of his certiorari petition, McCleskey challenged his sentence on Eighth Amendment and equal-protection grounds in a habeas petition that eventually reached the Supreme Court.\footnote{Id. at 313 (quoting Pulley v. Harris, 465 U.S. 37, 54 (1984)).}

The primary basis for McCleskey’s challenge was a groundbreaking study by David Baldus, which established with statistical significance that defendants who killed white victims were much more likely to receive a death sentence than those who killed black victims.\footnote{Id. at 286-91.} Per Justice Powell, a 5-4 Court rejected McCleskey’s challenge, finding that the significant racially based sentencing discrepancies identified in the study did not rise to the level of a “major systemic defect[.].”\footnote{Id. at 313 (quoting Pulley v. Harris, 465 U.S. 37, 54 (1984)).} Among several considerations that it cited to justify its decision, the majority opinion noted that “there is no limiting principle to the type of challenge brought by McCleskey,”\footnote{Id. at 318.} revealing a concern that “recognition of McCleskey’s claim would open the door to widespread challenges to all aspects of criminal sentencing.”\footnote{Id. at 339 (Brennan, J., dissenting).} In dissent, Justice Brennan suggested
that the majority ruled as it did out of “a fear of too much justice.”\footnote{Id.} Also in dissent, Justice Blackmun reasserted the Eleventh Circuit’s finding that the study “showed that systemic and substantial disparities existed” within Georgia’s capital sentencing regime.\footnote{Id. at 353 (Blackmun, J., dissenting) (citation omitted).} Justice Stevens remarked in his own dissent that “the Court’s decision appears to be based on a fear that the acceptance of McCleskey’s claim would sound the death knell for capital punishment in Georgia.”\footnote{Id. at 367 (Stevens, J., dissenting).} In the dissenters’ view, the Court’s decision to deny relief had little to do with its judgment of whether a systemic defect in fact existed, and more to do with its fear that allowing relief for this systemic failure would unduly upset an institution of criminal justice.

In many Eighth Amendment cases since McCleskey, the Court has drawn upon similar concerns to deny relief even when systemic failure is evident. A pair of cases from the 1990s, Wilson v. Seiter\footnote{501 U.S. 294 (1991); see also Estelle v. Gamble, 429 U.S. 97, 106 (1976) (raising similar issues); Farmer v. Brennan, 511 U.S. 825 (1994) (same).} and Lewis v. Casey,\footnote{518 U.S. 343 (1996); see also Rizzo v. Goode, 423 U.S. 362 (1976) (raising similar issues); City of Los Angeles v. Lyons, 461 U.S. 94 (1983) (same).} illustrate the general pattern of how the Court has used strict mens rea and standing requirements, respectively, to limit the availability of relief for systemic failures in criminal justice.

In Wilson, Pearly L. Wilson brought a § 1983 suit against officials at Ohio’s Hocking Correctional Facility, arguing that systemic failures had rendered conditions at the state prison inhumane, violating the Eighth Amendment’s prohibition on cruel and unusual punishment.\footnote{Wilson, 501 U.S. at 296.} Writing for a 5-4 majority, Justice Scalia explained that to trigger the Eighth Amendment, it was not enough for Wilson to show a deprivation of “the minimal civilized measure of life necessities.”\footnote{Id. at 298 (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)).} To prevail, the majority wrote, Wilson must have also shown that the prison officials acted with “deliberate indifference” to the harm Wilson suffered.\footnote{Id. at 303 (quoting LaFault v. Smith, 834 F.2d 389, 391 (4th Cir. 1987) (Powell, J., sitting by designation)).} Concurring only in the judgment, Justice White, joined by Justices Marshall,
Blackmun, and Stevens, highlighted a problem with the majority's approach: the “deliberate indifference” standard was poorly suited to redressing systemic failure in prison administration.239 “Inhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time,” the concurrence observed.240 “[I]ntent simply is not very meaningful when considering a challenge to an institution.”241 Along with Estelle v. Gamble,242 which introduced the “deliberate indifference” standard, and Farmer v. Brennan,243 in which the Court further intensified the individualistic focus of the conditions-of-confinement inquiry, Wilson effectively foreclosed the majority of prisoners’ claims for redress from systemic failures in prison administration.244

Lewis v. Casey245 continued this trend of circumscribing the availability of systemic relief. Fletcher Casey, Jr. and twenty-one other inmates in Arizona state prisons brought a class action under § 1983, alleging that various shortcomings in the prisons' library facilities deprived the plaintiffs of their First, Sixth, and Fourteenth Amendment rights of access to the courts as those had been defined in Bounds v. Smith.246 While Casey and the other plaintiffs obtained an injunction in federal district court, the Supreme Court reversed on standing grounds.247 The logic of Casey precluded the inmates from establishing actual injury from a Bounds violation unless they had proven that the alleged resource shortcomings actually hindered their pursuit of nonfrivolous legal claims relating to their sentences, treatment, or conditions of

239 Id. at 310-11 (White, J., concurring).
240 Id. at 310.
241 Id.
246 Casey, 518 U.S. at 346; see also Bounds v. Smith, 430 U.S. 817, 828 (1977) ("[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.").
247 Casey, 518 U.S. at 349.
confine ment.\textsuperscript{248} Although the possibility of relief for a systemic \textit{Bounds} violation technically survived after \textit{Casey}, the Court’s opinion rendered that possibility remote. The Court found that one of the named plaintiffs, Bartholic, made the necessary showing of “actual injury,” but this was insufficient to establish grounds for the injunction, because individual instances of “actual injury” were insufficient to prove a system-wide impact.\textsuperscript{249}

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

\textbf{B. Brown v. Plata: A Rare Exception}

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

\textsuperscript{248} \textit{Id.} at 351.
\textsuperscript{249} \textit{Id.} at 358-60.
\textsuperscript{250} \textit{Id.} at 395 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).
\textsuperscript{251} \textit{Id.} at 350. The \textit{Casey} majority’s view of standing echoed the Court’s earlier pronouncements in \textit{Rizzo v. Goode}, 423 U.S. 362 (1976), and \textit{City of Los Angeles v. Lyons}, 461 U.S. 94 (1983), both of which denied standing to plaintiffs seeking to challenge unconstitutional police practices.
\textsuperscript{252} \textit{Casey}, 518 U.S. at 408-09 (Stevens, J., dissenting).
Court was willing to allow relief. *Brown v. Plata*\(^{253}\) stands alone as the exception to the limits on systemic relief. In our view, it is the exception that explains the rule.\(^{254}\)

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

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

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

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

\(^{256}\) *Plata*, 563 U.S. at 501.

\(^{257}\) *Id.* at 498, 502.

\(^{258}\) *Id.* at 502.

\(^{259}\) *Id.* at 504 (quoting App. C).

\(^{260}\) See Brown v. Plata, No. 09-1233, slip op. at 51-52 (U.S. May 23, 2011).

\(^{261}\) The majority opinion in *Plata* also recalls an earlier era of cases involving southern prisons, upon which the film *Brubaker* was based. See Vincent Canby,
But the facts alone do not fully explain the opinion. Execrable as the prison conditions were, these individual instances of poor medical treatment might have appeared legally insufficient to grant class-wide relief. Indeed, the Casey Court opined if the judicial branch were to grant relief to a class of prisoners “simply on the ground that the prison medical facilities were inadequate, the essential distinction between judge and executive would have disappeared.”

Thus, in order to come out the other way, the majority in Plata had to distinguish Casey. Justice Kennedy’s majority opinion discussed the distinction in a footnote, in the midst of his description of individual physical and mental health crises created and exacerbated by the prison conditions. Unlike Wilson and Casey, the Plata plaintiffs did not challenge particular “deficiencies in care” that operated upon them individually, but “systemwide deficiencies” that, “taken as a whole,” violated the Eighth Amendment right. In dissent, Justice Scalia attacked the majority’s reasoning, and he quoted his own majority opinion in Casey, writing that “the notion that the plaintiff class can allege an Eighth Amendment violation based on ‘systemwide deficiencies’ is assuredly wrong.”

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

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263 See Plata, 563 U.S. at 505 n.3.
264 Id.
265 Id. at 553 (Scalia, J, dissenting).
that all the class plaintiffs have standing to bring systemic-injury claims.

C. The Court’s Limiting Principle

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

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

267 See discussion supra Section III.A.- B.
268 Id.
269 Id.
270 Id.
271 See Metzger, supra note 242, at 1859-63.
inherently systemic, the Court remains far more parsimonious and grants relief in only the rarest of cases.

IV. REVITALIZING SYSTEMIC-FAILURE DOCTRINE

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

A. Why Systemic-Failure Doctrine Works

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

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272 See discussion supra Section III.C.
273 See supra Section III.A.
274 See Allen v. Wright, 468 U.S. 737, 761 (1984) (“[S]eparation of powers[] counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties.”); see also Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992) (noting that conversion of an “undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts” would run afoul of the Take Care Clause and render the judiciary to “continu[ally] monitor[]” the Executive); cf. Jack Goldsmith & John F. Manning, The Protean Take Care Clause, 164 U. PA. L. REV. 1835, 1838-39 (2016) (noting that the Supreme Court often invokes the Take Care Clause as a pretext to freewheeling separation-of-powers analysis).
The Constitution charges federal judges with deciding cases and controversies, not with running state prisons. Yet, too frequently, federal district courts in the name of the Constitution effect wholesale takeovers of state correctional facilities and run them by judicial decree... dictating [programs] in excruciatingly minute detail.... Such gross overreaching by a federal district court... cannot be tolerated [and runs afoul] [p]rinciples of federalism and separation of powers.[275]

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

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

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

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

B. A Workable Systemic-Failure Doctrine

1. Bridging the Discovery Gap

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

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276 See supra Section II.B.
279 Id. at 2203.
affidavits than high-level or national datasets, and other courts have shown greater leniency with selective-enforcement claims over selective-prosecution claims.280

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

These new agencies could fill the “discovery gap” left by Armstrong without requiring any doctrinal change. Take, for example, the defendants in the Fourth Circuit case United States v. Hare.282 A group of black defendants was targeted as part of an ATF
sting operation, and in raising an Armstrong claim, they provided compelling evidence that investigators declined to direct the sting toward a similarly situated “crew” of white defendants who operated in the same neighborhood. Although this fell short of Armstrong’s standard, these defendants seem to be apt candidates for receiving more information from our theorized state law-enforcement database: they made a highly particularized showing that similarly situated individuals were not prosecuted or investigated, and any equal protection claim could be scrutinized under the current Armstrong framework with the benefit of more data. Because most law enforcement is organized at the state and local level, legislation on this issue may not be national—each locality could enact legislation suited to its unique needs. Indeed, while not specifically focused on providing discovery, many states are currently considering legislation that would greatly expand the right to discovery. In 2021, the National Conference of State Legislatures reported 142 proposed and 30 enacted bills in state legislatures aiming to provide increased collection and transparency of law enforcement data. Although it is too early to tell how criminal defendants may leverage insights from these databases in the future, they may well help defendants to surpass the high bar set by Armstrong.

2. Scrutinizing Recurring or Systemic Negligence

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

283 Id. at 96-98.
285 See supra Part II.
claims depend on evidence that is difficult for them to obtain—a similar solution would be helpful.

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

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

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

\textsuperscript{286} See generally 224 P.3d 55 (Cal. 2010).
\textsuperscript{287} Id. at 60.
\textsuperscript{288} Id.
\textsuperscript{289} Id.
\textsuperscript{290} Id. at 68, 70.
\textsuperscript{291} Id. at 71.
proposal detailed above, Robinson’s showing of negligence would have afforded him an independent investigation of whether the negligence was systemic, potentially providing him with data that he could have used to refute the testimony that allowed the court to deny his motion to suppress.

3. A Broader View of Systemic Breakdown

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

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

292 See People v. Williams, 315 P.3d 1, 38 (Cal. 2013).
293 See, e.g., In re Butler, 269 Cal. Rptr. 3d 649, 682 (Cal. App. 2020); see also People v. Superior Court (Vasquez), 238 Cal. Rptr. 2d 14 (Ct. App. 2018).
294 See, e.g., State v. Thomas, 2010-0528 (La. App. 4 Cir. 7/15/10); 54 So. 3d 1 (limiting Brillon relief despite defects in the public-defender system resulting from Hurricane Katrina).
295 See United States v. Taylor, 487 U.S. 326, 341 n.12 (1988) (noting that, under Barker v. Wingo, 407 U.S. 514 (1972), “it would be appropriate under some circumstances, as, for example, where there was a systemic problem with the procedures of a particular United States Attorney’s Office, for a district court to bar reprosecution in a case involving a delay of only a few days” (emphasis added)).
the direct result of the prosecution’s choice to seek the death penalty, should be weighed against the state for speedy trial purposes.” Jonathan Boyer, an indigent defendant charged with first-degree murder, languished in jail for more than seven years between his arrest and trial.

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

**CONCLUSION**

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

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297 Petition for Certiorari at i, *Boyer*, 569 U.S. 238 (No. 05-1631).
298 *Boyer*, 569 U.S. at 241 (Sotomayor, J., dissenting from the dismissal of cert. as improvidently granted).
299 See * supra* Part II.