
BOOK REVIEW
POLICING MASS INCARCERATION

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POLICING MASS INCARCERATION

PRESUMED GUILTY: HOW THE SUPREME COURT EMPOWERED THE POLICE AND SUBVERTED CIVIL RIGHTS. By Erwin Chemerinsky. New York, N.Y.: Liveright Publishing Corporation. 2021. Pp. xiii, 362. \$27.95.

*Reviewed by Fred O. Smith, Jr.**

In Presumed Guilty: How the Supreme Court Empowered the Police and Subverted Civil Rights, Dean Erwin Chemerinsky issues an indictment of the Supreme Court, charging that institution with facilitating undue state violence, wrongful convictions, invasions of dignity, and racial inequality. The Supreme Court has produced these consequences by offering needlessly narrow remedies for constitutional wrongs and by issuing crabbed constructions of criminal procedural rights. Chemerinsky's indictment is written with clarity, comprehensiveness, and humanity.

This Book Review argues that mass incarceration presents an immense barrier to the author's goals of producing less violent, more accurate, less invasive, and less racist policing. First, many of Chemerinsky's proposals for police reform assume a system of criminal trials. In our system of mass incarceration, the overwhelming majority of incarcerated persons never receive a trial. If the criminal legal system did attempt to rely on trials instead of coerced guilty pleas, the system would collapse under the weight of the sheer number of people we prosecute. Second, Chemerinsky argues that we should revisit and raise the requisite standard for police to search a suspect from reasonable suspicion to probable cause. But in a system of mass incarceration, probable cause is not hard to come by. The more things we label "crime," the more reasonable it is to believe that someone is likely committing one. Third, mass incarceration feeds on legal reforms that are not aimed at decarceration. A "criminal caste" is more tolerable if the government gives the caste members "rights" before stripping them of humanity and core dimensions of citizenship.

It is imperative to reverse and control mass incarceration to achieve lasting transformation of the police. There is no equitable way to police in a world of mass incarceration.

INTRODUCTION

In Dean Erwin Chemerinsky's new book *Presumed Guilty: How the Supreme Court Empowered the Police and Subverted Civil Rights*, he argues that the Supreme Court of the United States has facilitated undue state violence, wrongful convictions, invasions of dignity, and racial inequality. According to the book, the Supreme Court has produced these consequences by offering needlessly narrow remedies for constitutional wrongs and crabbed constructions of constitutional criminal procedure.

Chemerinsky's indictment is written with clarity, comprehensiveness, and humanity. By clarity, I mean that Chemerinsky's prose is intelligible to the engaged novice while simultaneously drawing out insights of value to seasoned experts in constitutional law, federal courts, and criminal procedure. By comprehensiveness, I mean that the book

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masterfully travels across different germane areas of the law and across many key points in time. By humanity, I mean that the captions of judicial cases are translated into what those captions actually are: the names of human beings whose lives were changed by the criminal legal system. Moreover, in this book, Supreme Court Justices are treated not as rarefied, infallible automatons, but as legally gifted human beings who are often called upon to exercise highly consequential discretion.

Two points in the book capture Chemerinsky's core claims. The preface opens: "Today in the United States, much attention is focused on the enormous problems of police violence and racism in law enforcement, but too often that attention fails to place the blame where much of it belongs: on the Supreme Court" (p. xi). Then, in Chapter Three, Chemerinsky further explains that "through most of American history, the Court has usually refused to impose constitutional checks on police or to provide adequate remedies for police misconduct. Instead, it has created a series of legal rules that fail to protect citizens' constitutional rights and that facilitate and even encourage racist policing" (p. 31). These two articulations of the book's core claims are compatible, but distinct. The former focuses on racism and excessive force. The latter identifies a broader, racialized crisis of accountability in criminal law enforcement.

On Chemerinsky's account, for most of American history, the Supreme Court was silent on questions of policing. During the nineteenth century, community-based night watches (in the North) and slave patrols (in the South) morphed into government-run, professional police forces (pp. 39–45). But at that time, the Bill of Rights did not apply to state and local governments (p. 52). And it was almost a century after the passage of the Reconstruction Amendments that the Supreme Court ruled that state actors were bound by the Fourth, Fifth, and Sixth Amendments (p. 53). Even after that happened, the Court only briefly interpreted constitutional rights and remedies in ways that limited the power of police. For example, the Warren Court incorporated the exclusionary rule against the states (p. 93), requiring that illegally obtained evidence not be admitted against defendants (p. 86). But later, the Court created exceptions that weakened that remedy's power (pp. 185–86, 247). And even the Warren Court held, 8–1, that officers may stop and frisk people without probable cause, so long as there is reasonable suspicion of criminal activity.¹ According to Chemerinsky, the latter decision is consistent with the Supreme Court's overwhelming tendency toward aggrandizing the power of police (pp. 111–12).

After making his case about the role the Supreme Court has played in unduly empowering the police, Chemerinsky turns to solutions. And while his critique focuses on the Supreme Court, his solutions do not. First, he proposes that Congress, state legislatures, and state judiciaries

¹ *Terry v. Ohio*, 392 U.S. 1, 8, 30, 35 (1968).

expand the rights of citizens during police encounters (pp. 283–84). Second, he proposes that those actors also expand remedies with regard to excluding illegally obtained evidence, imposing civil liability for governments and their officials, and strengthening habeas protections (pp. 283–84).² In a sense, some of these proposals invite states to pick up the mantle of the Warren Court on issues like the exclusionary rule. And the solutions are also in the tradition of Justice Brennan, who urged states to interpret their own constitutions without regard to how restrictively the Supreme Court had interpreted the Federal Constitution.³

Contextually, the book can be seen as a subject matter–specific sequel to Chemerinsky’s widely praised book *The Case Against the Supreme Court*. In that text, Chemerinsky similarly offers a long view of Supreme Court history, contending that the Court has done far more harm than good when it comes to the rights of subordinated groups.⁴ *Presumed Guilty* also shares some methodological similarities with Professor Devon Carbado’s scholarship on the Supreme Court’s role in promoting racial profiling through Fourth Amendment jurisprudence and sharp restrictions on civil liability.⁵

At the same time, Chemerinsky’s book represents a contrast with important policing and criminal justice scholarship from over the past decade. For example, in 2011, the late Professor William Stuntz offered influential descriptions of how criminal law became increasingly routinized, centralized, and punitive.⁶ Among other observations, Stuntz contended that the expansion of constitutional criminal procedural rights actually facilitated the criminal legal system’s increasingly punitive, racialized reach.⁷ Conversely, Chemerinsky focuses on ways that the Supreme Court’s failures to expand these rights further have led to dire, lethal consequences. There are also other important ways that Chemerinsky’s account differs from recent highly influential works. Chemerinsky’s book places the focus much more squarely on the Supreme Court than does Professor Michelle Alexander’s groundbreaking work situating America’s criminal legal system within a broader, longstanding system of apartheid;⁸ Professor Paul Butler’s insights on

² See *infra* section I.C, pp. 1867–68, for more detail on these proposals.

³ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977).

⁴ See generally ERWIN CHERMERINSKY, *THE CASE AGAINST THE SUPREME COURT* (2014).

⁵ See Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1505 (2016) [hereinafter Carbado, *Blue-on-Black Violence*]; Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 128–30 (2017) [hereinafter Carbado, *From Stopping Black People to Killing Black People*].

⁶ See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 1–11* (2011).

⁷ *Id.* at 216–18.

⁸ See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 173–208 (2010).

how societal and legal factors converge to facilitate the view that Black men are perpetually dangerous beings in need of violent control;⁹ and Professor Frank Zimring's thesis that the proliferation of firearms, substantive criminal law, and administrative rules facilitate police killings.¹⁰

There are other key ways that Chemerinsky's proposals — with their specific focus on sound, achievable doctrinal shifts — could make a meaningful difference in the lives of Americans on a human scale. Put starkly, there are innocent people who would not be convicted because eyewitness lineup procedures would lead to more accuracy. There are people who would not be killed because cities, deterred by potential liability, would ban especially dangerous procedures. There are families that would receive remedies when the government invades their rights. Indeed, there are four primary, normative values that guide Chemerinsky's critique and proposals: (1) reducing police violence; (2) increasing the accuracy of criminal trials and reducing wrongful convictions; (3) protecting privacy; and (4) reducing racial disparities in law enforcement. And there are important ways in which adopting Chemerinsky's proposals would successfully further these aims.

There is, however, a humanitarian and democratic crisis that frustrates all of Chemerinsky's aims: mass incarceration. To be sure, Chemerinsky's book is about "the police," not the entire criminal system. But civil rights lawyers and movement activists have encouraged us to eschew siloed conversations when thinking about the criminal legal system, given the "radical imagination" it would take to transform it meaningfully.¹¹ And guided by that perspective, this Book Review will show the deep interconnectedness of policing reform and broader questions about the future of an overgrown carceral system that is intolerably barbaric. Without dramatically reversing mass incarceration, it is unclear that the United States can reliably reduce domestic state-sanctioned violence, reduce wrongful convictions, protect privacy, or dismantle racial caste.

Mass incarceration is mass violence. Deprivation of physical liberty has become a national default for social ills, ranging from controlled substances to sex work to the inability to pay tickets for not cutting one's grass.¹² In the United States, 2.3 million people were incarcerated as of

⁹ See, e.g., PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN* 17–46 (2017).

¹⁰ See, e.g., FRANKLIN E. ZIMRING, *WHEN POLICE KILL* 224, 239–44, 247 (2017).

¹¹ Amna A. Akbar, *Toward a Radical Imagination of Law*, 93 N.Y.U. L. REV. 405, 473, 479 (2018); see also Monica C. Bell, Response, *Hidden Laws of the Time of Ferguson*, 132 HARV. L. REV. F. 1, 20–23 (2018); Jessica M. Eaglin, Essay, *To "Defund" the Police*, 73 STAN. L. REV. ONLINE 120, 140 (2021); Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform,"* 128 YALE L.J.F. 848, 851–52 (2019).

¹² See *infra* Part III, pp. 1873–82.

2017¹³ — roughly the entire populations of Atlanta, Boston, Miami, and Washington, D.C., combined.¹⁴ On a given day, hundreds of thousands of people are awaiting trial, purportedly protected by a presumption of innocence.¹⁵ And in turn, every night in the United States, millions of children go to sleep unable to hug one or both of their parents because those parents are in custody.¹⁶ Behind those numbers is a system that became so large so quickly that, as Stuntz observed, it “collapsed.”¹⁷

There are at least three reasons why mass incarceration presents an immense barrier to less violent, more accurate, less invasive, and less racist policing.

First, many of Chemerinsky’s proposals for police reform assume a system of trials. Expanding the exclusionary rule, for example, would prevent illegal evidence from being used as proof of guilt. That outcome, so the theory goes, would enhance the integrity of trials and deter officers from engaging in illegal conduct in the first place. In our system of mass incarceration, however, the overwhelming majority of incarcerated persons never receive a trial.¹⁸ As the Court itself has acknowledged, ours is “a system of pleas, not a system of trials.”¹⁹ Some experts and activists have surmised that routine jury trials would be nearly impossible given the high number of people who face charges.²⁰ On this theory, if the criminal legal system did attempt to rely on trials instead of coerced guilty pleas, the system would collapse under the sheer number of people we prosecute.

¹³ Samantha Jaffe, “*It’s Not You, It’s Your Caseload*”: Using Cronin to Solve Indigent Defense Underfunding, 116 MICH. L. REV. 1465, 1482 (2018).

¹⁴ See *QuickFacts: Atlanta City, Georgia*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/atlantacitygeorgia> [<https://perma.cc/HVF6-RVMZ>]; *QuickFacts: Boston City, Massachusetts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/bostoncitymassachusetts> [<https://perma.cc/XWT7-SC7V>]; *QuickFacts: District of Columbia*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/DC> [<https://perma.cc/FVG7-SYZA>]; *QuickFacts: Miami City, Florida*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/miamicityflorida> [<https://perma.cc/LW9Z-9BJL>].

¹⁵ Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 713 (2017); see also Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2308 (2018).

¹⁶ SUSAN D. PHILLIPS, THE SENT’G PROJECT, VIDEO VISITS FOR CHILDREN WHOSE PARENTS ARE INCARCERATED: IN WHOSE BEST INTEREST? 1 (2012), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Video-Visitation-for-Children-In-Whose-Best-Interest.pdf> [<https://perma.cc/EQ3C-MUQA>].

¹⁷ STUNTZ, *supra* note 6, at 2–3.

¹⁸ See *infra* section III.B, pp. 1878–79.

¹⁹ *Lafler v. Cooper*, 566 U.S. 156, 170 (2012); see also *Missouri v. Frye*, 566 U.S. 134, 143 (2012) (quoting *Lafler*, 566 U.S. at 170).

²⁰ Michelle Alexander, Opinion, *Go to Trial: Crash the Justice System*, N.Y. TIMES, (Mar. 10, 2012), <https://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html> [<https://perma.cc/R8QJ-W9H9>]; see also Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1093 (2013).

Second, Chemerinsky argues that we should revisit the requisite standard for police to search someone. For example, he advocates for a probable cause standard, instead of one of reasonable suspicion, before stops and frisks (p. 283). But in a system of mass incarceration, probable cause is not hard to come by. The more things we label “crime,” the more reasonable it is to believe that someone is likely committing one.²¹ Furthermore, as the Department of Justice’s Ferguson Report showed a few years ago, there are neighborhoods and towns where *most* people have warrants against them, even if those warrants are connected to the inability to pay outstanding fines for municipal code violations.²² Elevating a standard from reasonable suspicion, or banning pretextual stops, is unlikely to help them. Moreover, problems involving police encounters are likely to persist so long as the country is flooded with guns.

Third, mass incarceration feeds on legal reforms that are not aimed at decarceration.²³ More specifically, leading scholars have argued that criminal procedural rights contribute to a larger, more punitive system. A “criminal caste”²⁴ is more tolerable if the government gives caste members “rights” before stripping them of humanity and core dimensions of citizenship.²⁵ And if this criminal caste grows, three problems also grow: fewer trials, more criminals, and more crimes. For this reason, I suspect an important lodestar for some readers in assessing any criminal legal reform is whether it will ultimately result in fewer Americans under the state’s constant surveillance and control, including (and especially) the number of people who are incarcerated.

Does all of this mean that, so long as the nation locks people up at unprecedented rates, scholars should stop writing about the expansion of procedural rights and remedies for invasions of Americans’ bodies and dignity? Surely not. Chemerinsky is writing for the innocent, incarcerated individuals who would be free with better procedural pro-

²¹ See *infra* section III.C, pp. 1879–80.

²² See C.R. DIV., U.S. DEP’T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 6, 55 (2015) [hereinafter FERGUSON REPORT], https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [<https://perma.cc/4QN7-LLJY>] (noting Ferguson is home to roughly 21,000 people and has over 16,000 people with outstanding arrest warrants); see also Dorothy A. Brown, Opinion, *Ferguson’s Perfect Storm of Racism*, CNN (Mar. 5, 2015, 4:16 PM), <https://www.cnn.com/2015/03/05/opinions/brown-ferguson-report> [<https://perma.cc/2UTG-YZZP>] (“If you were the member of a minority group and tried to create a system to control and oppress the majority, you could not have done a better job than the white leaders of Ferguson, Missouri.”).

²³ See Chaz Arnett, *From Decarceration to E-carceration*, 41 CARDOZO L. REV. 641, 658 (2019) (describing decarceration as a penal aim); Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71, 80 (2016) (describing and examining political-economic challenges to decarceral solutions).

²⁴ Paul D. Butler, Essay, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2184 (2013).

²⁵ *Id.* at 2187–88.

tections. He is writing for families who currently do not receive remedies when Americans are unjustly searched, seized, maimed, or killed. Their dignity, liberty, and humanity should not be sacrificed in the name of the longer-term goal of exposing the system's indignities, constraints, and inhumanities.

Still, one must not lose sight of how mass incarceration impedes fairer public safety. Mass incarceration must be reversed and controlled to achieve lasting transformation of the police. There is no equitable way to police in a world of mass incarceration.

Part I of this Book Review highlights the human-centric manner in which Chemerinsky summarizes these complex doctrines. It then outlines the doctrinal mechanisms that he says have empowered the police in troubling ways. Finally, Part I summarizes Chemerinsky's proposed solutions. Part II contends that there are four primary, normative values that guide Chemerinsky's critique and proposed solutions: (1) reducing police violence; (2) increasing the accuracy of criminal trials and reducing wrongful convictions; (3) protecting privacy; and (4) reducing racial disparities in law enforcement. Part II then focuses on how Chemerinsky's thoughtful critiques and reforms further those aims. Part III describes why it is impossible to reliably and equitably surveil, control, and arrest Americans until we end mass incarceration. Only then will Chemerinsky's admirable and worthwhile aims be achieved.

I. MECHANISMS OF POLICE EMPOWERMENT

Chemerinsky examines how the United States Supreme Court has undermined the ability of litigants to access constitutional justice in cases that involve law enforcement. The Court has narrowed constitutional remedies when violations have taken place and provided narrow interpretations of the scope of constitutional rights. The author tells this doctrinal narrative on a human scale: he never allows readers to lose sight of the fact that humans authored the relevant judicial opinions, humans brought the cases, and humans will bear the consequences.

This Part begins by highlighting the ways in which the book tells a human-centered doctrinal narrative about the Court, the parties, and the public. Doctrinal accounts often take place at a lofty theoretical level. Precedents are sometimes treated as fixed and static or as contingent on mass political-economic shifts. While Chemerinsky does not challenge these kinds of grand theories, his approach serves to humanize the law. This Part then summarizes the primary ways that, in Chemerinsky's view, the Supreme Court has unduly empowered the police. He focuses on ways that the Supreme Court has limited remedies under interpretations of Article III, created obstructive federalism doctrines, and curtailed the reach of federal civil rights statutes. He also details the Supreme Court's crabbed interpretations of constitutional

criminal procedure under the Fourth, Fifth, and Sixth Amendments. Finally, this Part outlines Chemerinsky's proposed solutions.

A. *The Role of Human-Scale Legal Narrative*

Chemerinsky provides complex doctrinal narratives and analyses on a human scale. The humanity of the judges, parties, and the public all take center stage. For example, in describing the Justices on the United States Supreme Court, he does not speak solely about judgments, opinions, reasoning, and dissents. He provides brief biographical windows into the lives of Justices before they joined the Court and the seemingly idiosyncratic, personality-driven circumstances that sometimes led to their powerful lifetime appointments. Most notably, Chemerinsky highlights a period in the 1960s and early 1970s in which the Supreme Court, in his view, briefly issued rulings that properly placed constitutionally mandated limits on law enforcement (pp. 83–116). As he offers that narrative, he tells readers about Chief Justice Warren's hometown, time as a prosecutor, and formative experience as a governor (pp. 87–88). He tells readers how President Eisenhower promised to appoint Chief Justice Warren to the Supreme Court as a deal during a heated campaign and reluctantly kept the promise (p. 88). Chemerinsky also tells us about Justice Goldberg, the former labor lawyer whose appointment moved the Court to the left on criminal justice issues (p. 91). And he also tells how that period of accountability suffered a blow when President Johnson persuaded Justice Goldberg to take on a another, almost certainly less powerful role, as a way of opening up a spot on the Supreme Court for President Johnson's friend (p. 91).

Chemerinsky weaves these moments into his doctrinal account so smoothly and deftly that one could almost miss the work they are doing. Even though Chemerinsky is not questioning the Court's legitimacy, he is reminding readers that no one should be invested in the Court's infallibility. Every judge, every Justice, is a human being with life experiences whose service on the Court is far from inevitable. Other thoughtful, brilliant jurists might have reached different legal conclusions on interpretive matters that fundamentally shape the republic, including the relationship between the public and armed agents of the state.

The humanness of the legal narrative in *Presumed Guilty* does not end with the Justices. It extends to the parties of the key cases. These parties were ordinary human beings who had no reason to know that they would come into contact with law enforcement in ways that would not only transform their lives, but also transform the law. Take, for example, *Katz v. United States*,²⁶ which established that important Fourth Amendment protections extend beyond physical intrusions.²⁷

²⁶ 389 U.S. 347 (1967).

²⁷ *Id.* at 353.

Every student who has taken Criminal Procedure: Investigations has encountered the case and its holding. But when Chemerinsky tells the story, Katz is more than a name in a case caption. We are told a few details about Charles Katz, “a preeminent college basketball handicapper” who “lived in an apartment building on Sunset Boulevard in Los Angeles” (p. 101). Chemerinsky paints a picture that allows us to almost see Katz walking down Sunset Boulevard and making calls from a telephone booth — calls that the police were monitoring. “He had no idea that police were listening in on his call, let alone that he was initiating a chain of events that would dramatically change the law concerning the Fourth Amendment” (p. 101).

Chemerinsky also places a human face on the state, albeit not always a sympathetic one. For example, on the prosecution side of criminal cases involving the Los Angeles Police Department (LAPD) is, nominally, the State of California. But Chemerinsky tells us about former LAPD Police Chief William Parker, who served in that role for thirty-nine years (p. 14). He quotes Parker as making public, racist remarks (p. 14).²⁸ And according to Chemerinsky, “Parker imbued the LAPD with his militaristic, racist approach to policing” (p. 14). Chemerinsky also tells us about LAPD Police Chief Daryl Gates, who served from 1978 to 1992 (p. 7). When Gates was confronted with the fact that a disproportionate number of chokehold victims were Black, Gates explained the disparity by claiming that Black people had different physiological characteristics than “normal people” (p. 7).²⁹ Chemerinsky’s stories about these men help readers view policies through a lens that reminds us that, in every instance, fallible humans crafted those policies.

What is more, Chemerinsky brings the human consequences of the Court’s decisions into sharp relief. Early in the book, he tells readers about Adolph Lyons, a Black man who was placed into a chokehold by the LAPD during a routine traffic stop, even though he did not pose an imminent threat to the police (pp. 4–6). As described in more detail below, the Supreme Court denied Lyons an injunction against the police that would have prohibited the use of chokeholds against nonresisting suspects.³⁰ The Court reasoned that it was not likely that Lyons would experience another violent chokehold.³¹ Chemerinsky illuminates a

²⁸ Parker is quoted as saying: “It is estimated that by 1970, 45% of the metropolitan area of Los Angeles will be Negro. . . . If you want any protection for your home and family . . . you’re going to have to get in and support a strong Police Department. If you don’t, come 1970, God help you” (p. 14) (quoting David Shaw, *Chief Parker Molded LAPD Image — Then Came the ’60s*, L.A. TIMES, May 25, 1992, at A26). That same chief “attributed criminal activity among Latinos to their ‘not being too far removed from the wild tribes of . . . the inner mountains of Mexico’” (p. 14) (quoting Shaw, *supra*, at A26).

²⁹ The author quotes Gregory Howard Williams, *Controlling the Use of Non-deadly Force: Policy and Practice*, HARV. BLACKLETTER J., Spring 1993, at 79, 84 n.34.

³⁰ *City of Los Angeles v. Lyons*, 461 U.S. 95, 98, 112–13 (1983).

³¹ *Id.* at 105.

connection between that decision and the choice of many police departments to continue to use chokeholds on nonviolent suspects, including the famous, lethal use of a chokehold on Eric Garner in Staten Island in 2014 (p. 300).

B. Doctrinal Choices

Chemerinsky focuses on two doctrinal areas in which the Supreme Court has empowered police: constitutional remedies and constitutional rights. In the remedial sphere, the Supreme Court has issued cramped interpretations of standing doctrine, limited access to habeas corpus for entire classes of constitutional violations, made it increasingly easy to use illegal evidence against criminal defendants, and immunized government actors and entities from civil liability. And on the rights front, the Supreme Court has significantly curtailed the reach of federal constitutional rights by granting police significant discretion to conduct stops and pat downs, use unreliable lineup procedures, and rely on pretextual reasons to stop suspects, while simultaneously failing to adequately enforce the right against self-incrimination.

i. Remedies. — As introduced briefly above, in *City of Los Angeles v. Lyons*,³² Lyons sought a federal injunction against the LAPD prohibiting the use of chokeholds on suspects who did not constitute an imminent threat.³³ After having previously suffered from such a chokehold himself, Lyons experienced trauma and fear when he encountered LAPD officers, knowing that, consistent with LAPD official policy, such a chokehold could happen again (p. 8). The Supreme Court held, however, that Lyons did not have standing to seek an injunction or declaratory relief.³⁴ To seek prospective relief, the Court held, a litigant must demonstrate that they are likely to experience the challenged constitutional violation in the future.³⁵ This requirement would hold even if, like Lyons, the litigant had standing to seek damages for a violation that had already occurred.³⁶ The Court set up a bifurcated system of federal jurisdiction, where the very same litigant can have a “case” or “controversy” within the meaning of Article III for damages claims but not have a case or controversy for prospective relief.³⁷ This disparity means that

³² 461 U.S. 95.

³³ *Id.* at 98.

³⁴ *Id.* at 105.

³⁵ *Id.* at 111.

³⁶ *Id.*

³⁷ See generally Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 24 (1984) (discussing federal standing doctrine post-*Lyons*).

federal courts are sometimes powerless to stop blatantly unconstitutional practices and even policies in the absence of individuals who can show that a specific violation is likely to happen to them *in the future*.

Beyond that, Chemerinsky criticizes aspects of the Supreme Court's limits on the ability of state prisoners to challenge unconstitutional convictions in federal court (p. 167). Most directly, he takes on the 1976 case of *Stone v. Powell*,³⁸ in which the Supreme Court held that state prisoners could not raise Fourth Amendment claims that were previously fully and fairly decided in state courts to challenge their convictions in federal habeas proceedings (pp. 154–60).³⁹ Federal habeas statutes contain no such limitation, but the Supreme Court imposed this categorical prudential limitation on the ground that the ability to raise exclusionary rule claims on habeas corpus would not improve the reliability of the factfinding process (p. 154).

That case is at peace with another set of doctrines that — often in the Fourth Amendment context — limited the reach of the exclusionary rule. In the early 1960s, the Warren Court held that state prosecutors could not use illegal, unconstitutionally obtained evidence in state prosecutions (p. 85). To protect the integrity and legitimacy of the judiciary, cases like *Mapp v. Ohio*⁴⁰ made clear that such evidence was to be excluded.⁴¹ However, the Supreme Court retreated, offering a bevy of exceptions to this rule like the plain view doctrine and prosecutorial good faith (p. 188). And as the Supreme Court has watered down the exclusionary rule, some Justices have expressed doubts about it altogether (pp. 185–86). In Chemerinsky's view, this apparent retreat further empowered the police in ways that undermine the integrity of the criminal legal system and weaken a remedial tool that could deter constitutional violations from occurring in the first place (p. 185).

The Supreme Court has also sharply limited opportunities to bring civil suits for damages against governmental actors who violate federal constitutional rights. While a venerable Reconstruction Era statute, 42 U.S.C. § 1983, creates a cause of action against state actors who violate federal rights, the Supreme Court has erected a range of common law barriers to bringing those suits. Those serving in a prosecutorial or judicial capacity, for example, are entitled to absolute immunity for unconstitutional actions (pp. 196–98). A prosecutor withholds evidence during trial that demonstrates the defendant's innocence? Absolute immunity (p. 257). A judge illegally orders the sterilization of a young girl without her knowledge or consent? Absolute immunity (p. 197).⁴²

³⁸ 428 U.S. 465 (1976).

³⁹ *Id.* at 481–82.

⁴⁰ 367 U.S. 643 (1961).

⁴¹ *Id.* at 657.

⁴² The author cites *Stump v. Sparkman*, 435 U.S. 349 (1978).

All other government officials are protected by another type of immunity that, in recent years, has garnered considerable attention: qualified immunity. Under that doctrine, one may not obtain damages against government officials performing discretionary functions for federal constitutional violations unless the defendant has violated clearly established law that a reasonable person would have known at the time of the violation.⁴³ When, for example, police officers in Fresno, California, seized hundreds of thousands of dollars pursuant to a lawful warrant and kept the money for themselves, a federal court found that the officers were entitled to qualified immunity.⁴⁴ The Ninth Circuit reasoned that there were no prior cases with materially similar facts that could have put the officers on notice that stealing money in that context violated the Constitution, nor was the violation sufficiently obvious so as to warrant liability in the absence of such a case.⁴⁵ When immunities protect conduct of this sort, it makes it difficult to deter illegal conduct, leaves aggrieved victims without a meaningful remedy, and undermines the legitimacy of the legal system in the eyes of the public.⁴⁶

The Supreme Court has protected not only individual officers but also governments from suit.⁴⁷ For most torts, when an agent acts within the scope of one's employment, a plaintiff may sue the employer.⁴⁸ That is not the case, however, when a victim brings a § 1983 lawsuit against a local government for a violation of federal constitutional law. The Supreme Court has prohibited respondeat superior liability; one may sue cities only for unconstitutional policies or customs, or where a final policymaker causes the violation (pp. 203–04).⁴⁹

These remedial limitations across all of these dimensions operate together to mean that, often, there is no avenue to hold officers accountable when they violate the law.⁵⁰ Every meaningful avenue — injunctions,

⁴³ Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

⁴⁴ Jessop v. City of Fresno, 936 F.3d 937, 939–40, 943 (9th Cir. 2019).

⁴⁵ *Id.* at 942.

⁴⁶ Several authors have provided broader critiques of qualified immunity. See, e.g., William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 88 (2018) (arguing that the doctrine “lacks legal justification, and the Court’s justifications are unpersuasive”); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 11, 18–19 (2017) (contending that the doctrine’s basic justifications lack empirical and logical support); Fred O. Smith, Jr., *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 NOTRE DAME L. REV. 2093, 2095 (2018) (“In recent years, federal courts scholars have undermined some of the basic empirical and legal assumptions undergirding qualified immunity.”).

⁴⁷ See Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 411 (2016).

⁴⁸ *Id.* at 414 & n.16.

⁴⁹ The author cites *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978).

⁵⁰ Smith, *supra* note 47, at 416.

damages, the exclusionary rule, and habeas — has been sharply restricted.⁵¹

2. *Constitutional Criminal Procedure.* — In addition to restricting remedies, the Supreme Court has limited the scope of constitutional rights in criminal legal cases. Chemerinsky offers a range of examples to support this view, but for the purposes of this Book Review, I will focus on four. First, in *Terry v. Ohio*,⁵² the Supreme Court considered whether, without probable cause, an officer could physically detain and pat down a suspect based on the officer’s reasonable suspicion that the suspect violated the law (p. 111).⁵³ In a ruling that Chemerinsky calls a “terrible decision” (p. 111), the Court held that reasonable suspicion was sufficient. As he explains: “[P]olice do not need to have probable cause to seize a person by stopping him or her. Nor is it required that the officers have probable cause to frisk the person” (p. 111).

This lower, reasonable-suspicion standard, he observes, is highly ambiguous. He cites to a 2020 opinion in which the Court reaffirmed that “reasonable suspicion is an ‘abstract’ concept that cannot be reduced to ‘a neat set of legal rules,’” and emphasized that it has “repeatedly rejected courts’ efforts to impose a rigid structure on the concept of reasonableness” (p. 112).⁵⁴ Chemerinsky argues that, in the absence of “a neat set of legal rules,” police officers have wide discretion to “easily stop almost anyone at any time as long as they can articulate some basis for suspicion, even if they make it up after the fact to justify the admissibility of the evidence against the criminal defendant” (p. 113). He further argues that this discretion “opened the door to racialized policing” given that “[e]verything we know about policing — then and now — tells us that when American police have unfettered discretion, they will use it to the detriment of people of color” (p. 113).

Second, Chemerinsky argues that the Supreme Court has allowed police to conduct unreliable lineup procedures with eyewitnesses during investigations. For example, in *Stovall v. Denno*,⁵⁵ the Supreme Court affirmed the admission of evidence in which police showed only one suspect to an eyewitness.⁵⁶ The Court contended that under the facts of that case, the police had a need for immediate action (p. 180). Chemerinsky criticizes this reasoning, contending that exigencies do not convert unreliable evidence into reliable evidence (p. 180). Likewise, in

⁵¹ Leah Litman, *Remedial Convergence and Collapse*, 106 CALIF. L. REV. 1477, 1481–82, 1517–18 (2018).

⁵² 392 U.S. 1 (1968).

⁵³ The author cites *id.*

⁵⁴ The author cites *Kansas v. Glover*, 140 S. Ct. 1183, 1190 (2020).

⁵⁵ 388 U.S. 293 (1967).

⁵⁶ *Id.* at 295–96.

Neil v. Biggers,⁵⁷ a court allowed evidence from a highly suggestive lineup in which police commanded the defendant, and only the defendant, to assert, “shut up, or I’ll kill you,”⁵⁸ the same words the perpetrator had shouted at the victim on the evening of the crime.⁵⁹ In that instance, adducing the victim’s certainty of the defendant’s guilt, the Supreme Court again confirmed the defendant’s conviction (p. 182). Countering this reasoning, Chemerinsky identifies an important body of academic literature demonstrating that an eyewitness’s alleged certainty about an identification bears little relationship to the accuracy of the identification (p. 182).

Third, Chemerinsky contends that the Supreme Court has not fully protected the constitutional right against self-incrimination. In *Miranda v. Arizona*,⁶⁰ a landmark 1966 ruling, the Supreme Court held that to reduce the likelihood of coerced confessions, an individual who is arrested and is in police custody “must be told that he or she has the right to remain silent, that anything said can be used as evidence against the person, that the person has a right to a lawyer, and if the person cannot afford one, the government will provide an attorney” (p. 121). Chemerinsky argues that the Court should have gone further, requiring that an attorney be present for police interrogations. “The Warren Court saw the need to protect the Fifth Amendment’s privilege against self-incrimination during police interrogations, but it did far too little to make a real difference in safeguarding this fundamental right” (p. 124).

Fourth, Chemerinsky criticizes the case of *Whren v. United States*.⁶¹ That opinion held that when assessing the legality of a stop under the Fourth Amendment, an officer’s subjective motivation is not relevant (p. 223). That is, if an officer has an objectively reasonable basis for stopping a vehicle, it is irrelevant for Fourth Amendment purposes whether the real reason for the stop was, for example, “the officer’s dislike of the race of the driver or a desire to search the car for drugs” (p. 223). He argues that the opinion is part of “a larger pattern of the Supreme Court making it very easy for police to stop cars, especially those driven by people of color” (p. 223).

C. Solutions

In addition to his critique of the Court’s doctrinal choices, Chemerinsky offers solutions. Some of these solutions encourage an

⁵⁷ 409 U.S. 188 (1972).

⁵⁸ *Id.* at 195.

⁵⁹ *Id.* at 194.

⁶⁰ 384 U.S. 436 (1966).

⁶¹ 517 U.S. 806 (1996). For a thoughtful critique of *Whren*, see generally Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998).

expansion of constitutional procedural rights, while others invite an expansion of remedies. He contends that the Supreme Court, given its past and its present, is unlikely to adopt these constitutional interpretations and policies (pp. 282–83). Instead, he looks to the states. Jurists and other commentators have often encouraged states to forge their own way on constitutional rights and remedies.⁶² Chemerinsky's book is in that robust tradition. Specifically, he encourages Congress and states to:

- ♦ “eliminate stops and frisks based on reasonable suspicion, requiring that all seizures, arrests, and searches be based on probable cause”;
- ♦ “require written consent for police searches”;
- ♦ “restore citizens’ ability to raise Fourth Amendment claims on habeas corpus”;
- ♦ “eliminate pretextual police stops and exclude evidence gained as a result of illegal stops”;
- ♦ “provide counsel for everyone being interrogated by the police”;
- ♦ “eliminate the requirement that a suspect must expressly invoke the right to remain silent or the right to counsel”;
- ♦ “allow counsel at all identification procedures”;
- ♦ “eliminate the most suggestive forms of police identification” (p. 283);
- ♦ “exclude suggestive eyewitness identifications from being heard by juries”;
- ♦ “strengthen the exclusionary rule when police violate the Constitution so that any evidence gained as a result of unconstitutional police behavior cannot be used at trial”;
- ♦ “expand civil liability of police officers who violate the Constitution and that of the cities that employ them”; and
- ♦ “eliminate dangerous police practices, such as by barring the use of the chokehold by the police and end ‘no knock’ warrants” (p. 284).

II. VALUES

In the title, and throughout the book, Chemerinsky charges that the Supreme Court has overly “empowered the police.” For some readers, this might invite the following question: is empowering police inherently

⁶² E.g., JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 2, 6, 216 (2018); Brennan, *supra* note 3, at 491; Helen Hershkoff, *State Courts and the “Passive Virtues”*; *Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1941 (2001); Alexander Reinert et al., *New Federalism and Civil Rights Enforcement*, 116 NW. U. L. REV. 737, 742–43 (2021).

troubling? The opposite of empowering the police is arguably abolishing them,⁶³ but Chemerinsky makes explicit that he does not favor abolishing the police (p. 286). He explains: “Although I am sympathetic to the history and urgency behind that demand, my own view is that the idea of abolishing police is utopian and is neither possible nor desirable. . . . [E]very society needs a criminal justice system to punish the dangerous” (p. 286). Contending that some communities are overpoliced and that nondangerous offenses should often be treated in less punitive ways, Chemerinsky nonetheless makes the case that “every society has violent crimes, and they must be investigated and their perpetrators prosecuted and punished” (p. 287). Otherwise, he contends, there would be no deterrent against committing violent crime (p. 287). Moreover, wealthy individuals would hire private police patrols that, as nonstate actors, can operate with disregard for constitutional limits (p. 287). And those without means to hire private police would find themselves without protection (pp. 287–88).

Given that Chemerinsky is not an abolitionist, then, why is he troubled by empowering the police? One answer could be that the Supreme Court has empowered officers to violate constitutional rights. For example, Chemerinsky contends that the Supreme Court “refused to impose constitutional checks on police” (p. 31), and the book’s title references a “subversion of civil rights.” But presumably defenders of the Supreme Court’s jurisprudence would say that the Court did not subvert rights; it simply interpreted their scope in a different manner than liberal and progressive academics would prefer. Its job is to interpret the scope of constitutional rights. Inherent in Chemerinsky’s critique, then, is a set of assumptions about how the Supreme Court — when balancing various constitutional interests — has struck a balance that overvalues security in relation to other, sometimes more important, interests. This Part identifies those countervailing values and interests that serve as connective tissue for the book.

This Part identifies four normative perspectives that connect Chemerinsky’s empowerment critique. First, we should seek to reduce the number of violent encounters between police and the policed. Second, we should aim to ensure that our justice system is more reliable, reducing the likelihood that innocent individuals lose their freedom. Third, we should protect Americans’ dignitary interests such as privacy and bodily integrity. Fourth, we should aim to reduce or erase racial disparities in law enforcement.

Although Chemerinsky does not expressly organize the book around these values or aims, it is helpful to identify the role they play in the

⁶³ See generally Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781 (2020) (discussing abolitionist reform frameworks in legal scholarship in the wake of the Ferguson and Baltimore uprisings).

book. By doing so, we can connect his various critiques and suggested reforms to these aims.

A. Violence

The book's opening words make clear that police violence is one of the ills the work aims to address: "Today in the United States, much attention is focused on the enormous problems of police violence and racism in law enforcement, but too often that attention fails to place the blame where much of it belongs: on the Supreme Court" (p. xi). As the word "and" suggests, Chemerinsky is concerned about both unchecked excessive force generally *and* the disproportionate use of that violence against Black Americans. "Per capita and in total, more Americans die at the hands of law enforcement than individuals in any other 'peaceful and fully developed nation on earth.'"⁶⁴

Chemerinsky's critiques and reforms are aimed, in part, at deterring illegal state-sanctioned violence without accountability. For example, in his view, if individuals like Adolph Lyons were able to enjoin unconstitutional policing practices, then American life over the past few decades might have looked different. Chemerinsky notes that while Los Angeles banned the particular practice used on Lyons, other cities and towns have not (p. 16). Lives have been needlessly taken as a result.

On the other hand, Chemerinsky's account of violent policing could have benefited from a deeper engagement with other scholars who have studied why the United States, per capita, has so many more killings by law enforcement than do other nations. Chemerinsky's account is much more court-centric than, for example, accounts by scholars like Professor Frank Zimring. In Zimring's book *When Police Kill*, he argues that "[u]ntil police departments become willing to spend time, money, and management effort on resolving conflicts without killings, nothing significant can happen."⁶⁵ Only "[o]nce the value of civilian lives becomes a priority for policy planning, a significant number of changes in police protocols, training, and evaluation of critical incidents can make changes happen quickly and safely."⁶⁶ While liability can certainly shape these policy choices, the reality is that many acts of police violence are entirely legal and would continue to be legal even under the most victim-friendly potential reforms. Meaningfully reducing state-sanctioned violence, while keeping police officers safe, requires policy solutions that constitutional litigation cannot provide, and there are major aspects of the problem that courts did not create.

⁶⁴ Fred O. Smith, Jr., *Beyond Qualified Immunity*, 119 MICH. L. REV. ONLINE 121, 122 (2021) (quoting ZIMRING, *supra* note 10, at 247).

⁶⁵ ZIMRING, *supra* note 10, at 219.

⁶⁶ *Id.* at 219–20.

B. Reliability

Reliability is another normative aspiration of *Presumed Guilty*. Chemerinsky contends that extant Supreme Court doctrines facilitate wrongful convictions. The centrality of this concern in the book becomes most apparent in Chapter Seventeen, where Chemerinsky asserts: “If I were forced to limit myself to making only one criticism of the Supreme Court in its failure to protect those suspected and accused of crimes, it would be its total refusal to deal with the problem of false eyewitness identifications” (p. 239). After all, as Justice Brennan once quoted: “[T]here is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says ‘That’s the one!’”⁶⁷ And as Judge Myron Thompson once observed: “Despite eyewitness testimony’s persuasive nature, mounting evidence has suggested that it is not as reliable as has often been assumed.”⁶⁸ Some evidence suggests that over eighty percent of DNA exonerations involve convictions that were based on eyewitness identification.⁶⁹

For that reason, Chemerinsky takes issue with the Supreme Court’s rare and ineffective interventions in this area (pp. 241–42). The Court has permitted a number of suggestive lineups to be used as evidence against criminal defendants. In one of its most recent forays into this arena, the Court overwhelmingly voted to admit suggestive lineups against criminal defendants if police were not responsible for the suggestiveness (p. 241).⁷⁰ The sole dissenter was Justice Sotomayor, who reasoned that regardless of “the source of suggestiveness,” ultimately “[i]t is the likelihood of misidentification which violates a defendant’s right to due process” (p. 242).⁷¹ Chemerinsky’s words are sharper. “Innocent people will continue to be wrongly convicted on the basis of mistaken identifications, and the Supreme Court either doesn’t see it or doesn’t care” (p. 242). To that end, one of Chemerinsky’s policy solutions is to “eliminate the most suggestive forms of police identification” (p. 283).

C. Dignitary Interests

Another normative concern guiding *Presumed Guilty* is a presumption against governmental invasions of Americans’ privacy or bodily integrity absent a very good reason. As support for this American tradition, Chemerinsky cites to a dissent by Justice Brandeis in *Olmstead*

⁶⁷ *Watkins v. Sowders*, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (emphasis omitted) (quoting ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY* 19 (1979)).

⁶⁸ *United States v. Smith*, 621 F. Supp. 2d 1207, 1209 (M.D. Ala. 2009).

⁶⁹ *Id.*

⁷⁰ The author discusses *Perry v. New Hampshire*, 565 U.S. 228 (2012).

⁷¹ The author quotes *id.* at 257 (Sotomayor, J., dissenting).

v. United States,⁷² which he observes is “among the most admired opinions in American history” (p. 64). In that dissent, Justice Brandeis explained: “The makers of our Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men” (p. 64).⁷³

This view animates aspects of Chemerinsky’s critiques of the Court’s Fourth Amendment jurisprudence, including his arguments against the “reasonable suspicion” standard for stops and frisks. It also informs some of his proposed reforms, especially his view that when state courts interpret their own state constitutions, they should provide broader protections than the United States Supreme Court has provided in the context of the federal Constitution. Citing a classic 1977 article by Justice Brennan, Chemerinsky states that the Court “can provide more protection of rights under their constitutions than exists under the U.S. Constitution” (p. 289).⁷⁴ For example, while the Supreme Court has held that a person who is being chased by the police has not been seized until he or she has been tackled, fifteen states have reached the opposite conclusion under their state constitutions (p. 290). Chemerinsky encourages more innovation on that front to protect, among other things, Americans’ right to be let alone (p. 299).

D. Inequality

A fourth normative objective of *Presumed Guilty* is to explain, and correct, racial inequality in the criminal legal system. The book is framed as an exposition of the Supreme Court’s role in perpetuating racist policing, along with antidotes to that phenomenon. Chemerinsky situates the book within the current sociopolitical moment, in which ubiquitous cries for racial justice in the criminal legal system erupt almost annually across the United States and reached fever pitch in the summer of 2020 (pp. 275, 283). He places the book in conversation with scholars who have identified the historical relationship between modern policing and slave patrols across the American South (pp. 41–42). Race, then, plays a powerful and prominent role in the book’s observations and critiques.

Although none of his reforms expressly mention race, Chemerinsky explains how they may reduce racist policing practices. Requiring probable cause for stops will reduce discretion and make it harder to allow bias to enter decisions about whom to stop. Prohibiting pretextual stops will reduce instances in which race is the unspoken motivator for the stop. And expanding civil liability will deter and correct constitutional

⁷² 277 U.S. 438 (1928).

⁷³ The author quotes *id.* at 478 (Brandeis, J., dissenting).

⁷⁴ The author cites Brennan, *supra* note 3.

violations generally. Since some of these violations disproportionately affect people of color, reducing those violations will reduce disparities in policing.

One should consider Chemerinsky's policy proposals as interventions that are part of a broader moment in which scholars are asking related questions. For example, in a series of articles, Professor Carbado has explored how criminal procedure and jurisdictional rules work together to perpetuate racialized, violent policing.⁷⁵ And Chemerinsky's recounting of policing's racialized history is in conversation with the work of other scholars who are asking important questions about how the past has shaped the criminal legal system's role in perpetuating racial subordination.⁷⁶ *Presumed Guilty* is a formidable contribution to this important space as the nation reckons with how to improve the criminal legal system and dismantle systems of racial subordination.

III. MASS INCARCERATION AS AN OBSTACLE

A. *Mass Incarceration on a Human Scale*

Within a few minutes of driving in northern St. Louis County, Missouri, we had already passed through multiple towns. It is not that we were speeding. Rather, the small towns only lasted a few blocks. Towns like Jennings and Berkeley and Pine Lawn and Ferguson. It was December 2014, and at the time, the area had become the epicenter of America's political and cultural imagination on questions of race and policing.⁷⁷

Why was I there? My former co-clerk, a visionary young civil rights lawyer named Alec Karakatsanis, told me he was going to do some investigating there. I felt drawn to join him in his investigation in ways that I still cannot entirely articulate.⁷⁸ The first night, we helped some

⁷⁵ See Carbado, *Blue-on-Black Violence*, *supra* note 5, at 1483–84; Carbado, *From Stopping Black People to Killing Black People*, *supra* note 5, at 125–31.

⁷⁶ See generally ALEXANDER, *supra* note 8 (drawing connections between past explicit policies of racial discrimination and mass incarceration in the United States); Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 68 UCLA L. REV. DISCOURSE 200 (2020) (arguing that modern policing is a “badge and incident of slavery,” *id.* at 202, subject to congressional control under the Thirteenth Amendment); Darren Lenard Hutchinson, “*With All the Majesty of the Law*”: *Systemic Racism, Punitive Sentiment, and Equal Protection*, 110 CALIF. L. REV. 371 (forthcoming 2022) (on file with the Harvard Law School Library) (arguing that courts’ “doctrinal choices validate a broad range of criminal justice practices that impose severe harms and burdens on racial subordinates and that validate and preserve white supremacy,” *id.* (manuscript at 58)).

⁷⁷ See generally Bell, *supra* note 11, at 1, 5–8; Samuel P. Jordan, *Federalism, Democracy, and the Challenge of Ferguson*, 59 ST. LOUIS U. L.J. 1103, 1103–05 (2015) (providing background on Ferguson); S. David Mitchell, *Ferguson: Footnote or Transformative Event?*, 80 MO. L. REV. 943, 944–49 (2015) (same); Smith, *supra* note 15, at 2285–86; Smith, *supra* note 46, at 2095.

⁷⁸ See Fred Smith, Jr., Faculty Voices, *What Now? Lessons and Questions from Ferguson, Missouri*, EMORY LAW., Summer 2015, at 9 (describing the experience).

local lawyers prepare for a hearing to enjoin the tear-gassing of peaceful protestors.⁷⁹ And in the days thereafter, I joined Alec as he interviewed residents of the towns who were being routinely arrested due to their inability to pay traffic tickets. At some point along the way, surprised at the experiences people were sharing, I asked a few questions too.

During the interviews, my relationship to law changed, likely forever. As a federal courts professor, I was accustomed to telling students about the importance of federal judicial deference to state and local courts on criminal matters.⁸⁰ But what I realized during the interviews is that deference works only in places where those state and local courts are generally functioning in ways that furnish fair procedures. These men and women were referencing state and local courts that were doing no such thing. The systems deployed the rhetoric of law, but they were frankly lawless. One survivor showed us a notice to appear that had even dispensed with some of the rhetoric of law. A court employee had crossed out the word “court” in “court date.” With a pen, the employee had replaced the word “court” with “pay.”

Below are two stories from individuals we met in St. Louis County. Many of the details are found in federal complaints.⁸¹ I share them because, like *Presumed Guilty*, they provide two human-scale portals into the consequences of mass incarceration. And they provide lessons and warnings about how mass incarceration interacts with proposals to reform policing, including those in *Presumed Guilty*.

I. *Edward Brown*. — We met Mr. Brown late one evening at a barbershop that had closed for the day. Mr. Brown, who was in his early sixties, had racked up tickets from the City of Jennings, largely for code violations like allegedly failing to cut his grass.⁸² Another ticket was for letting his girlfriend spend the night at his home without noting her presence on his occupancy permit.⁸³ These tickets transformed his life. By the time we met Mr. Brown, he was homeless. Sometimes he would squat in a home that lacked heat and running water, but that substandard housing was unavailable when it was cold.⁸⁴

⁷⁹ See Temporary Restraining Order at 3, *Templeton v. Dotson*, No. 14-cv-02019 (E.D. Mo. Mar. 26, 2015).

⁸⁰ See *Younger v. Harris*, 401 U.S. 37, 37, 53 (1971) (“Since the beginning of this country’s history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts.” *Id.* at 37.).

⁸¹ See Class Action Complaint ¶¶ 1–2, *Jenkins v. City of Jennings*, No. 15-cv-00252 (E.D. Mo. Feb. 13, 2017) [hereinafter *Jennings Complaint*]; Class Action Complaint ¶¶ 1–3, *Fant v. City of Ferguson*, No. 15-cv-00253 (E.D. Mo. Feb. 8, 2015) [hereinafter *Ferguson Complaint*], 2015 WL 510270.

⁸² *Jennings Complaint*, *supra* note 81, ¶ 55.

⁸³ *Id.*

⁸⁴ *Id.* ¶ 54.

Because Mr. Brown could not afford to pay these tickets, he entered a seemingly endless cycle of incarceration. For example, in 2010, Mr. Brown “was jailed by the City and told by City employees that he would not be released from jail unless he paid several hundred dollars.”⁸⁵ He was only able to secure release from jail once officials reduced his cost of release closer to \$100 and after he had spent nearly two weeks in the facility.⁸⁶ Officials then imprisoned him in the City of Pine Lawn because of unpaid tickets in that jurisdiction.⁸⁷ On another occasion, Mr. Brown was in a Jennings jail for nearly a month, again because of an inability to pay hundreds of dollars in release costs.⁸⁸ That time, he was taken before a judge weekly, who told Mr. Brown that he would be released only when he paid, what the judge called, “my money.”⁸⁹

Over the course of years, this happened to him time and again.⁹⁰ And he was not alone. According to the complaint, “Mr. Brown also observed courtroom staff and the City judge tell people routinely that they would be put in jail if they showed up to court without money.”⁹¹ And despite his indigence, “he was never appointed an attorney by the City, and the City made no meaningful inquiry into his ability to pay.”⁹²

2. *Keilee Fant*. — During the same trip, in a living room filled with debtors who heard what we were up to, we met Ms. Fant, a certified nursing assistant in her midthirties.⁹³ We learned that over the course of sixteen months, she had been jailed by the City of Jennings at least four times for tickets she could not afford to pay.⁹⁴ On one occasion the incarceration lasted forty-eight days. I remember that number well in part because Ms. Fant explained to us that during that experience, she missed her father’s funeral.⁹⁵

The first of that series of arrests occurred when she was taking her children to school.⁹⁶ That arrest led to an indefinite detention, in which

⁸⁵ *Id.* ¶ 56.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* ¶¶ 57–58.

⁸⁹ *Id.* ¶ 57.

⁹⁰ *Id.* ¶¶ 59–61.

⁹¹ *Id.* ¶ 75.

⁹² *Id.* ¶ 76.

⁹³ Ms. Fant recently referenced this meeting during an interview about the fifth anniversary of the filing of the complaint. See ArchCity Defenders, *Keilee Fant on the 5 Year Anniversary of Filing the Debtors’ Prison Lawsuit Against Ferguson*, YOUTUBE, at 0:30 (Feb. 18, 2020), https://youtu.be/P4TSP__g_QM [https://perma.cc/63PQ-ZJ CZ].

⁹⁴ Jennings Complaint, *supra* note 81, ¶ 79.

⁹⁵ Ferguson Complaint, *supra* note 81, ¶ 32.

⁹⁶ Jennings Complaint, *supra* note 81, ¶ 79.

she would be released only if she paid \$300.⁹⁷ Three days into her detention, the jail staff reduced her release amount, which she paid.⁹⁸ But the ordeal did not end. In the words of the federal complaint filed against the City of Jennings: “Ms. Fant’s supposed ‘release’ from the City’s custody was just the beginning of a Kafkaesque journey through the debtors’ prison network of St. Louis County — a lawless and labyrinthine scheme of dungeon-like municipal facilities and perpetual debt.”⁹⁹

When Ms. Fant was “released” from the custody of Jennings, the City refused to let her leave. Jailers explained they were now keeping her on behalf of the town of Bellefontaine Neighbors, where she also had a ticket.¹⁰⁰ After several more days in jail, Bellefontaine Neighbors agreed to reduce her release amount, and Ms. Fant was able to raise money from family and friends to purchase her release.¹⁰¹

After this second purported “release,” she remained in the custody of Jennings for three more days.¹⁰² Jail officials explained that this time, they were keeping her because of a ticket she was not able to pay in nearby Velda City.¹⁰³ When Velda City officials declined to pick her up, jailers placed her in the custody of Saint Louis County, where she remained for three more days before being “released.”¹⁰⁴

The third “release” did not result in Ms. Fant’s freedom either. She was kept in jail for eight more days because she could not afford to pay tickets in the nearby cities of Normandy and Beverly Hills.¹⁰⁵ After those eight days, she finally saw a judge in the nearby town of Maryland Heights, where the judge “released” her for free.¹⁰⁶

After this fourth “release,” she was taken to jail in Ferguson.¹⁰⁷ “Ferguson officials told her that [they would keep her] indefinitely unless she paid [them] over \$1,000.”¹⁰⁸ Three days later, however, they let her go for free.¹⁰⁹ She remained free until the cycle began again a few months later.¹¹⁰ And then again.¹¹¹ And then again.¹¹²

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* ¶ 80.

¹⁰⁰ *Id.* ¶ 81.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* ¶ 83.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *See id.*

¹¹¹ *See id.* ¶ 87.

¹¹² *See id.* ¶ 88.

During her incarceration, Ms. Fant faced squalid conditions. In Jennings, she was forced to live “without basic hygiene,” such as “feminine products for menstruation.”¹¹³ The jails were overcrowded, with debtors forced to sleep on the floor.¹¹⁴ And they were routinely taunted by jail staff, who told them that they smelled bad.¹¹⁵ At the time that we met Ms. Fant, she still had unpaid debts and feared that she would be forced to return to those conditions.¹¹⁶

* * *

While mass incarceration has a variety of forms and tentacles, there are lessons from these stories that can expose how mass incarceration provides barriers to meaningful policing reform. First, systems across the nation process more people than they can handle with human decency and fair, nonexploitative process.

Second, mass criminalization creates communities where there is probable cause to stop most people at any time. Many people in a community will have outstanding warrants that would furnish probable cause to pull them over. Further, the more behaviors that we label “crime,” the more likely it is that any person at any given time is committing one. And millions of Americans live under government custody by way of probation, sometimes exempting them from key Fourth Amendment protections. This has implications for reducing violence in policing, where frequent contacts, the proliferation of firearms, and social forces collide, resulting in disproportionate violence striking the bodies of Black Americans as long as the law encourages those frequent contacts.

Third, the two narratives serve as a reminder that the mere existence of “rights” does not mean that people will benefit from those rights. It has long been a violation of rights to, for example, detain someone because of their inability to pay.¹¹⁷ But people continue to experience predatory practices that flatly contradict that guarantee.¹¹⁸ This apparent dissonance harmonizes with the voices of scholars who critique the overreliance on rights to address deeper structural issues.¹¹⁹ Those debates have implications for rights-based policing reform.

¹¹³ *Id.* ¶ 93.

¹¹⁴ *Id.* ¶ 226.

¹¹⁵ *Id.* ¶ 95.

¹¹⁶ *Id.* ¶ 96.

¹¹⁷ *Bearden v. Georgia*, 461 U.S. 660, 667 (1983) (citing *Tate v. Short*, 401 U.S. 395, 398 (1971)).

¹¹⁸ Judith Resnik & David Marcus, *Inability to Pay: Court Debt Circa 2020*, 98 N.C. L. REV. 361, 363–64 (2020); Smith, *supra* note 15, at 2306–08.

¹¹⁹ See also Monica Bell et al., *Toward A Demosprudence of Poverty*, 69 DUKE L.J. 1473, 1506 (2020) (“Courts can grant or deny relief to indigent defendants without having to address — or even mention — the weighty issues of substantive and structural inequality that are truly at the heart of the cases before them.”).

The next three sections of Part III will expound further on these observations in relationship to Chemerinsky's specific proposals.

B. Too Big for Trials

Some proposals in *Presumed Guilty* assume the existence of trials. Trials rarely occur, nor can they routinely occur given the massive size of the incarcerated population.

In the United States, the overwhelming majority of incarcerated people do not experience trials. According to a generally accepted statistic, "ninety-seven percent of federal convictions and ninety-four percent of state convictions are secured by guilty pleas."¹²⁰ This statistic is connected, in part, to the nature of plea bargaining. Prosecutors can and do threaten to advocate for higher sentences later if defendants do not plead guilty before trial.¹²¹ But the statistic is also tied to the nature of pretrial detention for indigent persons in this nation. For indigent Americans who cannot afford bail, prosecutors can offer immediate release from jail in exchange for a guilty plea.¹²² Rejecting the prosecutor's offer and awaiting trial can mean staying in detention longer, away from one's kids, job, and life. This creates considerable pressure to accept a plea, even if one is innocent. As one set of scholars recently observed, pretrial detention for misdemeanors "seems especially likely to induce guilty pleas, including wrongful ones. This is also, perversely, the realm where the utility of cash bail or pretrial detention is most attenuated. These defendants' incentives to abscond should be relatively weak, and the public safety benefit of detention is dubious."¹²³

At the same time, given the number of people that jurisdictions arrest, it is unlikely that trying everyone accused of a misdemeanor is even possible. Professor Alexander and activist Susan Burton once surmised that if every detained person refused to plead guilty and forced trials, it would crash the system.¹²⁴ There are not enough resources, not enough time, not enough personnel, and not enough jurors.¹²⁵

¹²⁰ William Ortman, Essay, *Confrontation in the Age of Plea Bargaining*, 121 COLUM. L. REV. 451, 462 (2021).

¹²¹ Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1312–14 (2018); cf. John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 8 (1978) (describing how prosecutors induce guilty pleas in exchange for sentences more lenient than those imposed after trial).

¹²² Heaton et al., *supra* note 15, at 715–16.

¹²³ *Id.* at 716.

¹²⁴ Alexander, *supra* note 20.

¹²⁵ *Id.* ("If everyone charged with crimes suddenly exercised his constitutional rights, there would not be enough judges, lawyers or prison cells to deal with the ensuing tsunami of litigation."). For deep scholarly engagement about the viability of this proposal, see Andrew Manuel Crespo, *No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action*, 90 FORDHAM L. REV. 1999 (forthcoming 2022) (manuscript at 8) (on file with the Harvard Law School Library).

This brings us to Chemerinsky's trial-oriented proposals, especially his proposal to expand rules that exclude illegally obtained evidence from trial (p. 283).¹²⁶ Expanding the exclusionary rule would presumably improve the integrity of the trials that do exist.¹²⁷ But it would not directly impact the much larger group of inmates who do not receive trials, especially poor people accused of misdemeanors. And if the theory holds that mass incarceration makes routine jury trials impossible, this is an obstacle that is built into today's political economy of criminal law.¹²⁸ This consequence of mass incarceration, then, constricts the reach of proposals that focus on the trial process.

C. When Everything Is a Crime, Everyone Is a Criminal

Presumed Guilty proposes raising the standard for a stop and frisk to probable cause. Under a system of mass criminalization, however, there often is probable cause to stop people — especially poor, Black people.

“Mass criminalization” is among the forces that facilitate frequent contact between police and citizens¹²⁹ — contact that sometimes escalates into violence. Professor Carbado defines this term as “the criminalization of relatively nonserious behavior or activities and the multiple ways in which criminal justice actors, norms, and strategies shape welfare state processes and policies.”¹³⁰ As examples, there are criminal sanctions against behaviors like jaywalking, loitering, and public drunkenness.¹³¹ Crimes of this sort give police a high degree of discretion as to whom to stop, arrest, or issue tickets many cannot afford to pay.¹³²

Mass criminalization burdens *Presumed Guilty*'s proposal to raise the standard to stop someone from “reasonable suspicion” to “probable cause.” In the absence of mass criminalization, a “probable cause” standard might mean fewer invasions of dignitary interests like privacy and fewer opportunities for incidents that escalate into deadly encounters. But mass criminalization increases the circumstances in which an officer has probable cause. As Carbado explains:

¹²⁶ The absence of trials also impacts Chemerinsky's proposal to expand the writ of habeas corpus to Fourth Amendment claims (p. 283). When people plead guilty, they sometimes simultaneously waive claims on appeal. See Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195, 1238 (2005).

¹²⁷ For a detailed discussion about the heterogenous rules that impact plea bargaining across the country, see generally Crespo, *supra* note 121.

¹²⁸ Cf. William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2550 (2004) (“[P]lea bargains take place in the shadow of prosecutors' preferences, voters' preferences, budget constraints, and other forces — but not in the shadow of the law.”).

¹²⁹ Carbado, *Blue-on-Black Violence*, *supra* note 5, at 1487.

¹³⁰ *Id.*

¹³¹ *Id.* at 1487–88.

¹³² See *id.* at 1489.

[I]f the law criminalizes jaywalking, and people regularly jaywalk, the question is not whether the police will have probable cause (they will because many people jaywalk). The question is whether the police will use that probable cause selectively to arrest members of particular groups (for example, African-Americans). All of this is to say that the more law criminalizes activities in which many people engage, the wider the pool of people from which police officers may arrest.¹³³

Raising the standard to probable cause would often be no match for the discretion and de facto general warrant that comes with mass criminalization.

Relatedly, mass criminalization can lead to communities in which there is probable cause to stop large numbers of people because those individuals have active warrants out against them for minor crimes. When the Department of Justice issued a report on Ferguson, Missouri, in 2014, one statistic that alarmed people across the country was that, of the roughly 21,000 residents who lived in the town, 16,000 of them had outstanding warrants.¹³⁴

Finally, mass criminalization leads to mass probation, which further weakens the impact of a probable cause standard. According to 2018 figures, there are roughly 3.5 million adults on probation in the United States.¹³⁵ A frequent condition of probation is the waiver of one's Fourth Amendment rights.¹³⁶ And while the enforceability of such waivers varies across jurisdictions,¹³⁷ it is nonetheless the case that for that large population of persons, a new probable cause standard generally would not help.

D. Mass Incarceration and the Critique of Rights

Mass incarceration maintains sociological legitimacy, in part, because the accused have procedural "rights." Yet, those rights are often hollow.

Leading scholars have sometimes encouraged some degree of caution in assuming that the creation of new rights would be a net positive for

¹³³ *Id.* at 1488–89.

¹³⁴ *Utah v. Strieff*, 579 U.S. 232, 250 (2016) (Sotomayor, J., dissenting) (citing FERGUSON REPORT, *supra* note 22, at 6, 55) (using Ferguson as one example of the widespread police practice of using outstanding warrants to make stops without cause).

¹³⁵ DANIELLE KAEBLE & MARIEL ALPER, U.S. DEP'T OF JUST., NCJ 252072, PROBATION AND PAROLE IN THE UNITED STATES, 2017–2018, at 1 (2020), <https://bjs.ojp.gov/content/pub/pdf/ppus1718.pdf> [<https://perma.cc/F5JX-PPP4>].

¹³⁶ Sean M. Kneafsey, Comment, *The Fourth Amendment Rights of Probationers: What Remains After Waiving Their Right to Be Free from Unreasonable Searches and Seizures?*, 35 SANTA CLARA L. REV. 1237, 1248 (1995); *see, e.g.*, *Whitfield v. State*, 786 S.E.2d 547, 548 (Ga. Ct. App. 2016).

¹³⁷ Marc R. Lewis, *Lost in Probation: Contrasting the Treatment of Probationary Search Agreements in California and Federal Courts*, 51 UCLA L. REV. 1703, 1712–23 (2004).

the intended beneficiaries.¹³⁸ This “critique of rights” has been summarized as follows: (1) There is a liberal overinvestment in rights, despite the fact that they often prove more symbolic than real. (2) Rights are decided at a high level of abstraction that render them indeterminate. (3) The rhetoric of rights mystifies and mollifies, making sometimes brutal systems seem more benign than they are. (4) The language of rights is atomistic, even when a problem is collective and systemic. (5) Rights discourse sometimes distracts from urgent problems.¹³⁹

One compelling example of such a critique is Professor Butler’s critique of *Gideon v. Wainwright*,¹⁴⁰ the case that famously guaranteed a right to counsel to indigent criminal defendants.¹⁴¹ He observed that poor, Black people have fared worse after *Gideon*.¹⁴² And he argued that this was, in part, for the five reasons adduced above.¹⁴³ That is, *Gideon* is mostly symbolic in a world without trials; its reach is indeterminate; it makes the system seem more benign than it is; it treats indigent defense as an individual issue rather than a systemic one; and it distracts from the more pressing fact that the United States brutally incarcerates so many poor people.¹⁴⁴ A number of scholars have written about how actual and perceived procedural fairness enhances a system’s perceived legitimacy.¹⁴⁵ Butler’s argument highlights a difficulty with this point: perceived procedural fairness can offer sociological legitimacy to a brutal system.¹⁴⁶

A more global variation of this argument was offered by Professor Stuntz, though his argument is grounded in political economy.¹⁴⁷ He

¹³⁸ See Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23, 32 (1993); see also Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 715 (2011) (describing the critique of rights as “one of the most vibrant, important, counterintuitive, challenging set of ideas that emerged from the legal academy over the course of the last quarter of the twentieth century”).

¹³⁹ See Butler, *supra* note 25, at 2188.

¹⁴⁰ 372 U.S. 335 (1963).

¹⁴¹ Butler, *supra* note 25, at 2194.

¹⁴² *Id.* at 2178.

¹⁴³ *Id.* at 2190–98.

¹⁴⁴ *Id.*

¹⁴⁵ See, e.g., Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC’Y REV. 513, 519 (2003); see also Smith, *supra* note 15, at 2356 (“[W]hen a sense of procedural fairness is illusory, this fosters a sense of second-class citizenship, increases the likelihood people will fail to comply with legal directives, and induces anomie in some groups that leaves them with a sense of statelessness.”); cf. Monica C. Bell, Essay, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2067–68 (2017) (suggesting that procedural injustice estranges people from the legal system).

¹⁴⁶ For a rich discussion of different forms of legitimacy, including the nature of “sociological legitimacy,” see Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005).

¹⁴⁷ See STUNTZ, *supra* note 6, at 9, 216.

argued that the Warren Court's constitutional procedural rulings resulted in "political backlash," and states were emboldened to adopt more punitive approaches to the criminal legal system.¹⁴⁸ While one commentator has cautioned against reading the Stuntz critique as imputing *blame* to the Warren Court,¹⁴⁹ Stuntz identified a tragic perversity that should give liberal proponents of constitutional rights reason for reflection or even embarrassment.

Because many of Chemerinsky's proposals could be read as a call for states to finish what the Warren Court started, it could be easy to view this set of critiques as a threat to his project, perhaps even an existential one. If constitutional procedural rights facilitate mass incarceration, and mass incarceration threatens Chemerinsky's core objectives, then does that not mean a project that valorizes such rights is flawed from the start?

Chemerinsky implicitly offers powerful defenses to this objection in two ways. First, by telling so many doctrinal stories on a human scale, Chemerinsky never loses sight of the fact that there are real human consequences attached to his proposals. Even if banning chokeholds in a jurisdiction does not end mass incarceration for all, for example, there are at least some human beings who would not experience that form of abuse. Likewise, although mass incarceration will not end if states ban highly suggestive techniques during eyewitness lineups, there are some innocent people who may experience freedom if those techniques are not deployed.

Second, it is important to recall that Chemerinsky does *not* simply focus on rights. He also focuses on fixing the architecture of remedies, including some civil remedies aimed at smoking out particularly broken systems (pp. 296–99). For example, he advocates for permitting damages suits against cities when their agents violate the law (p. 298).¹⁵⁰ And he advocates for additional suits for injunctive relief against localities with a pattern and practice of violations (p. 303). These kinds of remedies can shape substantive policy incentives.¹⁵¹ And ideally, they would lead to less criminalization and incarceration. Indeed, while transforming substantive criminal law is not on Chemerinsky's core list of reforms, he does acknowledge that "many functions now being performed by police might well be transferred to social service agencies" (p. 287).

¹⁴⁸ See *id.* at 217.

¹⁴⁹ Robert Weisberg, *Crime and Law: An American Tragedy*, 125 HARV. L. REV. 1425, 1443 (2012) (reviewing STUNTZ, *supra* note 6).

¹⁵⁰ "If I could make one change in existing law, it would be to allow the public to hold cities liable when their police officers violate the Constitution" (p. 298). See also Smith, *supra* note 47, at 473 (advocating for wider municipal liability).

¹⁵¹ Smith, *supra* note 64, at 124 ("Governmental policymakers can make decisions of scale in ways that individual officers simply cannot. We should aim to craft jurisdictional rules that influence *those* decisions.").

CONCLUSION

Chemerinsky's indictment of Supreme Court doctrine and his call for action by state and local officials are valuable contributions that may literally save lives. What I hope to have highlighted in this Review is the colossal threat that mass incarceration poses to those reforms. Without surveilling and controlling the humanitarian crisis of mass incarceration, new policing reforms run the risk of inadvertently perpetuating a kind of "usual cruelty" that can hide in plain sight.¹⁵²

¹⁵² ALEC KARAKATSANIS, USUAL CRUELTY: THE COMPLICITY OF LAWYERS IN THE CRIMINAL INJUSTICE SYSTEM 1-11 (2019).