

Winter 2018

## "A Few Bad Apples": How the Narrative of Isolated Misconduct Distorts Civil Rights Doctrine

Chiraag Bains  
Demos, cbains@demos.org

Follow this and additional works at: <https://www.repository.law.indiana.edu/ilj>



Part of the [Civil Rights and Discrimination Commons](#), and the [Construction Law Commons](#)

---

### Recommended Citation

Bains, Chiraag (2018) "'A Few Bad Apples': How the Narrative of Isolated Misconduct Distorts Civil Rights Doctrine," *Indiana Law Journal*: Vol. 93 : Iss. 1 , Article 3.

Available at: <https://www.repository.law.indiana.edu/ilj/vol93/iss1/3>

This Symposium is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact [rvaughan@indiana.edu](mailto:rvaughan@indiana.edu).



**JEROME HALL LAW LIBRARY**

INDIANA UNIVERSITY  
Maurer School of Law  
Bloomington

## “A Few Bad Apples”: How the Narrative of Isolated Misconduct Distorts Civil Rights Doctrine\*

CHIRAAG BAINS†

Viral videos of fatal police force used against unarmed or nondangerous individuals, many of them black men, are driving a conversation about race and policing in America. The names are familiar by now, part of a macabre roll of modern American tragedy. Eric Garner was choked to death in Staten Island, repeating “I can’t breathe” before he died. Philando Castile was shot five times in Minnesota after politely volunteering that he was carrying a firearm and reaching for his license at the officer’s request. Twelve-year-old Tamir Rice was playing with a toy gun in a Cleveland park when an officer shot him in the stomach less than two seconds after arriving. A University of Cincinnati police officer shot motorist Samuel DuBose in the head as DuBose tried to drive away from the traffic stop. Video evidence contradicted the officer’s claim that he was dragged fifteen to twenty feet by the car.

In each of these cases, prosecutors either declined to file charges, lost at trial, or dropped the case after the jury could not reach a verdict. Although the results left many people scratching their heads, those familiar with governing Supreme Court law were less surprised. With respect to police use of force, state law and jury instructions frequently incorporate deferential Supreme Court standards, including the admonition that “police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving” and should not be judged “with the 20/20 vision of hindsight.”<sup>1</sup> But weren’t these individuals at least the victims of racial profiling, some wondered. After all, the incidents almost all began as investigations into common, minor offenses—the untaxed sale of loose cigarettes, a broken tail light, a missing front license plate. Under Supreme Court precedent, however, the stops were perfectly lawful, and any claim of selective enforcement based on race involved a separate harm that would be nearly impossible to prove.<sup>2</sup>

These cases highlight the barriers to vindicating civil rights under modern constitutional law. How did it become so difficult? To be sure, constitutional rules have been shaped by a number of factors—text, interpretive methodologies, the jurisprudential commitments of the Justices, the facts of the particular cases that reach the Court. In this Essay, I want to suggest that constitutional law is also driven by public and judicial attitudes about the security of our core American values: liberty, equality, and human dignity. Narratives about the extent to which government threatens, or does not

---

\* Copyright © 2018 Chiraag Bains.

† Director of Legal Strategies, Demos, and Senior Fellow, Criminal Justice Policy Program at Harvard Law School.

1. *Graham v. Connor*, 490 U.S. 386, 396–97 (1989).

2. *See Whren v. United States*, 517 U.S. 806, 813 (1996) (holding that officer’s subjective motivations, even when based on race, are not relevant to Fourth Amendment reasonableness inquiry and have to be considered under the Fourteenth Amendment’s Equal Protection Clause); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 337–38 n.22 (discussing the uphill legal and evidentiary battle litigants face in proving intentional race discrimination, as required for an equal protection violation).

threaten, these values can shape how easy or difficult the courts make it to enforce constitutional rights, how narrowly or expansively they read those rights, and how generous or stingy they are with remedies.

The case law has developed the way it has, I argue, in part because of the dominance of a particular narrative about civil rights violations—specifically, that they are isolated and the product of individual rogue actors, not widespread or the product of flawed or biased systems. One might call this the “Few Bad Apples” story of civil rights violations.<sup>3</sup>

One can see signs of the Few Bad Apples narrative in the Supreme Court’s cases, sometimes expressed in the judicial opinions themselves, sometimes lurking in the background. In Parts I and II, I examine precedents involving the two broad topics with which this Essay began: policing and race, respectively. The narrative is perhaps more familiar in the policing context. Attorney General Jeff Sessions articulated it succinctly in a March 2017 memo ordering the reevaluation of all consent decrees the Justice Department had entered with police departments because “[t]he misdeeds of individual bad actors should not impugn or undermine the legitimate and honorable work that law enforcement officers and agencies perform in keeping American communities safe.”<sup>4</sup>

The narrative applies with respect to race, as well, although it comes in different forms: the ideal of color blindness, the notion that we are living in a nearly post-racial society, the feeling that we would finally get past our racial history if we’d simply stop obsessing about it. After all, we hear, slavery ended 150 years ago, whites and blacks drink from the same water fountains, and the voters twice elected a black president. In this worldview, racial discrimination is cabined to the deplorable acts of a few retrograde individuals.

When the Few Bad Apples narrative has been ascendant—as I believe it is now—it has entailed the contraction of substantive rights and the erection of procedural barriers to redressing constitutional wrongs. The narrative has not always prevailed, however. At times, a majority of the Supreme Court has identified systemic injustice and reoriented legal doctrine to address it. The narrative is constantly being contested, sometimes among the Justices themselves, more often in the arena of public debate. Our time is no different. In Part III, I briefly review how the Few Bad Apples narrative is inconsistent with what we know about police misconduct and racial discrimination. In Part IV, I conclude by considering how constitutional doctrine might

---

3. Others have identified the influence of this narrative in other contexts. *See, e.g.*, Michael C. Dorf, *Iqbal and Bad Apples*, 14 LEWIS & CLARK L. REV. 217, 218–19 (2010) (arguing that the Supreme Court in *Iqbal v. Ashcroft* accepted the narrative that the detainee abuse at Guantanamo Bay and elsewhere “was the work of a relatively small number of relatively low-ranking military and civilian officials who went beyond the limits of the law” and “not the result of official policy”); Damien S. Donnelly-Cole, Note, *Not Just a Few Bad Apples: The Prosecution of Collective Violence*, 5 WASH. U. GLOBAL STUD. L. REV. 159, 178–85 (2006) (arguing for theories of criminal liability that would hold high-level officials accountable for torture committed by underlings in U.S. detention facilities).

4. Memorandum from Attorney General Jefferson B. Sessions to Heads of Dep’t Components and U.S. Attorneys (Mar. 31, 2017), <https://www.justice.gov/opa/press-release/file/954916/download> [<https://perma.cc/26JP-VBZT>].

change if the Few Bad Apples narrative were to lose currency in the area of civil rights, and what reasons there are to think this might or might not come to pass.

### I. POLICING

Officers have the authority to stop, search, arrest, interrogate, and use force against individuals. These activities are important to responding effectively to crime, but they are also among the most invasive exercises of government power and the greatest threats to individual privacy, dignity, and autonomy. In the absence of significant legislative and administrative regulation, constitutional law has been the principal means of regulating the police.<sup>5</sup> Over 130 years ago, the Supreme Court stated in *Boyd v. United States* that the Fourth and Fifth Amendment were designed to guard against violation of “the indefeasible right of personal security, personal liberty and private property.”<sup>6</sup> The Court warned that “illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure,” and it announced a “duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon,” lest those rights come to exist “more in sound than in substance.”<sup>7</sup>

Those words can feel foreign in 2017. Today the Constitution’s protections against government encroachment on individual liberty are dramatically reduced. At least with respect to the harms that can result from police practices, the Supreme Court has taken what Anthony Amsterdam called an “atomistic” approach to the criminal procedure amendments, rather than a “regulatory” approach that would deter misconduct more generally.<sup>8</sup> The result has been a piecemeal response to police misconduct, and one that has mostly narrowed constitutional protections and remedies. In part, this trajectory has been driven by judicial attitudes about the infrequency of serious officer misconduct.<sup>9</sup> As we will see, the Court’s cases reveal that, especially in recent decades, a majority of Justices have believed misconduct to be fairly uncommon and the need for judicial intervention to be correspondingly low.

This has not always been the case. There have been moments when the Court has perceived systemic problems in policing and taken concrete steps to remedy them. Carol Steiker has written that the Court’s exposure to the existence of racial discrimination in law enforcement helps explain its creation of more protective Fourth

---

5. See BARRY E. FRIEDMAN, *UNWARRANTED: POLICING WITHOUT CONSENT* 51, 65 (2017) (commenting that “it proves remarkably difficult to get legislators, who should be doing the job, to write rules for policing” and that police agencies’ internal policies are “not the comprehensive set of rules they should have”); Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 790 (1970) (observing that “almost the only law relating to police practices or to suspects’ rights is the law that the Court itself makes by its judicial decisions”).

6. 116 U.S. 616, 630 (1886).

7. *Id.* at 635.

8. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 367 (1974).

9. Another major factor, scholars have argued, has been judicial concern over high crime rates and officers’ ability to do their jobs efficiently. See, e.g., William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2151–55 (2002).

Amendment doctrines. She has argued that “the racist outrages of the 1930s and 1940s” explain the Court’s fashioning of a robust warrant requirement, and that the Civil Rights Movement of the 1950s and 1960s led the Warren Court to strengthen the warrant requirement and apply the exclusionary rule to the states.<sup>10</sup> During this time, unjustified police violence against black people was dramatized by newspaper and television coverage of officers turning their batons, dogs, and fire hoses on people who were peacefully protesting Jim Crow segregation.<sup>11</sup>

The influence of the view that officer misconduct is systemic in nature was perhaps most evident in *Miranda v. Arizona*,<sup>12</sup> in which the Court announced a new set of requirements for custodial interrogations under the Fifth Amendment. The Court began with a recitation of evidence that investigations frequently involved Fifth Amendment violations, starting with the 1931 Wickersham Report,<sup>13</sup> which documented that “police violence and the ‘third degree’ flourished at that time.”<sup>14</sup> The majority then noted that the Court had decided cases involving “beating, hanging, whipping” and “sustained and protracted questioning incommunicado” from the 1930s to 1950s,<sup>15</sup> and that a 1961 report by the U.S. Commission on Civil Rights showed that physical brutality during interrogations had not yet been “relegated to the past or to any part of the country.”<sup>16</sup> Just the year prior, the majority noted, a New York court had confronted a case in which officers pressed burning cigarette butts against a suspect’s back.<sup>17</sup> Notably, the Court did not claim that such practices were the norm. Although the majority described them as “undoubtedly the exception now,” it nonetheless saw them as a systemic problem: “[T]hey are sufficiently widespread to be the object of concern.”<sup>18</sup> The Court believed it had a role to play in addressing the problem: “Unless a proper limitation upon custodial interrogation is achieved . . . there can be no assurance that practices of this nature will be eradicated in the foreseeable future.”<sup>19</sup>

The Court also identified a pattern of widespread psychological intimidation, “equally destructive of human dignity.”<sup>20</sup> The majority surveyed a variety of police

---

10. Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 843 (1994).

11. DAVID J. GARROW, BEARING THE CROSS 250, 399 (1986) (discussing public shock over graphic media coverage of the repressive police response to civil rights demonstrations in Birmingham in 1963 and Selma in 1965).

12. 384 U.S. 436 (1966).

13. The Wickersham Commission, the informal name for the National Commission on Law Observance and Enforcement, was appointed in 1929 to study the criminal justice system under Prohibition and issued its report in 1931. The Commission observed police practices in the states, finding abusive interrogation tactics—including “the inflicting of pain, physical or mental, to extract confessions”—to be “widespread throughout the country.” NAT’L COMM’N ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 153 (1931).

14. *Miranda*, 384 U.S. at 445.

15. *Id.* at 446, 446 n.6 (citing cases where “police resorted to physical brutality”).

16. *Id.* at 446.

17. *Id.*

18. *Id.* at 447.

19. *Id.*

20. *Id.* at 457.

interrogation manuals, identifying a practice of manipulating and coercing confessions from defendants using “an unfamiliar atmosphere” and “menacing” interrogation tactics.<sup>21</sup> Ultimately, the Court concluded that the risks of compulsion were too great, and that specific legal advisements were necessary to counteract the inherently coercive nature of custodial interrogation.<sup>22</sup> The dissenting Justices contended that the majority overstated the risks. But the majority believed the problem of police misconduct to be widespread and acted on that basis.<sup>23</sup>

The systemic view of officer misconduct, however, wins the day relatively infrequently in the Court’s cases. The Few Bad Apples narrative has played a much larger role. Take the Court’s jurisprudence over when officers can make traffic stops and arrests. In *Whren v. United States*, the Court rejected a Fourth Amendment challenge to the use of pretextual traffic stops to investigate crimes for which an officer lacks adequate suspicion to independently justify the stop. Petitioners, who were black, had argued that permitting pretextual stops could lead to racial profiling. After all, the traffic code is so expansive and so ubiquitously violated that officers have virtually total discretion over whom to single out.<sup>24</sup> The opinion reflects little concern for this danger. “For the run-of-the-mine case,” Justice Scalia wrote for the unanimous Court, probable cause of a traffic violation is enough.<sup>25</sup>

In *Atwater v. City of Lago Vista*, the Court held 5-4 that the Fourth Amendment does not limit officers’ ability to make warrantless custodial arrests for minor offenses, even those not punishable by jail time, so long as they have probable cause.<sup>26</sup> Gail Atwater had been driving her pickup truck with her two children beside her, none of them wearing a seatbelt. This was a fine-only violation with a fifty dollar maximum.<sup>27</sup> Atwater posed no danger to the community—she had been driving fifteen miles per hour on a street with no other traffic, and her only other ticket ever was a ten-year-old citation for changing lanes without signaling.<sup>28</sup> Nonetheless, a police officer stopped her, yelled “You’re going to jail!”, threatened to take her kids to the lockup as well, handcuffed her, and transported her to jail—ironically, the dissent pointed out, without fastening her seatbelt.<sup>29</sup>

Writing for the majority, Justice Souter acknowledged that “[i]n her case, the physical incidents of arrest were merely gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment.”<sup>30</sup> He called Atwater’s arrest a “pointless indignity.”<sup>31</sup> But he declined to recognize a constitutional limit to such indignities because he didn’t see them as a systemic ill. At oral argument, he had

---

21. *Id.*

22. *Id.* at 471–72.

23. *Id.* at 515, 517 (Harlan, J., dissenting) (questioning the “generally black picture of police conduct painted by the Court” and objecting that “the Court portrays the evils of normal police questioning in terms which I think are exaggerated”).

24. 517 U.S. 806, 813 (1996).

25. *Id.* at 819.

26. 532 U.S. 318 (2001).

27. *Id.* at 368–69 (O’Connor, J., dissenting).

28. *Id.*

29. *Id.*

30. *Id.* at 346–47.

31. *Id.* at 347.

specifically asked “how bad the problem is out there.”<sup>32</sup> In his written opinion, Justice Souter asserted “there is simply no evidence of widespread abuse.”<sup>33</sup> Relying on its perception of “a dearth of horrors demanding redress” and its conviction that “surely the country is not confronting anything like an epidemic of unnecessary minor-offense arrests,” the majority rejected Atwater’s Fourth Amendment claim.<sup>34</sup>

The view of police misconduct as isolated, not systemic, has likewise been influential in the consent search line of cases. In *Florida v. Bostick*, the Court held that random, suspicionless bus sweeps by police officers were not per se unconstitutional.<sup>35</sup> The majority stated that a bus passenger was not necessarily seized for Fourth Amendment purposes when two narcotics agents in raid jackets and police uniforms boarded the bus, picked him out, partially blocked his access to the aisle, and questioned him.<sup>36</sup> The proper test, the majority held, was whether a reasonable innocent person in the passenger’s position would have felt free to decline the officer’s requests or terminate the encounter.<sup>37</sup> Writing for himself and two other dissenting Justices, Justice Marshall challenged the majority’s analysis and emphasized the harm that it allowed to persist. He explained that suspicionless bus sweeps had become an “increasingly common tactic in the war on drugs.”<sup>38</sup> Officers were engaging in a “tremendously high volume of searches” through these “inconvenient, intrusive, and intimidating” sweeps, with minimal success in interdicting drugs.<sup>39</sup> The problem, Justice Marshall insisted, was widespread, but he could not command a majority.

Recognition of the prevalence of coercive police conduct was again the minority voice in *Ohio v. Robinette*. There, the Court ruled that the Fourth Amendment does not require law enforcement officers to tell a person stopped for a traffic violation

---

32. *Id.* at 351.

33. *Id.* at 353 n.25.

34. *Id.* at 353. The four dissenters, meanwhile, feared that the “unbounded discretion” conferred on police officers by the decision “carries with it grave potential for abuse,” and warned of racial profiling and harassment. *Id.* at 372 (O’Connor, J., dissenting).

35. 501 U.S. 429 (1991).

36. *Id.*

37. *Id.* at 439–40. In rejecting the Florida Supreme Court’s rule that such encounters are automatically seizures, the majority suggested that passengers may well feel free not to cooperate with the investigating officers. The dissent disputed this. There is strong basis to believe the average person would not feel free to walk away when approached by police. See Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1297–1307 (1990). This may be particularly true for black men. See Tracey Maclin, “Black and Blue Encounters”—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 VAL. U. L. REV. 243, 278 (1991) (arguing that “many black men like Bostick are unlikely to challenge or resist the requests of armed drug agents who appear, unannounced, inside a bus aisle seeking permission to search for illegal drugs”).

38. 501 U.S. at 442 (Marshall, J., dissenting) (citations omitted) (quoting *United States v. Lewis*, 921 F.2d 1294, 1295 (D.C. Cir. 1990)).

39. *Id.* (citations omitted) (quoting *United States v. Chandler*, 744 F. Supp. 333, 335 (D.D.C. 1990), and later citing *United States v. Flowers*, 912 F.2d 707, 710 (4th Cir. 1990), for the data point that a sweep of 100 buses resulted in only seven arrests).

that he is “free to go” before seeking consent to search.<sup>40</sup> Justice Ginsburg wrote separately to emphasize the systemic nature of rights violations. “Robinette’s experience,” she began, “was not uncommon in Ohio.”<sup>41</sup> She noted that “traffic stops in the State were regularly giving way to contraband searches, characterized as consensual, even when officers had no reason to suspect illegal activity.”<sup>42</sup> She quoted a state appellate court opinion stating that “hundreds, and perhaps thousands of Ohio citizens are being routinely delayed in their travels,” as officers seek opportunities to look for drugs or “practice [their] drug interdiction technique.”<sup>43</sup> Justice Ginsburg may have wanted to rule for Robinette, but no member of the majority joined her opinion, and she ultimately concurred in the judgment, stating the result was required by precedent.<sup>44</sup> She suggested, however, that the Ohio Supreme Court could interpret the *state* constitution to require officers to inform people of their right to refuse consent, as a “prophylactic measure” meant to “reduce the number of violations of textually guaranteed rights.”<sup>45</sup>

Whether the Court sees police misconduct as exceptional or widespread has been particularly consequential for the scope of the exclusionary rule, a judge-made remedy that the Court can contract or expand as it sees fit. When the Court extended the exclusionary rule to state criminal cases in *Mapp v. Ohio*, it did so out of concern that the Fourth Amendment had become “an empty promise. . . . revocable at the whim of any police officer.”<sup>46</sup> But the Justices have been deeply ambivalent about the remedy, resolving to apply it only “where its deterrence benefits outweigh its substantial social costs.”<sup>47</sup> And if there isn’t much misconduct to deter, it follows that there isn’t much need to suppress incriminating evidence.

This logic can be observed in the good-faith exception cases. In *United States v. Leon*, the Court held that the exclusionary rule does not apply when an officer reasonably relied on an arrest warrant later held to be invalid for lack of probable cause.<sup>48</sup> The Court explained that there was “no evidence” of “lawlessness” among judges supporting the application of the exclusionary rule.<sup>49</sup> It acknowledged concerns that magistrate judges had become rubber stamps for police, but set them aside because “we are not convinced this is a problem of major proportions.”<sup>50</sup> In *Arizona v. Evans*, the Court held the exclusionary rule did not apply when an arrest turned

---

40. 519 U.S. 33, 39–40 (1996).

41. *Id.* at 40 (Ginsburg, J., concurring).

42. *Id.* at 40–42 (alteration omitted) (quoting *State v. Retherford*, 639 N.E.2d 498, 503 (Ohio Ct. App. 1994)).

43. *Id.* at 40–41.

44. *See* *Schneckloth v. Bustamonte*, 412 U.S. 218, 248–49 (1973) (holding that the Fourth Amendment does not require that officers inform individuals of their right not to consent to a search and does not require the prosecution to demonstrate knowledge of the right to refuse consent in order to establish voluntariness).

45. *Robinette*, 519 U.S. at 43.

46. 367 U.S. 643, 660 (1961).

47. *Hudson v. Michigan*, 547 U.S. 586, 591 (2006) (quoting *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 363 (1998), and further observing that those social costs “sometimes include setting the guilty free and the dangerous at large”).

48. 468 U.S. 897 (1984).

49. *Id.* at 916.

50. *Id.* at 916 n.14.

out to be unlawful due to clerical errors by court employees.<sup>51</sup> The majority opinion observed that the chief clerk of the local court had testified at the suppression motion that quashed warrants erroneously remained in the system only “once every three or four years” and that the clerk corrected the error in this case immediately upon discovering it.<sup>52</sup>

In *Illinois v. Krull*, the Court extended the good-faith exception to an officer’s reasonable reliance on a later invalidated statute authorizing warrantless administrative searches.<sup>53</sup> The majority wrote that there was “no evidence” legislatures had “enacted a significant number of statutes permitting warrantless administrative searches violative of the Fourth Amendment.”<sup>54</sup> In dissent, Justice O’Connor disputed the empirical point and presented a contrary narrative, writing that “history . . . supplies the evidence that *Leon* demanded for the proposition that the relevant state actors, here legislators, might pose a threat to the values embodied in the Fourth Amendment.”<sup>55</sup> She also explained that unlike the decisions of individual judges, which are case specific and whose errors might well be isolated, legislative action “sweeps broadly” and “may affect thousands or millions.”<sup>56</sup> Thus, she perceived a “greater threat to liberty” than in *Leon*.<sup>57</sup> Seeing little evidence or potential for abuse, however, the majority was unmoved.

In each of these cases, the Court had allayed fears about sapping the deterrent power of the exclusionary rule by also pointing out that the actors responsible for the Fourth Amendment violation—judges, clerks, legislators—were not the focus of the judge-made remedy. Suppression was meant to deter the police alone. The Court abandoned that limiting principle in *Herring v. United States*, where it relied only on its assessment of the seriousness and prevalence of the misconduct at issue. In *Herring*, the Court declined to exclude evidence obtained incident to an arrest based on a recalled warrant that remained in a neighboring police agency’s database by mistake.<sup>58</sup> The Court could have used the exclusionary rule to pressure all jurisdictions to keep their warrant databases updated—no small thing given the profound liberty interest citizens have in avoiding unlawful arrest. Instead, the Court held that the rule applied only to unlawful conduct that was “sufficiently deliberate” and “sufficiently culpable,” or “flagrant.”<sup>59</sup> Negligent violations were not worth deterring. Chief Justice Roberts allowed that perhaps the exclusionary rule would be appropriate where the errors were “recurring or systemic.”<sup>60</sup> In this case, however, he saw no such evidence.<sup>61</sup>

---

51. 514 U.S. 1 (1995) (declining to suppress evidence recovered in a search incident to an arrest based on a warrant that had been quashed but remained active in the court records system).

52. *Id.* at 15.

53. 480 U.S. 340 (1987).

54. *Id.* at 351.

55. *Id.* at 364 (O’Connor, J., dissenting).

56. *Id.* at 365.

57. *Id.*

58. 555 U.S. 135 (2009).

59. *Id.* at 144.

60. *Id.*

61. *Id.* at 147–48 (“In a case where systemic errors were demonstrated, it might be reckless for officers to rely on an unreliable warrant system. . . . But there is no evidence that errors

These cases show that the good-faith exception has grown wider and wider because a majority of the Supreme Court has sensed that misconduct is rare, that errors are isolated, and that the risk of abuse is low.

That same reasoning has contributed to the weakening of the exclusionary rule in other contexts. Take attenuation doctrine. In *Utah v. Strieff*, the Court declined to exclude drugs found during a search incident to arrest, even though the encounter began with an unlawful stop.<sup>62</sup> After the stop, the officer asked the man for his license, ran him through a police database, and found an outstanding warrant for a traffic violation. In holding that the discovery of the warrant broke the causal chain and attenuated the taint of the unlawful stop, Justice Thomas wrote that “there is no indication that this unlawful stop was part of any systemic or recurrent police misconduct.”<sup>63</sup> Instead, he characterized the Fourth Amendment violation as “an isolated instance of negligence that occurred in connection with a bona fide investigation of a suspected drug house.”<sup>64</sup> Justice Thomas dismissed the concern of the petitioner—and the dissenters—that because many jurisdictions have thousands of outstanding warrants, declining to apply the exclusionary rule in this case would encourage officers to stop people unlawfully. “We think that this outcome is unlikely,” he wrote. “Such wanton conduct would expose police to civil liability,” and at any rate he saw “no evidence that [Strieff’s concerns] are present in South Salt Lake City, Utah.”<sup>65</sup>

The Few Bad Apples narrative has had some influence over the Supreme Court’s use of force jurisprudence as well. A significant data point is *City of Los Angeles v. Lyons*, where a five-Justice majority held that a plaintiff lacked Article III standing to sue the Los Angeles Police Department (LAPD) for its use of chokeholds.<sup>66</sup> Lyons had been choked to the point of unconsciousness by an LAPD officer. He produced evidence that the department had applied chokeholds repeatedly—at least 975 times between 1975 and 1980—and that sixteen people, twelve of them black, had died as a result.<sup>67</sup> At first blush, it might seem that the Justices were simply skeptical of excessive force actions, regardless of their understanding of the breadth of the problem. The majority justified closing the courthouse door to Lyons, however, based on its view of chokeholds as a still relatively infrequent problem. It ruled that the chances he would be subjected to a police chokehold in the future were so speculative that he had “no personal stake”

---

in Dale County’s system are routine or widespread.”); *see also* *Hudson v. Michigan*, 547 U.S. 586, 604 (Kennedy, J., concurring in part and concurring in the judgment) (agreeing that suppression was not required for violation of knock-and-announce rule but noting that “[i]f a widespread pattern of violations were shown . . . there would be reason for grave concern”). Justice Ginsburg, writing for the four dissenters, saw greater danger in negligent recordkeeping. Police have access to rapidly expanding criminal justice, terrorism-related, and commercial databases, she wrote, and “[t]he risk of error stemming from these databases is not slim.” *Herring*, 555 U.S. at 155 (Ginsburg, J., dissenting).

62. 136 S. Ct. 2056 (2016).

63. *Id.* at 2063.

64. *Id.*

65. *Id.* at 2064.

66. 461 U.S. 95, 111–12 (1983).

67. *Id.* at 115–16 (Marshall, J., dissenting).

in the case he had filed.<sup>68</sup> The majority also cited the lack of “any evidence showing a pattern of police behavior” demonstrating that LAPD allowed officers to use chokeholds against people who did not resist them.<sup>69</sup>

With regard to the substantive limits on police violence, the Court’s most restrictive intervention came in *Tennessee v. Garner*, in which it held that deadly force could be used against a fleeing felon only when necessary to prevent escape and when he posed a significant threat of death or injury to others.<sup>70</sup> Four years later in *Graham v. Connor*, the Court emphasized the high level of deference due to officer decision making.<sup>71</sup> Invoking some of the very language Justice O’Connor employed in her dissent in *Garner*, which he had joined, Chief Justice Rehnquist wrote for a unanimous court that the reasonableness of a use of force “must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”<sup>72</sup> Moreover, the constitutional inquiry must account for the reality that “police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.”<sup>73</sup> This language has become a significant barrier to civil rights claims. It is difficult to see how the Court could have embedded such deferential terms into the constitutional analysis if it had understood excessive force to be a common problem in law enforcement.

Subsequent decisions have shielded officers from liability for injuries resulting from their decisions to engage in dangerous car chases and shoot at moving vehicles, practices that law enforcement professional organizations and many police departments have sought to limit.<sup>74</sup> According to one study, over 11,500 people were killed due to vehicle pursuits from 1979 to 2013.<sup>75</sup> A separate study of almost 8000 pursuits by the International Association of Chiefs of Police (IACP) found that only 8.6% began

---

68. *Id.* at 111 (“Absent a sufficient likelihood that he will again be wronged in a similar way, Lyons is no more entitled to an injunction than any other citizen of Los Angeles; and a federal court may not entertain a claim by any or all citizens who no more than assert that certain practices of law enforcement officers are unconstitutional.”).

69. *Id.* at 110 n.9.

70. 471 U.S. 1 (1985).

71. 490 U.S. 386 (1989).

72. *Id.* at 396; *see also Garner*, 471 U.S. at 26 (O’Connor, J., dissenting) (“The clarity of hindsight cannot provide the standard for judging the reasonableness of police decisions made in uncertain and often dangerous circumstances.”).

73. *Graham*, 490 U.S. at 397; *see also Garner*, 471 U.S. at 23 (O’Connor, J., dissenting) (describing “the difficult, split-second decisions police officers must make”); *id.* at 32 (warning against “second-guessing of difficult police decisions that must be made quickly in the most trying of circumstances”).

74. *Mullenix v. Luna*, 136 S. Ct. 305 (2015); *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014); *Scott v. Harris*, 550 U.S. 372 (2007); *Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam). For a description of how the Court has failed in its force jurisprudence to take into account the police profession’s own standards, see Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 217 (2017) (“[T]he Supreme Court’s post-*Garner* case law has been at loggerheads with the very fundamentals of police tactics.”).

75. Thomas Frank, *High-Speed Police Chases Have Killed Thousands of Innocent Bystanders*, USA TODAY (July 30, 2015), <https://www.usatoday.com/story/news/2015/07/30/police-pursuits-fatal-injuries/30187827> [<https://perma.cc/MXG4-FRZL>] (analyzing

in response to violent felonies.<sup>76</sup> Meanwhile, the *Washington Post* found that from January 2015 to May 2017, police shot and killed seventy-six people unarmed with any weapon other than their vehicle.<sup>77</sup> IACP has counseled against shooting at moving vehicles because the practice typically will not disable the vehicle, endangers innocent bystanders, and can lead to officers being struck and killed.<sup>78</sup> The Supreme Court, however, has treated high-speed chases and shooting at cars as tactics that serve public safety rather than undermine it.

In a variety of contexts, then, the Court has been influenced by its perception of the prevalence of officer misconduct when ruling on questions of constitutional rights and remedies. At times, this factor has been an explicit part of the Court’s analysis; other times, it may have been at work in the background. More often than not, the Court has seen officer misconduct as isolated and rare, and it has refrained from constraining police authority as a result.

## II. RACIAL DISCRIMINATION

For years the Supreme Court ignored,<sup>79</sup> tolerated,<sup>80</sup> or endorsed<sup>81</sup> explicit discrimination. In the middle of the twentieth century, the Court began to acknowledge the

National Highway Traffic Safety Administration data). These included 139 officers, 6301 suspects, and 5066 passengers and bystanders. The data are not detailed enough to track resulting injuries, but *USA Today* estimated that the number could be more than 270,000 over the same time period. *Id.* Another study of pursuits found 7430 fatalities resulted from pursuits between 1982 and 2004. H. Range Hutson, Phillip L. Rice, Jr., Jasroop K. Chana, Demetrios N. Kyriacou, Yuchiao Chang & Robert M. Miller, *A Review of Police Pursuit Fatalities in the United States from 1982–2004*, 11 *PREHOSPITAL EMERGENCY CARE* 278, 279 (2007).

76. CYNTHIA LUM & GEORGE FACHNER, *POLICE PURSUITS IN AN AGE OF INNOVATION AND REFORM: THE IACP POLICE PURSUIT DATABASE* 56 (2008), [https://www.nccpsafety.org/assets/files/library/Police\\_Pursuits.pdf](https://www.nccpsafety.org/assets/files/library/Police_Pursuits.pdf) [<https://perma.cc/FMY7-E55V>] (noting further that the pursuit was initiated in 42.3% of cases based on a traffic violation).

77. Wesley Lowery, Lindsey Bever & Katie Mettler, *Police Have Killed Nearly 200 People Who Were in Moving Vehicles Since 2015, Including 15-Year-Old Jordan Edwards*, *WASH. POST* (May 3, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/05/03/police-have-killed-nearly-200-people-who-were-in-moving-vehicles-since-2015-including-15-year-old-jordan-edwards> [<https://perma.cc/BGM3-3EDB>].

78. IACP NAT’L LAW ENF’T POLICY CTR., *USE OF FORCE* 7 (2006), <https://assets.documentcloud.org/documents/2303827/useofforcepaper.pdf> [<https://perma.cc/VG9S-HASE>].

79. *See, e.g.*, *Grovey v. Townsend*, 295 U.S. 45 (1935) (holding no constitutional violation because there was no state action where county clerk refused to provide black voter an absentee ballot based on Texas Democratic Party resolution to restrict party membership to whites), *overruled by* *Smith v. Allwright*, 321 U.S. 649 (1944).

80. *See, e.g.*, *Korematsu v. United States*, 323 U.S. 214, 223 (1944) (holding that Korematsu was excluded from designated area “not . . . because of hostility to him or his race,” but “because we are at war with the Japanese Empire”); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (propounding the separate-but-equal doctrine); *Civil Rights Cases*, 109 U.S. 3 (1883) (announcing state action requirement for regulation under the enforcement clause of the Fourteenth Amendment and invalidating the Civil Rights Act of 1875, which prohibited private discrimination in access to accommodations, transportation, and theaters).

81. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1856) (holding that black people, who were “so far inferior, that they had no rights which the white man was bound to respect,”

depth of racial inequality and take action to address it. At a certain point, a majority of the Justices simply could not defend the subordination of nonwhite people that was written into law and entrenched in American social and political institutions. Very quickly, however, the Court retreated from the view of racism as a systemic problem and began to treat it as the province of a minority of bad actors—the Few Bad Apples whose animus distinguished them from the vast majority of the population.

When the Court did read the Constitution's protections for people of color more broadly, it was influenced by an understanding that discrimination was widespread.<sup>82</sup> It did not always make that understanding explicit, though. At times, the Court worked to undo racial harms without discussing race at all. In *Powell v. Alabama*, the Court established the due process right to effective counsel in capital cases and vacated the convictions of the Scottsboro boys, a group of black youths whose attorneys had been appointed the morning of trial.<sup>83</sup> Although the Court noted that the defendants were "negro," race did not factor into its written legal analysis.<sup>84</sup> And yet the centrality of race to the Court's decision to intervene in the railroading of black capital defendants was unmistakable. The defendants were falsely accused of raping two white women, a charge that routinely inspired white mob violence and lynchings at the time, and the case was discussed around the world as an example of America's racism.<sup>85</sup> Michael Klarman has suggested that the intense national focus on racialized violence in the form of lynching during this period likely influenced the Justices to invalidate state capital convictions that were "just one step removed from lynching," or "legal lynching."<sup>86</sup> He has argued persuasively that this backdrop helps explain the Court's vacating state court convictions of southern black defendants on constitutional grounds not only in

---

could not be citizens).

82. See Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 14 (1994) (arguing that "deep-seated social, political, and economic forces had already begun to undermine traditional American racial attitudes" before the Court's decision in *Brown v. Board of Education*).

83. 287 U.S. 45 (1932).

84. It's also true that the Court rejected other challenges to the prevailing racial order during this era. See *Breedlove v. Suttles*, 302 U.S. 277 (1937) (upholding the poll tax); *Grove v. Townsend*, 295 U.S. 45 (1935) (deeming the white primary constitutional); *Gong Lum v. Rice*, 275 U.S. 78 (1927) (upholding the exclusion of a Chinese student from a whites-only public high school and thereby sanctioning school segregation); *United States v. Thind*, 261 U.S. 204 (1923) (holding an Indian Sikh man ineligible for American citizenship because, although he might have been Caucasian, he was not white); *Ozawa v. United States*, 260 U.S. 178 (1922) (holding a Japanese man ineligible for American citizenship because, although he appeared white, he was not Caucasian).

85. See Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 53–54 (2000) ("In the South during this period, the mere allegation by a white woman that she had been raped by a black man generally was the equivalent of conviction.").

86. *Id.* at 53; see also *id.* at 60–61 (discussing the resurgence in lynchings during and after World War I and the increasing support for federal antilynching law, and suggesting that "[j]ust as Republican congressmen were motivated by the recent epidemic of anti-black violence to condemn lynching, so may similarly-minded Supreme Court Justices have been prompted to take action against lynching's close cousin, mob-dominated trials").

*Powell*, but also in *Norris v. Alabama*,<sup>87</sup> *Moore v. Dempsey*,<sup>88</sup> and *Brown v. Mississippi*.<sup>89</sup> All involved mob-dominated trials in which the proceedings were rushed and guilty verdicts by white juries were foreordained.

Another example is *Harper v. Virginia Board of Elections*, in which the Court outlawed poll taxes under the Equal Protection Clause.<sup>90</sup> Just seven years before *Harper*, the Court had rejected a facial challenge to a literacy test in *Lassiter v. Northampton County Board of Elections* despite ample evidence that such tests were designed to suppress black voting.<sup>91</sup> In *Lassiter*, the Court applied rational basis review and found the county’s test was reasonably related to the legitimate government interest of having an intelligent electorate.<sup>92</sup> Rather than acknowledge the racist purpose and effect of the myriad vote suppression devices then in use throughout the South—that is, do what it did not do in *Lassiter*—the *Harper* Court departed from *Lassiter* in other ways. It treated voting as a fundamental right and wealth as a near-suspect class.<sup>93</sup> It effectively applied strict scrutiny rather than rational basis review.<sup>94</sup> And it found no relationship between wealth and intelligent participation in elections, even though wealth correlated with literacy.<sup>95</sup> The Court declined to analyze the poll tax as a form of racial discrimination,<sup>96</sup> and yet the historical context suggests that race played a significant role. Three Justices, who initially helped form a majority that would have denied the challengers’ appeal and upheld the poll tax, switched their vote the day after police attacked black civil rights marchers trying to cross the Edmund Pettus Bridge in Selma, Alabama.<sup>97</sup>

87. 294 U.S. 587 (1935) (holding that the exclusion of blacks from grand or petit jury based on race violates the Equal Protection Clause).

88. 261 U.S. 86 (1923) (holding that convictions obtained under mob pressure violate the Due Process Clause).

89. 297 U.S. 278 (1936) (holding that the Due Process Clause forbids using a confession obtained through torture).

90. 383 U.S. 663 (1966), *overruling in part* *Breedlove v. Shuttles*, 302 U.S. 277 (1937) (unanimously upholding Georgia poll tax for voting in state elections).

91. 360 U.S. 45 (1959).

92. *Id.* Like many literacy tests at the time, Northampton County’s had a grandfather clause exempting those with a family member who voted prior to 1867. The county had conceded that its grandfather clause was unconstitutional, but wanted to continue to use it for what it claimed were nondiscriminatory reasons. *Id.* at 45–46.

93. *Harper*, 383 U.S. at 667.

94. *See id.* at 670.

95. *Id.* at 666–67.

96. *Id.* at 666 n.3 (“While the ‘Virginia poll tax was born of a desire to disenfranchise the Negro’ . . . , we do not stop to determine whether on this record the Virginia tax in its modern setting serves the same end.”) (quoting *Harman v. Forssenius*, 380 U.S. 528, 543); *id.* at 672 (Black, J., dissenting) (observing that the Court’s ruling “is to no extent” based on the use of the poll tax to disenfranchise voters due to race).

97. *See* Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. 63, 113–16 (2009); *see also* Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59, 82–83 (2010) (arguing that race exerted a “gravitational pull” on the Court in *Harper* but that the Court invalidated the poll tax on other grounds because of the difficulty of proving racially discriminatory purpose).

At other times, the Court strived to appear *not* to be reacting to systemic societal discrimination while doing exactly that. For example, in *Sweatt v. Painter*, in which the Court unanimously ordered the admission of a black applicant to the all-white University of Texas Law School, the Court insisted it was not addressing group rights or taking on the institution of segregated education sanctioned by its own prior decisions.<sup>98</sup> Heman Marion Sweatt had been denied admission to the law school on account of his race. In the midst of the litigation, Texas created a new law school for black students to satisfy the standards of the Equal Protection Clause under the separate-but-equal rule of *Plessy v. Ferguson*. The Court found that the schools were unequal in all relevant respects—facilities, course options, prestige, and alumni network.<sup>99</sup> It therefore required Sweatt’s admission to the white law school to ensure rights “personal” to Sweatt “as an individual.”<sup>100</sup> The Court claimed the case did not require it to reconsider the rule of *Plessy*.<sup>101</sup> Unquestionably, however, its decision struck a blow against racial exclusion in education at large and paved the way for dismantling the legal foundation of segregation.<sup>102</sup>

In some cases, the Court has directly acknowledged the systemic nature of racial subordination and facilitated systemic remedies. The most prominent example is the Court’s repudiation of its separate-but-equal doctrine in *Brown v. Board of Education*.<sup>103</sup> There the Court took a deliberately systemic view of school segregation, noting that it “has long been a nationwide problem, not merely one of sectional concern.”<sup>104</sup> The Court likewise understood the far-reaching consequences of such segregation. It discussed “the importance of education to our democratic society” and explained that “its present place in American life throughout the nation” was an indispensable part of the equal protection analysis.<sup>105</sup> The Court grasped the depth of the harm caused by segregation<sup>106</sup> and resolutely announced, “Separate educational facilities are inherently unequal.”<sup>107</sup>

When later confronted with the widespread failure of school systems to desegregate, the Court authorized broad judicial remedies. In *Green v. County School Board of New Kent County*, the Court ruled that a school assignment plan based on students’ choice between two schools failed to address the violation of equal protection.<sup>108</sup> The Court criticized the school board for “deliberate perpetuation of the unconstitutional dual

---

98. 339 U.S. 629 (1950).

99. *Id.* at 633–34.

100. *Id.* at 635 (quoting *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 351 (1938)).

101. *Id.* at 635–36.

102. See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 205–06 (2004) (arguing that *Sweatt* “functionally overruled *Plessy* with regard to higher education” and “nullified segregation in higher education”).

103. 347 U.S. 483 (1954).

104. *Id.* at 491 n.6.

105. *Id.* at 492–93.

106. *Id.* at 494 (“To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”).

107. *Id.* at 495.

108. 391 U.S. 430 (1968).

system” and called the failure “at this late date” of any meaningful effort to desegregate “intolerable.”<sup>109</sup> The Court demanded an effective plan “now” and authorized the district court to retain jurisdiction of the case until “state-imposed segregation has been completely removed.”<sup>110</sup> Three years later, in *Swann v. Charlotte-Mecklenburg Board of Education*, the Court again lamented the “[d]eliberate resistance” and “dilatory tactics” of school boards since the remedial decision of *Brown II*.<sup>111</sup> Confirming the broad authority of district courts to order changes—including changes that were “administratively awkward, inconvenient, and even bizarre in some situations” and that “impose burdens on some”—the Court upheld mandatory busing and rezoning as appropriate means to bring about integration.<sup>112</sup>

In this period, the Court’s grasp of the breadth and depth of racial subordination also influenced its decisions to uphold landmark civil rights legislation. These cases required the Court to consider the factual predicate for Congress’s authority to act pursuant to its Commerce Clause power and under the enforcement clauses of the Reconstruction Amendments. In *Heart of Atlanta Motel, Inc. v. United States*, the decision upholding the public accommodations title of the Civil Rights Act of 1964, the Court relied on a congressional record “replete with evidence” that black travelers were denied accommodations “nationwide.”<sup>113</sup> Upholding the constitutionality of the Voting Rights Act in *South Carolina v. Katzenbach*, the Court noted that Congress passed the Act “to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century.”<sup>114</sup> Given the “variety and persistence” of discrimination in voting, the Court explained, Congress’s dramatic and “decisive” action in enacting “an array of potent weapons against the evil” was a constitutional exercise of Section 2 of the Fifteenth Amendment.<sup>115</sup> Two years later, when the Court held that 42 U.S.C. § 1982’s prohibition on discrimination in real estate rental and sales was meant to reach beyond state action, it relied on evidence that Congress considered “the prevalence of private hostility toward Negroes” at the time of the law’s passage in 1866. The Court also concluded that the statute was a legitimate exercise of Congress’s enforcement power under the Thirteenth Amendment.<sup>116</sup>

These cases were driven, in large part, by the Court’s recognition that racial subordination resulted from resilient power structures and widespread cultural attitudes. It was not simply the product of isolated and malevolent jurors, school board officials, and voter registrars.

Although the Court analyzed cases and took remedial action based on a more systemic view of racial discrimination at the height of the civil rights era, it soon began to retreat from that approach. Very quickly, three related strains to the Court’s race jurisprudence developed: a belief that the Constitution protected only against intentional discrimination; a commitment to a “color-blind Constitution” that eschewed

---

109. *Id.* at 438.

110. *Id.* at 439–40.

111. 402 U.S. 1, 13 (1971).

112. *Id.* at 28–31.

113. 379 U.S. 241, 252–53 (1964).

114. 383 U.S. 301, 308 (1966).

115. *Id.* at 311, 335.

116. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 428, 438–44 (1968).

race-conscious remedies; and a view that pernicious racial discrimination was a thing of the past, reducing the need for judicial intervention.

The most consequential part of this retrenchment was the Court's narrowing of the Constitution's guarantee of equal protection. Over time, the Court interpreted the Equal Protection Clause to cover only purposeful discrimination, making it nearly impossible to challenge racial disparities produced by facially neutral decision making, no matter how severe. In 1973 in *Keyes v. School District No. 1*, the first Supreme Court case involving school segregation not pursuant to a statutory scheme, the Court held that the Equal Protection Clause required a showing of "purpose or intent to segregate."<sup>117</sup> The majority declined Justice Powell's invitation to abandon "the de facto/de jure distinction nurtured by the courts," which he characterized as "a legalism rooted in history rather than present reality" and blamed for inhibiting desegregation outside of the South.<sup>118</sup> The following year, in *Milliken v. Bradley*, the Court held that a district court could not order a multidistrict desegregation plan to cure de jure segregation in one district without finding the same infirmity in other districts that would be affected, even if the result would be to leave schools in the inner core of a metropolitan area all black and surrounding suburban schools all white.<sup>119</sup>

The Court later relied on these cases in articulating the general principle, in *Washington v. Davis*, that equal protection challenges to facially neutral government action that had a racially disproportionate impact would succeed only if plaintiffs could prove a racially discriminatory purpose.<sup>120</sup> As the Court further articulated in *Personnel Administrator v. Feeney*, a challenge to a state hiring preference for veterans based on the foreseeability of its disparate impact on women, the Equal Protection Clause prohibited only government action taken "because of, not merely in spite of, its adverse effects upon an identifiable group."<sup>121</sup> That requirement has since frustrated many a challenge to stark racial disparities, including in *City of Mobile v. Bolden*, where an at-large election system produced only white city council members despite a black population of thirty-five percent,<sup>122</sup> and *McCleskey v. Kemp*, where the Court denied the constitutional relevance of statistical evidence that capital sentencing in Georgia depended to a striking extent on race.<sup>123</sup> As Reva Siegel

---

117. 413 U.S. 189, 208 (1973) (emphasis omitted).

118. *Id.* at 218–19 (Powell, J., concurring in part and dissenting in part) (italics omitted); *see also id.* at 216 (Douglas, J., opinion) ("I think it is time to state that there is no constitutional difference between *de jure* and *de facto* segregation, for each is the product of state actions or policies.").

119. 418 U.S. 717 (1974).

120. 426 U.S. 229, 240–41 (1976); *see also* *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

121. 442 U.S. 256, 279 (1979) (internal quotation marks omitted).

122. 446 U.S. 55, 66–67 (1980).

123. 481 U.S. 279, 292–97 (1987). The study, conducted by David Baldus, looked at over 2000 cases from 1973 to 1979. It found that prosecutors charged the death penalty in 70% of cases with black defendants and white victims, 32% of cases involving white defendants and white victims, 19% of cases with white defendants and black victims, and 15% of cases involving black defendants and black victims. *Id.* at 287. The defendant was sentenced to death in those same categories 22%, 8%, 3%, and 1% of the time, respectively. *Id.* at 286. Controlling for 230 variables, Baldus found that a death sentence was 4.3 times as likely for a

has described, the Court’s purpose-based equal protection jurisprudence fails to account for the reality that most people either hide their biases or are unaware of them. The result is that “most race-dependent governmental decisionmaking will elude equal protection scrutiny.”<sup>124</sup>

At the same time that the Court limited the reach of the Equal Protection Clause to remedy disparities experienced by racial minorities, it strengthened the Clause as a means for white plaintiffs to challenge race-conscious affirmative action programs. The Court’s decisions rested on the ideal of the color-blind Constitution, under which *any* consideration of race would be inherently suspect and subject to strict scrutiny.

In *Regents of the University of California v. Bakke*, a splintered Court invalidated the use of racial quotas in public university admissions. In the process, Justice Powell opined that all uses of race should be subject to strict scrutiny and that remedying the effects of “societal discrimination” against racial minorities was not a compelling state interest.<sup>125</sup> The four dissenters urged that statements that the Constitution is color-blind “must be seen as aspiration rather than as description of reality.”<sup>126</sup> They warned that color blindness would “become myopia which masks the reality that many ‘created equal’ have been treated within our lifetimes as inferior both by the law and by their fellow citizens.”<sup>127</sup> And they argued that racial classifications designed to remedy discrimination should be subject to the more forgiving intermediate scrutiny.<sup>128</sup> The Court rejected that view, and adopted Justice Powell’s, in *Richmond v. J.A. Croson Company*, holding that all state and local affirmative action programs were subject to strict scrutiny.<sup>129</sup> The Court later

defendant who killed a white victim as for one who killed a black victim. *Id.* at 287–88. Nonetheless, the Court rejected McCleskey’s challenge, holding that he had failed to prove “that the decisionmakers in *his* case acted with discriminatory purpose.” *Id.* at 292 (emphasis in original). For more details on the study and the litigation, see David C. Baldus, George Woodworth, John Charles Boger & Charles A. Pulaski, Jr., *McCleskey v. Kemp: Denial, Avoidance, and the Legitimization of Racial Discrimination in the Administration of the Death Penalty*, in *DEATH PENALTY STORIES* 229–75 (John H. Blume & Jordan M. Steiker eds., 2009).

Disparate impact remains cognizable under several federal statutes, *see* *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015) (Fair Housing Act); *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005) (Age Discrimination in Employment Act); *Thornburg v. Gingles*, 478 U.S. 30 (1986) (Voting Rights Act); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971) (Title VII), but the Court has imposed limitations on the theory in some contexts, *see, e.g., Alexander v. Sandoval*, 532 U.S. 275 (2001) (interpreting Title VI of the Civil Rights Act of 1964 to provide no private right of action).

124. Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 *STAN. L. REV.* 1111, 1136–37 (1997).

125. 438 U.S. 265, 307–10 (1978).

126. *Id.* at 327 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part).

127. *Id.*

128. *Id.* at 359.

129. 488 U.S. 469 (1989); *see also Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

extended strict scrutiny to federal programs, overruling a four-year-old precedent after four of the Justices in the majority resigned.<sup>130</sup>

By 2007, the Constitution as color-blind had become ascendant on the Supreme Court. In *Parents Involved in Community Schools v. Seattle School District No. 1*, the Supreme Court struck down voluntary school integration programs because they relied partly on race for student assignments.<sup>131</sup> Rejecting the use of race-conscious remedies for racial harms, Chief Justice Roberts wrote for himself and three other Justices that the rule of *Brown* compelled this result: “What do the racial classifications at issue here do, if not accord differential treatment on the basis of race?”<sup>132</sup> In his concurrence, Justice Thomas likewise extolled “the colorblind Constitution,” calling it “the rallying cry for the lawyers who litigated *Brown*,” and compared the dissenters to segregationists.<sup>133</sup> Chief Justice Roberts also announced his view of the way forward: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>134</sup>

Justice Sotomayor disputed this position in her dissent in *Schuette v. Coalition to Defend Affirmative Action*, where the Court rejected an equal protection challenge to a Michigan state constitutional amendment barring affirmative action.<sup>135</sup> “Race matters,” she insisted. “The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race,” rather than to “sit back and wish away . . . racial inequality.”<sup>136</sup> Her position did not carry the day in *Schuette* and has remained the minority view on the Court. Although last term, to the surprise of many, the Court upheld the use of race in public university admissions, it permitted race to be a factor only in the name of diversity and only in the narrowest of circumstances. The prevailing narrative on the Court concerning race has continued to be that broad, indefensible discrimination warranting judicial intervention is rare, and that race-conscious corrective action is nearly indistinguishable from racism.<sup>137</sup>

A sentiment closely related to the ideal of the color-blind Constitution is that we are, in fact, approaching a post-racial society. The Constitution need not provide race-conscious remedies for racial discrimination, the idea goes, because race is becoming less salient on its own, and to emphasize the role of race would be to reverse that progress. This theme came through most clearly in *Shelby County v. Holder*, where the Court dismantled the most effective protection against voting discrimination this country has ever known.<sup>138</sup> In striking down the Voting Rights

---

130. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (overruling *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990)).

131. 551 U.S. 701 (2007).

132. *Id.* at 747.

133. *Id.* at 772–74 (Thomas, J., concurring).

134. *Id.* at 748 (plurality opinion).

135. 134 S. Ct. 1623, 1676 (2014).

136. *Id.* at 1676 (Sotomayor, J., dissenting).

137. *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2210 (2016) (explaining that a university may consider race only “as a means of obtaining ‘the educational benefits that flow from student body diversity’” and may do so only after meeting its “heavy burden” in proving it had not already obtained those benefits (citations omitted)).

138. 133 S. Ct. 2612 (2013).

Act’s coverage formula for preclearance, Chief Justice Roberts explained that “[o]ur country has changed.”<sup>139</sup> Coverage was based on “decades-old data and eradicated practices”; the formula no longer spoke to “current conditions.”<sup>140</sup> The formula therefore violated the little-known principle of equal sovereignty among the states. In short, ours was now a very different nation, one in which discrimination against states mattered more than discrimination against racial minorities.

The result is a Court that does not deny the existence of racial discrimination, but that sees it as rare and the product of individual bad actors. It is a Court that will endorse remedial action, but only when the racism is blatant and undeniable.

Hence, two years ago the Court was willing to find discrimination in jury selection in *Foster v. Chatman*, where a capital defendant’s attorneys located smoking-gun evidence that the prosecutor’s office struck black jurors based on race.<sup>141</sup> Documents showed that the prosecution had highlighted the names of the five black individuals on the venire list in bright green, had placed an “N” for “no” next to each one of them, had listed them as the first five on a six-person list of “definite Nos,” and had considered whom to permit to remain “if we had to pick a black juror.”<sup>142</sup> This past term, in *Buck v. Davis*, the Court granted habeas relief to a capital defendant whose attorneys called an expert to testify that he was statistically more likely to act violently in the future—an aggravating factor necessary for a death sentence to be imposed—because he is black.<sup>143</sup> And in *Peña-Rodriguez v. Colorado* last year, the Court created a narrow exception to the no-impeachment rule against inquiring into jury deliberations “where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant.”<sup>144</sup> In that case, one juror had told the others that he thought the defendant had committed the alleged sexual assault “because he’s Mexican and Mexican men take whatever they want.”<sup>145</sup>

Virtually anyone would agree these cases involve abhorrent conduct. They are also all examples of one-off constitutional violations. The vindication of these individuals’ rights should not obscure the fact that the Court applied legal tests designed to capture only the most exceptional violations. Driven by a view of racism as the product of animus, the Court’s constitutional jurisprudence offers rather anemic protection to members of groups subjected to past and continuing discrimination based on race.<sup>146</sup>

---

139. *Id.* at 2631.

140. *Id.* at 2627.

141. 136 S. Ct. 1737 (2016).

142. *Id.* at 1744, 1755 (observing that “[t]he sheer number of references to race in [the prosecution’s] file is arresting”).

143. 137 S. Ct. 759 (2017).

144. 137 S. Ct. 855, 869 (2017).

145. *Id.* at 862.

146. See Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 2 (1976) (observing that “[c]overt discrimination continued to flourish” despite 1960s enforcement efforts against open discrimination in education, voting, employment, housing, and public accommodations); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1348–49, 1348 nn.66–67, 1377–78 (1988) (distinguishing between “symbolic”

## III. EXAMINING THE NARRATIVE

The problem with the Few Bad Apples narrative—that police misconduct is isolated and insignificant, that racial discrimination is a historical and dwindling problem—is that it does not accurately describe contemporary America. Returning to how I started this Essay, consider the experience of people of color vis-à-vis law enforcement. A growing body of evidence indicates that patterns of unequal treatment have resulted from a variety of factors—program-level decisions about where and when to deploy police resources, conscious and unconscious bias, and failures of internal accountability systems—that are insufficiently addressed by the bad actor theory of constitutional regulation.

Data sets with sufficient integrity to be subjected to rigorous analysis and large enough to be illuminating are uncommon. But that is changing. A recent study by the Stanford Open Policing Project of sixty million stop and search records from agencies in twenty states, between 2011 and 2015, found significant racial disparities. After controlling for gender, age, and location, the researchers found that black drivers are stopped at higher rates, that black and Latino drivers are more likely to be ticketed and arrested, and that both groups are twice as likely to be searched as whites. Using search rates and hit rates (how often contraband is found), the researchers also found that officers required less suspicion to search black and Latino drivers.<sup>147</sup>

These results are consistent with findings in high-profile private litigation and Department of Justice (DOJ) investigations into police departments. In 2013, Judge Shira Scheindlin ruled that the NYPD's stop-and-frisk practice resulted in a pattern of unconstitutional stops in violation of the Fourth Amendment and racial profiling in violation of the Fourteenth Amendment.<sup>148</sup> The number of pedestrian stops made by NYPD skyrocketed from 97,000 in 2002 to 686,000 in 2011.<sup>149</sup> In the 4.4 million stops conducted between 2004 and 2012, 52% of those stopped were black, 31% were Hispanic, and 10% were white. In 2010, the city was 23% black, 29% Hispanic, and 33% white. The disparities persisted when researchers controlled for other relevant variables.<sup>150</sup> Although the City defended the disparities by noting that minorities were disproportionately represented in the criminal suspect population, Judge Scheindlin rejected this argument because “the stopped

---

oppression—“the formal denial of social and political equality to all Blacks”—and “material” oppression—“the ways that discrimination and exclusion economically subordinated Blacks to whites and subordinated the life chances of Blacks to those of whites on almost every level”—and arguing that antidiscrimination law has failed to address the latter); Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1, 7 (1991) (arguing that extending the idea of a race-blind society “from the public sphere into a generalized social goal risks further disapproval and repression of African-American culture”).

147. EMMA PIERSON, CAMELIA SIMOIU, JAN OVERGOOR, SAN CORBETT-DAVIES, VIGNESH RAMACHANDRAN, CHERYL PHILLIPS & SHARAD GOEL, *A LARGE-SCALE ANALYSIS OF RACIAL DISPARITIES IN POLICE STOPS ACROSS THE UNITED STATES*, <https://5sharad.com/papers/traffic-stops.pdf> [https://perma.cc/R49Z-F8RK].

148. *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

149. *Id.* at 591–92.

150. *Id.* at 574.

population is overwhelmingly innocent.”<sup>151</sup> Only 12% of stops resulted in a summons or arrest; 88% entailed no further law enforcement action.<sup>152</sup> Police recovered guns only 0.1% of the time and other contraband 1.8% of the time. Meanwhile, searches had higher rates in recovering contraband for whites than for blacks and Hispanics.<sup>153</sup> Officers also appeared to be stopping people without regard to a specific criminal offense. As the program ramped up from 2004 to 2009, the percentage of stops in which officers did not list suspicion of a specific crime on their stop forms rose from 1% to 36%.<sup>154</sup>

An ACLU of Massachusetts review of Boston Police Department data from 2007 to 2010 also found serious disparities. Although blacks were less than a quarter of the city’s population, they accounted for 63.3% of stops, frisks, and searches. The racial disparities “persisted even after controlling for crime and other non-race factors.”<sup>155</sup> Studies of traffic stops in Maryland, New Jersey, and Ohio in the 1990s similarly found significant racial disparities.<sup>156</sup> In addition, new data reveal disparities in the use of force. A 2016 study from the Center for Policing Equity examining 19,000 use of force reports from twelve cities from 2010 to 2015 found that blacks were more likely than whites to be subjected to force, even when controlling for the demographics of criminal offending.<sup>157</sup>

DOJ investigations likewise have marshaled hard data to establish patterns and practices of unconstitutional conduct in police departments across the country.<sup>158</sup> Where these investigations have identified patterns of violations, they have also

151. *Id.* at 560.

152. *Id.* at 573.

153. *Id.* at 574 (citing that weapons were seized in stops 1% of the time for blacks, 1.1% for Hispanics, and 1.4% for whites; and that contraband was seized 1.8% of the time for blacks, 1.7% for Hispanics, and 2.3% for whites).

154. *Id.* at 575.

155. ACLU FOUND. OF MASS., BLACK, BROWN AND TARGETED: A REPORT ON BOSTON POLICE DEPARTMENT STREET ENCOUNTERS FROM 2007–2010, at 5, 9 (2014), <https://aclum.org/wp-content/uploads/2015/06/reports-black-brown-and-targeted.pdf> [<https://perma.cc/KU8K-639J>] (concluding that “the BPD unfairly targets Black people because of their race, separate and apart from efforts to target neighborhoods or people associated with crime”).

156. See David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265 (1999) (discussing the studies). A host of other studies have found differential experiences of white and black individuals with police. For example, black respondents to a random survey in Ohio were more than twice as likely to report being treated disrespectfully by police. In Soo Son & Dennis M. Rome, *The Prevalence and Visibility of Police Misconduct: A Survey of Citizens and Police Officers*, 7 POLICE Q. 179, 186 (2004).

157. PHILLIP ATIBA GOFF, TRACEY LLOYD, AMANDA GELLER, STEVEN RAPHAEL & JACK GLASER, CTR. FOR POLICING EQUITY, THE SCIENCE OF JUSTICE: RACE, ARRESTS, AND POLICE USE OF FORCE 5–6, 10, 12–18, 26–27 (2016) (using arrest rates to control for crime and concluding that “racially disparate crime rate is an insufficient explanation of racially disparate use of force rates for this sample of police departments”).

158. DOJ gained statutory authority to conduct these investigations as part of the Violent Crime Control and Law Enforcement Act of 1994. The Act provides that DOJ may seek judicial remedies to “eliminate” any “pattern or practice” of conduct “by law enforcement officers” that “deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.” 34 U.S.C.A. § 12601 (West 2017) (formerly 42 U.S.C. § 14141).

identified root causes in city policy and systems failures within the police department. In Ferguson, Missouri, DOJ alleged a pattern of First Amendment violations; unlawful stops, searches, arrests; excessive force; race discrimination; and due process and equal protection violations in the operation of the municipal court.<sup>159</sup> DOJ found that the misconduct stemmed from a policy choice by the city's civilian leaders: the decision to use its criminal justice system to generate revenue, with police officers ramping up ticketing, the court imposing burdensome fines and fees, and the city relying on arrest and incarceration as the means of debt collection. The focus on revenue generation led policing in Ferguson to become overly aggressive, unmoored from community relationships, and prone to violating constitutional rights in everyday encounters.<sup>160</sup>

In Baltimore, DOJ found that the city's investment in zero-tolerance policing and "clearing corners" led to a pattern of unconstitutional stops and arrests, among other problems. In a city of 620,000, the police department made hundreds of thousands of stops per year concentrated in black neighborhoods. Only 3.7% of pedestrian stops resulted in citation/arrest. Over a six-year period, the prosecutor's office rejected 11,000 charges. DOJ found that over 400 people were stopped ten or more times, and 95% of them were black. One man was stopped more than thirty times, and yet was never cited or charged. Investigators found disparities in charge of arrest, as well. Ninety-one percent of failure to obey charges, 89% of false statement charges, and 84% of disorderly conduct charges were against African Americans. They were arrested at five times the rate of others for drug possession, even though surveys showed they used drugs at similar rates as other groups.<sup>161</sup>

In Chicago, DOJ identified a pattern of excessive force, including shooting at people who were fleeing and posed no immediate threat to officers or the public. The investigation revealed that officers used force "almost ten times more often against

---

159. The racial disparities were stark. DOJ's review of Ferguson's police records found that 85% of vehicle stops, 90% of citations, and 93% of arrests were against African Americans, who made up only 67% of the city's population. Discretionary police actions were overwhelming concentrated on the black population. To take just one example, 95% of "manner of walking in roadway" (jaywalking) charges were levied against African Americans. Black drivers were more than twice as likely to be searched but 26% *less* likely to be found in possession of contraband than white drivers, suggesting that officers were impermissibly stopping people based on race. Meanwhile, 88% of force incidents involved African Americans, and every time a police canine was used to bite a person, that person was black. In the municipal court, African Americans were 68% less likely to have their cases dismissed, more likely to have their cases drag on longer, and at least 50% more likely to have their cases lead to an arrest warrant. African Americans accounted for 92% of the cases in which arrest warrants were issued, and 96% of those actually arrested on warrants alone. In addition, DOJ uncovered evidence of intentional discrimination and therefore alleged a violation of equal protection. CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, REPORT OF INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 1, 4-5 (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/Y74D-4RDH>].

160. *Id.* at 2-3, 9-15.

161. *See* CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, REPORT OF INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 3-10 (2016), <https://www.justice.gov/crt/file/883296/download> [<https://perma.cc/TT5N-VFA6>].

blacks than against whites,” and that the complete breakdown in the police department’s accountability mechanisms had allowed the unconstitutional practices to proliferate.<sup>162</sup>

In each of these cases, the problems of unconstitutional police activities and racial discrimination were systemic in nature—not the unfortunate choices of isolated bad actors.

#### IV. ENVISIONING THE FUTURE OF THE CONSTITUTION

I have argued that narratives in civil rights law concerning the prevalence of misconduct have shaped judicial doctrine. Without a doubt, other forces are at work, including interpretive methodologies and the commitment to *stare decisis*, but it would be a mistake to ignore the role of the Few Bad Apples narrative in the development of doctrines underprotective of constitutional values.

If this is right, then we might expect a change in the prevailing narrative to help produce changes in constitutional law. If the average American, and the average judge or Justice, came to see civil rights violations as systemic in nature, the judiciary might eventually reconsider some of the restrictions it has placed on constitutional claims.

For example, the Court might reconsider its view of what encounters with police officers are and are not consensual.<sup>163</sup> It might rethink *Whren*’s permissive attitude toward pretextual stops in light of evidence that unfettered police discretion, the concentration of police activity in black and Latino neighborhoods, and unconscious bias have led to racial profiling.<sup>164</sup> It might implement Akhil Amar’s suggestion that the racially disparate impact of police search and seizure practices should be considered in the reasonableness analysis under the Fourth Amendment.<sup>165</sup> In the force context, the Court might provide greater content to the indeterminate reasonableness standard of *Graham v. Connor*,<sup>166</sup> relax its requirement that civil rights plaintiffs plead facts nearly identical to those

---

162. CIVIL RIGHTS DIV. & U.S. ATTORNEY’S OFFICE FOR THE N. DIST. OF ILL., U.S. DEP’T OF JUSTICE, REPORT OF INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 4–10, 15 (2017), <https://www.justice.gov/opa/file/925846/download> [<https://perma.cc/2UA6-9X3E>].

163. *E.g.*, *United States v. Gross*, 784 F.3d 784, 789–90 (D.C. Cir. 2015) (Brown, J., concurring) (criticizing the police practice of “randomly trawl[ing] high crime neighborhoods asking occupants who fit a certain statistical profile—mostly males in their late teens to early forties—if they possess contraband,” and characterizing the view that these interactions are consensual as “a fiction” and “a stubborn mythology”).

164. In some cases, state courts have imposed restrictions on officer conduct as a matter of state constitutional law that the Supreme Court has declined to require under the federal Constitution. *See, e.g.*, *State v. Ladson*, 979 P.2d 833, 842 (Wash. 1999) (en banc) (holding pretextual traffic stops illegal under state constitution).

165. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 808 (1994) (“[I]n a variety of search and seizure contexts, we must honestly address racially imbalanced effects and ask ourselves whether they are truly reasonable.”).

166. *See* Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1119–20, 1131–32 (2008).

previously held unconstitutional in order to survive qualified immunity,<sup>167</sup> or clarify that its “split-second judgments” language cannot be invoked as a talisman to defeat liability in cases like those that opened this Essay.<sup>168</sup> The Court might even take up Anthony Amsterdam’s forty-year-old suggestion to impose an explicit regulatory regime on policing, prohibiting all searches and seizures that are not “conducted pursuant to and in conformity with either legislation or police departmental rules and regulations.”<sup>169</sup>

Or take the three recent cases in which the Supreme Court confronted blatant racial injustice—*Foster* (striking jurors based on race), *Buck* (capital sentencing infected by race), and *Peña-Rodriguez* (biased juror). A recognition of widespread racial inequality and bias in the criminal justice system would counsel in favor of broader constitutional protection to bring about deeper institutional change. To prevent attorneys from striking jurors based on race, the Court could take up the recommendations of Justices Marshall and Breyer that peremptory strikes be declared *per se* unconstitutional.<sup>170</sup> To prevent racial discrimination in the administration of the death penalty, the Court could correct its wrong turn in *McCleskey v. Kemp*, where it dismissed extreme racial disparities as “an inevitable part of our criminal justice system” and not constitutionally cognizable.<sup>171</sup> To ensure that defendants are judged by impartial juries, the Court could clarify how a defendant can prove that people of color have been systematically excluded from jury pools in violation of the Sixth Amendment’s fair cross-section requirement.<sup>172</sup> These would be system-oriented solutions to systemic problems.

The difficulty is that the prevailing influence of the Few Bad Apples narrative makes it less likely that the Court will recognize or redress patterns of misconduct in the future. And the problem is self-perpetuating. The more the courts rule against civil rights claims, the more it will seem to judicial actors that civil rights claims lack merit and that misconduct is rare. In turn, courts will be more likely to continue to contract substantive rights and erect procedural barriers to relief.

Is it possible that our cultural currents could shift? There are some encouraging signs. The proliferation of viral videos and the emergence of the Black Lives Matter movement have made it harder to see the problem of police violence as isolated, race-neutral, or independent of discrimination across a range of spheres.<sup>173</sup> Ferguson

---

167. *Id.* at 1142 (“In practice, the Court has required quite specific prior case law describing the unconstitutionality of the conduct in closely analogous circumstances in order to overcome qualified immunity.”).

168. *See* Garrett & Stoughton, *supra* note 74, at 229 (citing James J. Fyfe’s reference to the “split-second syndrome” or “fallacy”).

169. Amsterdam, *supra* note 8, at 416.

170. *See* Miller-El v. Dretke, 545 U.S. 231, 273 (2005) (Breyer, J., concurring) (“I believe it necessary to reconsider *Batson*’s test and the peremptory challenge system as a whole.”); *Batson v. Kentucky*, 476 U.S. 79, 107 (1983) (Marshall, J., concurring) (discussing “the inherent potential of peremptory challenges to distort the jury process”).

171. 481 U.S. 279, 312 (1987).

172. *See* Berghuis v. Smith, 559 U.S. 314, 333 n.6 (2009) (declining to consider whether the disproportionate impact of social and economic factors, such as hardship exemptions, can support a claim under the fair-cross-section requirement).

173. *See, e.g., Platform*, MOVEMENT FOR BLACK LIVES, <https://policy.m4bl.org/platform>

opened the eyes of millions of Americans to unequal and exploitative practices in law enforcement, validating complaints long made in communities of color.<sup>174</sup> Universities are grappling with the legacy of slavery, in some cases renaming storied institutions, abandoning insignia, creating reparations-like programs for the ancestors of enslaved people, and committing funding to diversify their faculties. Across the South, Confederate monuments are beginning to come down and local populations are renaming streets and highways that lionize secessionists. The terms “mass incarceration” and “white supremacy” can be found on the lips of mainstream Democratic and Republican officials alike.

The Few Bad Apples narrative is being contested even at the Supreme Court. In a forceful dissent in *Utah v. Strieff*, Justice Sotomayor disputed the majority’s characterization of the risks of abuse that would follow from its decision not to apply the exclusionary rule. “Respectfully,” she insisted, “nothing about this case is isolated.”<sup>175</sup> Citing Justice Department investigations, she demonstrated that many cities and towns have thousands of outstanding warrants. She criticized the majority for failing to explain why Edward Strieff’s case was isolated or “how a defendant can prove that his arrest was the result of ‘widespread’ misconduct.”<sup>176</sup> Indeed, evidence of systemic misconduct is not easily uncovered during suppression hearings in criminal cases, and relatively few jurisdictions have been the subject of a federal investigation capable of uncovering patterns of abuse. Justice Sotomayor also sought to demonstrate how the Court’s Fourth Amendment jurisprudence overall has conferred too much discretion on police and given them too much control over individuals’ liberty:

We must not pretend that the countless people who are routinely targeted by police are “isolated.” They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. . . . They are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but.<sup>177</sup>

At the same time, President Donald Trump and Attorney General Jeff Sessions have doubled down on the Few Bad Apples narrative. They perceive a War on Cops and have disputed the notion that there are any systemic problems in law enforcement. Trump has railed against “political correctness,” and Sessions is backing away from civil rights enforcement. Just five weeks into his tenure, the new Attorney General withdrew the intentional discrimination claim in the case against Texas’s

---

[<https://perma.cc/5XQ5-BT8A>] (criticizing “patriarchy, exploitative capitalism, militarism, and white supremacy” and seeking reparations and “long-term investments” in black communities).

174. The significance of Ferguson has not escaped the Supreme Court’s notice. Justices Sotomayor and Kagan both relied on the presence of thousands of outstanding warrants, documented in DOJ’s report, in their dissents in *Strieff*. See *Utah v. Strieff*, 136 S. Ct. 2056, 2068, 2073 n.1 (2016).

175. *Id.* at 2068 (Sotomayor, J., dissenting).

176. *Id.* at 2069.

177. *Id.* at 2071 (citations omitted).

voter identification law, and he has shifted resources from ensuring equal voting opportunity to pressuring states to purge people from the rolls.

Ironically, this Administration's rhetoric and actions might have the effect of exposing the insufficiency and falsity of the Few Bad Apples narrative. The President campaigned on a vision of purging the United States of undocumented immigrants, curtailing legal immigration, and barring Muslims from the country. He articulated that vision in inflammatory terms not often heard in the modern political arena.<sup>178</sup> By speaking with such open animus based on race and religion, and doing so from the highest political perch in the land, Trump is exploding the fiction that we live in a post-racial society. When white supremacists with tiki torches converged on Charlottesville, Virginia, in August 2017 and one of them killed a counter-protestor, the president failed to condemn racial prejudice with anything approaching moral clarity. His response helped renew a national conversation about race in America.

President Trump also styled himself as a "law and order" candidate, and six months into his administration he began to articulate what that meant. In July 2017, he advocated police violence in a speech that was widely condemned by law enforcement leaders.<sup>179</sup> This kind of statement may draw more, not less, attention to the need for police reform. Similarly, September 2017 saw a wave of protests against police violence by professional athletes, most of whom began kneeling or locking arms during the national anthem at games only *after* the President lashed out in a public speech at the relatively few who had done so.<sup>180</sup>

178. In kicking off his campaign, Trump explained, "When Mexico sends its people, they're not sending their best. . . . They're bringing drugs. They're bringing crime. They're rapists." *Full Text: Donald Trump Announces a Presidential Bid*, WASH. POST (June 16, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid> [<https://perma.cc/7AL8-LGEK>]. He also claimed, falsely, to have seen thousands of Muslims in New Jersey cheering as the Twin Towers collapsed on 9/11. Lauren Carroll, *Fact-checking Trump's Claim That Thousands in New Jersey Cheered When World Trade Center Tumbled*, POLITIFACT (Nov. 22, 2015, 6:17 PM), <http://www.politifact.com/truth-o-meter/statements/2015/nov/22/donald-trump/fact-checking-trumps-claim-thousands-new-jersey-ch> [<https://perma.cc/7TU4-USNQ>]. Two weeks after making that statement, Trump called for "a total and complete shutdown of Muslims entering the United States." Patrick Healy & Michael Barbaro, *Donald Trump Calls for Barring Muslims from Entering U.S.*, N.Y. TIMES (Dec. 7, 2015, 10:42 PM) <https://www.nytimes.com/politics/first-draft/2015/12/07/donald-trump-calls-for-banning-muslims-from-entering-u-s> [<https://perma.cc/C7PM-DJS2>].

179. President Trump stated:

[A]nd when you see these thugs being thrown into the back of a paddy wagon—you just see them thrown in, rough—I said, please don't be too nice. Like when you guys put somebody in the car and you're protecting their head, you know, the way you put their hand over? Like, don't hit their head and they've just killed somebody—don't hit their head. I said, you can take the hand away, okay?

President Donald Trump, Remarks to Law Enforcement Officials on MS-13 (July 28, 2017), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-law-enforcement-officials-ms-13> [<https://perma.cc/748X-KSWN>].

180 Sophie Tatum, *Trump: NFL Owners Should Fire Players Who Protest the National Anthem*, CNN (Sept. 23, 2017, 4:05 PM), <http://www.cnn.com/2017/09/22/politics/donald-trump-alabama-nfl/index.html> [<https://perma.cc/QZ39-8WDT>].

Will the Few Bad Apples narrative continue to have resonance in our society, and by extension in the judiciary? Or will emerging social movements and salient events cause Americans and jurists to acknowledge the systemic nature of civil rights infringement? The answer to this question will play a significant role in whether the future of the Constitution is more or less protective of the individual liberty, privacy, and dignity.