

# VIRGINIA LAW REVIEW ONLINE

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VOLUME 108

AUGUST 2022

239–264

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— FORTHCOMING IN PRINT, SEPTEMBER 2022 —

## *ESSAY*

### ON LENIENCY: WHAT JUSTICE GORSUCH DIDN'T SAY

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*Facially neutral doctrines create racially disparate outcomes. Increasingly, legal academia and mainstream commentators recognize that this is by design. The rise of this colorblind racism in Supreme Court jurisprudence parallels the rise of the War on Drugs as a political response to the Civil Rights Movement. But, to date, no member of the Supreme Court has acknowledged the reality of this majestic inequality of the law. Instead, the Court itself has been complicit in upholding facially neutral doctrines when confronted with the racial disparities they create. It advances the systemic racism of colorblindness against any race-conscious remedial legislation, while denying marginalized people relief from unequally burdensome systems so long as those systems' rationale is facially neutral. This obstinate colorblindness has become so pervasive in the framework of criminal*

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*jurisprudence that race is no longer merely the elephant in the room—it is the room itself.*

*This Essay presents the Court's recent decision in *Wooden v. United States* as a case study of what the Court could achieve by saying the quiet part out loud and explaining the white supremacist motives underlying presumptively neutral doctrines. The Court can overturn its misguided doctrines without acknowledging their racial and colonial dimensions, but fixing the underlying rot in the system requires the Court to first acknowledge that the rot exists. Otherwise, new "neutral" doctrines and rationales will continue to crop up to take the place of those that were overturned. The decline of lenity and corresponding shifts in fundamental doctrines can only be fully reversed if the Court is willing to embrace the anticolonial and abolitionist consequences.*

#### INTRODUCTION

*"As every civil rights lawyer has reason to know—despite law school indoctrination and belief in the 'rule of law'—abstract principles lead to legal results that harm [B]lacks and perpetuate their inferior status. Racism provides a basis for a judge to select one available premise rather than another when incompatible claims arise."*<sup>1</sup>

– Derrick Bell

In the second season of *Star Trek: Deep Space Nine*, the long-suffering engineer Miles O'Brien is arrested and tried in a Cardassian criminal court.<sup>2</sup> The trial is overseen by an archon, who acts as both judge and prosecutor.<sup>3</sup> At the beginning of the trial, she declares, "The offender Miles O'Brien, Human, officer of the Federation's Starfleet, has been found guilty of aiding and abetting seditious acts against the state. The sentence is death; let the trial begin."<sup>4</sup> As viewers, we recoil from this perversion of justice; it's the stuff of kangaroo courts. Our notion of justice is grounded in the public perception of a fundamentally fair

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<sup>1</sup> Derrick Bell, *Racial Realism*, 24 Conn. L. Rev. 363, 369 (1992).

<sup>2</sup> See *Star Trek: Deep Space Nine: Tribunal* (Paramount Television June 5, 1994) (depicting the trial of Miles O'Brien on Cardassia Prime).

<sup>3</sup> See *id.*

<sup>4</sup> *Id.*

process.<sup>5</sup> We would be shocked to encounter Cardassian procedures in an American courtroom.

And yet, there are two sorts of justice in America. There is the ideal, guided by strong constitutional limits on prosecution meant to produce a fair trial for defendants, even if it means the guilty sometimes go free. Traditional doctrines guide the court to favor the defendant until the prosecution can overcome all reasonable doubt. And then there is the fast and loose world of mass incarceration, replete with plea bargaining, harmless error, qualified immunity, and good faith exceptions. That sort of justice is fit for a colonial power—like the Cardassians—bent on subjugating large portions of its populace. That sort of justice would have little use for lenity. These two systems often exist in parallel, with the latter cloaking itself in the trappings of the former.

In *Wooden v. United States*,<sup>6</sup> the Court, in an opinion authored by Justice Kagan, held that a series of burglaries committed at a single address on a single night did not count as more than one “occasion” under the Armed Career Criminal Act<sup>7</sup> (ACCA)’s mandatory minimum sentencing provision.<sup>8</sup> In a concurring opinion joined in part by Justice Sotomayor, Justice Gorsuch indicated that, when interpreting ambiguous statutes such as the ACCA, courts should turn to the rule of lenity before analyzing a statute’s legislative history or purpose.<sup>9</sup> The rule of lenity requires that courts resolve reasonable doubts about the application of penal laws in the defendant’s favor.<sup>10</sup>

Justice Gorsuch observed that courts have weakened the rule of lenity over time, culminating in the Court’s current interpretation, which requires a finding of a “grievous ambiguity” before courts can apply lenity and find in favor of the defendant.<sup>11</sup> This narrow rule of lenity is one factor that perpetuates mass incarceration and its concomitant racial disparities. But Justice Gorsuch does not say why this shift in the rule of lenity occurred. This Essay presents the narrowing of the historical doctrine of lenity as an offshoot of mass incarceration’s racist roots. That

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<sup>5</sup> See Tracey L. Meanes, *Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 *Ohio St. J. Crim. L.* 105, 106 (2005) (discussing the role of public perception in the fundamental fairness analysis of due process).

<sup>6</sup> *Wooden v. United States*, 142 S. Ct. 1063 (2022).

<sup>7</sup> 18 U.S.C. § 924(e)(1).

<sup>8</sup> *Wooden*, 142 S. Ct. at 1069.

<sup>9</sup> *Id.* at 1081 (Gorsuch, J., concurring).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 1084.

is, lenity—or rather, its narrowing—is one tool courts use to lock up Black, Brown, and poor people, and to keep them locked up.

This constriction of lenity was only an intermediate step in the erosion of constitutional law to permit racially driven mass incarceration. In the early years of the conservative reaction to the Civil Rights Movement, the Court both invented new doctrines and revised or abandoned longstanding ones to police marginalized people and prevent their recourse to the courts. Even the Warren Court contributed to this reaction, giving rights access with one hand while erecting procedural barriers to rights access with the other.<sup>12</sup> The Court extended harmless error to encompass constitutional violations in 1967.<sup>13</sup> The Court invented qualified immunity in 1967,<sup>14</sup> then expanded it considerably over the next few decades.<sup>15</sup> Police harassment gained fresh justification with the invention of reasonable suspicion in 1968.<sup>16</sup> Lenity was (sometimes) corralled to only apply in cases of “grievous” ambiguity in 1974.<sup>17</sup> By 1983, the Court began to foreclose the possibility of implying damages as relief for constitutional violations by federal actors.<sup>18</sup> The Court created a “good faith” exception to its Fourth Amendment exclusionary rule in 1984.<sup>19</sup> While advancing purportedly race-neutral doctrines, the Court buttressed the racial hierarchies of the carceral state.<sup>20</sup> This is what Justice Gorsuch didn’t say. Leaving out this critical context indicates that even

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<sup>12</sup> See William J. Stuntz, *The Collapse of American Criminal Justice* 79–80, 227–30, 260–65 (2011) (demonstrating how the Warren Court’s procedural rulings reduced the focus on a defendant’s guilt in favor of procedural questions, thereby incentivizing the legislative criminalization of increasingly trivial behavior). Daniel Harawa and I will address the racial dimensions of the Warren Court’s ostensibly colorblind criminal procedure jurisprudence in a forthcoming piece, *The Warren Court’s Colorblind Counterrevolution*.

<sup>13</sup> See *Chapman v. California*, 386 U.S. 18, 23–24 (1967).

<sup>14</sup> See *Pierson v. Ray*, 386 U.S. 547, 555 (1967).

<sup>15</sup> See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).

<sup>16</sup> See *Terry v. Ohio*, 392 U.S. 1, 19 (1968).

<sup>17</sup> See *Huddleston v. United States*, 415 U.S. 814, 831 (1974).

<sup>18</sup> See *Bush v. Lucas*, 462 U.S. 367, 390 (1983).

<sup>19</sup> See *United States v. Leon*, 468 U.S. 897, 908 (1984).

<sup>20</sup> See Devon W. Carbado, (E)racing the Fourth Amendment, 100 *Mich. L. Rev.* 946, 967–68 (2002) (“[T]he Supreme Court’s construction and reification of race in Fourth Amendment cases legitimizes and reproduces racial inequality in the context of policing.”); Brandon Hasbrouck, *The Antiracist Constitution*, 116 *B.U. L. Rev.* 87, 116 (2022) (“While the individual mechanisms [of procedural racism] have often been decried for their role in perpetuating white supremacy, the pattern of their adoption and application reveals a much larger problem: the Court is decidedly anti-Black.”).

when the Court is willing to address the symptoms, it will leave the disease of systemic racism undiagnosed and untreated.

Part I explains lenity and provides a background of *Wooden*. Part II discusses how courts have shifted and narrowed the doctrine of lenity, so that it almost never applies today. Part III explains the reason for that shift: courts' narrowing of the rule of lenity is one purportedly race-neutral means of imprisoning Black, Brown, and poor people. Finally, this Essay explains why it is necessary for members of the Court to start saying the quiet part out loud. The Court can overturn its misguided doctrines without acknowledging their racial dimensions. But to fix the rot in the system, the Court must first acknowledge that the rot exists. Otherwise, new "neutral" doctrines will continue to crop up to take the place of those that were overturned.

### I. LENITY

The doctrine of lenity dictates that courts must resolve reasonable doubts about the application of penal laws in the defendant's favor.<sup>21</sup> In other words, "where uncertainty exists, the law gives way to liberty."<sup>22</sup> The doctrine stems from the old rule that "penal laws should be construed strictly."<sup>23</sup> There is no question that criminal laws are penal laws, but courts sometimes classify civil statutes as penal laws as well, especially when the civil punishment is on the harsher side.<sup>24</sup> The doctrine comes to American law as part of our common law foundation which was further enshrined in our Constitution's guarantees of due process and the separation of powers. This Part explores this background and uses *Wooden* to demonstrate the application of lenity.

Lenity dates back to the English common law assumption that Parliament only meant to administer punishment when it was clearly stated in legislation.<sup>25</sup> Back when defendants could be executed merely

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<sup>21</sup> *Wooden v. United States*, 142 S. Ct. 1063, 1081 (2022) (Gorsuch, J., concurring); see also Shon Hopwood, *Restoring the Historical Rule of Lenity as a Canon*, 95 N.Y.U. L. Rev. 918, 920 (2020).

<sup>22</sup> *Wooden*, 142 S. Ct. at 1082 (Gorsuch, J., concurring).

<sup>23</sup> *The Adventure*, 1 F. Cas. 202, 204 (Marshall, Circuit Justice, C.C.D. Va. 1812) (No. 93), rev'd, 12 U.S. 221 (1814).

<sup>24</sup> See 3 Shambie Singer, *Statutes and Statutory Construction* § 59.2 (Thomson Reuters 8th ed. 2021) (discussing the types of laws courts have classified as penal).

<sup>25</sup> *Wooden*, 142 S. Ct. at 1082 (Gorsuch, J., concurring).

for chopping down a cherry tree, British judges used lenity to literally save lives.<sup>26</sup>

When the concept was imported to America, courts used the presumption of lenity to uphold due process rights guaranteed in the Constitution.<sup>27</sup> Indeed, Alexander Hamilton noted that “subjecting . . . men to punishment for things which, when they were done, were breaches of no law . . . ha[s] been, in all ages, the favorite and most formidable instrumen[t] of tyranny.”<sup>28</sup> The main justification for lenity is that “the law must afford ordinary people fair notice of its demands.”<sup>29</sup> The government must give its citizens a clear warning about both what it considers unlawful and the consequences for stepping over the line.<sup>30</sup> Another justification lies in our understanding of separation of powers: *United States v. Wiltberger*<sup>31</sup> stands for the idea that judges may not extend a penal statute beyond the text adopted by Congress.<sup>32</sup> The Court in *Wiltberger* found that the ethical proscription built into crimes should only come from the people’s representatives.<sup>33</sup>

Justice Gorsuch’s concurring opinion in *Wooden v. United States*<sup>34</sup> provides one example of how current Justices think about lenity. William Dale Wooden broke into a series of ten storage units in Georgia on one night.<sup>35</sup> Prosecutors indicted Wooden for ten counts of burglary, to which he pleaded guilty.<sup>36</sup> A police officer later caught him with firearms in his home, qualifying him as “a felon in possession of a firearm.”<sup>37</sup> The ACCA mandates a 15-year minimum sentence if the defendant has three or more prior convictions for violent felonies, including burglary, “committed on occasions different from one another.”<sup>38</sup> Even though Wooden’s burglary

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<sup>26</sup> Peter Benson Maxwell & W. Wyatt-Paine, *On the Interpretation of Statutes* 462 (6th ed. 1920).

<sup>27</sup> *Id.* at 463.

<sup>28</sup> The Federalist No. 84, at 511–12 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>29</sup> *Wooden*, 142 S. Ct. at 1082 (Gorsuch, J., concurring).

<sup>30</sup> See *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (“[A] fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.”).

<sup>31</sup> 18 U.S. (5 Wheat.) 76 (1820).

<sup>32</sup> *Id.* at 95 (“It is the legislature, not the Court, which is to define a crime, and ordain its punishment.”).

<sup>33</sup> *Id.*

<sup>34</sup> *Wooden*, 142 S. Ct. 1063 (Gorsuch, J., concurring).

<sup>35</sup> *Id.* at 1071.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> 18 U.S.C. § 924(e)(1).

convictions relate to events that occurred on a single evening, the District Court applied the ACCA and sentenced Wooden to almost sixteen years.<sup>39</sup> Before the government decided to seek an enhancement under the ACCA, it had recommended a sentence of 21 to 27 months.<sup>40</sup>

The case turned on the meaning of “occasion.”<sup>41</sup> The government argued that “an occasion happens at a particular point in time—the moment when an offense’s elements are established.”<sup>42</sup> Justice Kagan, writing for the majority, used the ordinary meaning of “occasion,” backed by the history and purpose of the ACCA, to explain why the government’s argument failed.<sup>43</sup> After examining how an ordinary person might describe Wooden’s ten burglaries and the dictionary definition of “occasion,” Justice Kagan created a “multi-factored” balancing test that considered “a range of circumstances [that] may be relevant to identifying episodes of criminal activity.”<sup>44</sup> She directed lower courts to examine the timing, proximity, and character and relationship of the offenses when determining whether a criminal event happened on one or separate occasions for the purposes of the ACCA.<sup>45</sup>

In an opinion joined in part by Justice Sotomayor, Justice Gorsuch argued against Justice Kagan’s “‘multi-factored’ balancing test.”<sup>46</sup> “The potentially relevant factors turn out to be many and disparate[,]” Justice Gorsuch wrote. Anyway, he argued, the creation of a balancing test was not necessary to resolve this case.<sup>47</sup> When there is ambiguity in a statute, the first stop should not be the statute’s purpose, nor its legislative history, but rather the rule of lenity.<sup>48</sup> He contended that, “[b]ecause reasonable minds could differ (as they have differed) on the question whether Mr. Wooden’s crimes took place on one occasion or many, the rule of lenity demands a judgment in his favor.”<sup>49</sup>

Justice Gorsuch pointed to the fair notice justification for the rule of lenity, as well as to how the rule helped ensure separation of powers and

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<sup>39</sup> *Wooden*, 142 S. Ct. at 1065.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 1069.

<sup>42</sup> *Id.* (internal citations omitted).

<sup>43</sup> *Id.* at 1069.

<sup>44</sup> *Id.* at 1070–71.

<sup>45</sup> *Id.* at 1071.

<sup>46</sup> *Id.* at 1079 (Gorsuch, J., concurring).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 1081.

<sup>49</sup> *Id.*

due process.<sup>50</sup> “Lenity works to enforce the fair notice requirement by ensuring that an individual’s liberty always prevails over ambiguous laws . . . where uncertainty exists, the law gives way to liberty.”<sup>51</sup> He detailed how courts have weakened lenity over time and advocated for courts to return to a strong lenity jurisprudence.<sup>52</sup>

The next Part of this Essay provides an overview of the shift in lenity jurisprudence that occurred in the latter half of the twentieth century and examines how courts have diluted the concept of lenity over the years. The third Part says the quiet part out loud: the doctrine of lenity has transformed because of mass incarceration’s goal to lock up Black, Brown, and poor people. By saying what Justice Gorsuch did not, Part III puts the rot in the system on display in hopes that doing so will create lasting change rather than simply reform one misguided doctrine.

## II. SHIFT IN THE APPLICATION OF LENITY

Justice Gorsuch can only call for a return to a strong lenity jurisprudence because the Court strayed from the historical doctrine, adopting a weaker version that provides little protection to defendants. This part explores just how the law reached that state of affairs. Scholars have traced the shift in the application of the rule of lenity to the 1952 Supreme Court decision in *United States v. Universal C.I.T. Credit Corp.*<sup>53</sup> There, Universal was charged with violating wage and hour provisions of the Fair Labor Standards Act (FLSA).<sup>54</sup> At issue in *C.I.T.* was whether each individual breach of the statutory duty owed by the employer to the employee, one occurring every week, constituted a separate violation under the Act.<sup>55</sup> Writing for the majority, Justice Frankfurter noted that a simple reading of the text of the statute did not

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<sup>50</sup> Id. at 1082–83.

<sup>51</sup> Id. at 1082.

<sup>52</sup> Id. at 1084–87.

<sup>53</sup> 334 U.S. 218 (1952); see, e.g., David S. Romantz, *Reconstructing the Rule of Lenity*, 40 *Cardozo L. Rev.* 523, 538 (2018) (“*Universal C.I.T.* begat a slow march that purged due process and fair warning from the lenity equation.”). See also generally Shon Hopwood, *Restoring the Historical Rule of Lenity as a Canon*, 95 *N.Y.U. L. Rev.* 918, 928–31 (2020) (describing the decline of the rule of strict construction to the haphazard modern application of lenity).

<sup>54</sup> *Universal C.I.T. Credit Corp.*, 334 U.S. at 218–19.

<sup>55</sup> See id. at 221 (“What Congress has made the allowable unit of prosecution—the only issue before us—cannot be answered merely by a literal reading of the penalizing sections.”).

yield a solution to the legal question at hand.<sup>56</sup> “For that reason,” Justice Frankfurter explained, “we may utilize . . . all the light relevantly shed upon the words and the clause and the statute that express the purpose of Congress.”<sup>57</sup> Rather than turning immediately to the rule of lenity, Justice Frankfurter instead first took up the legislative history.<sup>58</sup>

In support of this claim, Justice Frankfurter cited *United States v. Fisher*,<sup>59</sup> which asserted that “[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived.”<sup>60</sup> This language from *Fisher* would go on to justify the Court’s shift toward a method of statutory interpretation that looks to legislative history, the purpose of the statute, and statutory canons before deigning to apply the rule of lenity.<sup>61</sup>

The Court later cited the *Fisher* standard articulated in *C.I.T.* when it required thoroughgoing ambiguity to justify applying lenity in *United States v. Bass*.<sup>62</sup> In *Bass*, the defendant was convicted under a provision of the Omnibus Crime Control and Safe Streets Act of 1968, which stated that a convicted felon may not “receive[], possess[], or transport[] in commerce or affecting commerce . . . any firearm.”<sup>63</sup> While the government showed at trial that the defendant possessed guns, it made no showing that he possessed those guns in commerce or in a way that would affect commerce.<sup>64</sup> After analyzing the plain meaning of the statutory language, the legislative history, statutory canons, and statements made by United States senators about the statute, the Court ultimately

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<sup>56</sup> See *id.* (“The problem of construction of the criminal provisions of the Fair Labor Standards Act is not easy of solution.”).

<sup>57</sup> *Id.*

<sup>58</sup> It is worth noting that the statute in question in *Universal C.I.T. Corp.*, while potentially penal, is not a criminal statute. See *id.* at 219. It draws its statutory interpretation principles from a bankruptcy case. See *infra* notes 59–61 and accompanying text. While these rules may be entirely applicable in civil cases, they are hardly appropriate as a source of authority to derogate the traditional rule of lenity in criminal law.

<sup>59</sup> 6 U.S. (2 Cranch) 358 (1805).

<sup>60</sup> *Id.* at 386; see also *id.* at 386–87 (applying this method of statutory interpretation to a non-criminal case).

<sup>61</sup> As scholars have noted, it is not clear that Justice Marshall, who wrote the majority opinion in *United States v. Fisher*, intended for this language to be applied in the lenity context. See Romantz, *supra* note 53, at 552 (“*Fisher* had nothing to do with lenity, fair warning, or due process. . . . *Fisher* neither intended to require ultimate ambiguity nor did it intend to convert lenity to a last resort canon.”).

<sup>62</sup> 404 U.S. 336 (1971).

<sup>63</sup> *Id.* at 337.

<sup>64</sup> *Id.* at 338.

concluded that the statute remained ambiguous.<sup>65</sup> Only after considering “every thing from which aid can be derived”<sup>66</sup> did the Court apply the rule of lenity in the face of the ultimate ambiguity of the statute.<sup>67</sup> *Bass* set the stage for the Supreme Court’s forthcoming insistence on examining every possible method of statutory interpretation before turning to the rule of lenity.<sup>68</sup>

Three years later in *Huddleston v. United States*,<sup>69</sup> lenity continued its journey from a rights-protective doctrine to an ultimately ineffectual abstraction. There, Guy Rufus Huddleston was convicted under a statute that prohibited making false statements in the course of acquiring a firearm.<sup>70</sup> Huddleston argued that because the conduct for which he was convicted involved redeeming a firearm that he had pawned, his conduct entailed *reacquisition* as opposed to *acquisition*; therefore the rule of lenity should apply to counteract the statutory ambiguity in the defendant’s favor.<sup>71</sup> The Supreme Court disagreed.<sup>72</sup> After looking to the language of the statute, its legislative history, and its structure, the Court concluded that the statute was not “grievous[ly]” ambiguous and therefore was not unclear enough to justify applying the rule of lenity.<sup>73</sup> The Court prioritized legislative intent over legislative ambiguity, asserting, “we will not blindly incant the rule of lenity to ‘destroy the spirit and force of the law which the legislature intended to [and did] enact.’”<sup>74</sup> *Huddleston*’s insistence on the stringent “grievous” ambiguity

<sup>65</sup> See *id.* at 339–47 (considering text, history, statutory canons, and statements by legislators, and determining that “the statutory materials are inconclusive on the central issue of whether or not the statutory phrase ‘in commerce or affecting commerce’ applies to ‘possesses’ and ‘receives’ as well as ‘transports’”).

<sup>66</sup> *Id.* at 347–48 (quoting *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805)).

<sup>67</sup> See *id.* at 347 (“[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.” (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971))).

<sup>68</sup> See Romantz, *supra* note 53, at 549 (“After *Bass*, the Court continued to insist on ultimate ambiguity to trigger the rule of lenity.”).

<sup>69</sup> 415 U.S. 814 (1974).

<sup>70</sup> *Id.* at 814 (citing 18 U.S.C. § 922(a)(6)).

<sup>71</sup> See *id.* at 815 (“This case presents the issue whether 18 U.S.C. § 922(a)(6), declaring that it is unlawful knowingly to make a false statement ‘in connection with the acquisition . . . of any firearm . . . from a . . . licensed dealer,’ covers the redemption of a firearm from a pawnshop.”).

<sup>72</sup> *Id.* at 823.

<sup>73</sup> See *id.* at 831 (“We perceive no grievous ambiguity or uncertainty in the language and structure of the Act. The statute in question clearly proscribes petitioner’s conduct and accorded him fair warning of the sanctions the law placed on that conduct.”).

<sup>74</sup> *Id.* at 832 (quoting *Am. Tobacco Co. v. Werckmeister*, 207 U.S. 284, 293 (1907); *United States v. Katz*, 271 U.S. 354, 357 (1926)); *Chapman v. United States*, 500 U.S. 453 (1991).

standard as a prerequisite for considering lenity undergirded its resistance to lenity in later cases.

In the ensuing years, the Court and the states continued to stray from the due process and fair warning justifications for lenity. In *Chapman v. United States*, the Supreme Court relied on *Huddleston* and *Bass* when it articulated the standard that “[t]he rule of lenity [] is not applicable unless there is a ‘grievous ambiguity or uncertainty in the language and structure of the Act,’ such that even after a court has ‘seize[d] every thing from which aid can be derived,’ it is still ‘left with an ambiguous statute.’”<sup>75</sup> After articulating this virtually insurmountable standard, the Court refused to apply the rule of lenity in *Chapman*.<sup>76</sup> States followed suit, and likewise diluted their own lenity traditions. Indeed, “[a]s many as twenty-eight states have abolished or even reversed the rule of lenity by statute.”<sup>77</sup> Unsurprisingly, since the Supreme Court articulated the “grievous” ambiguity requirement, it has failed to encounter a statute sufficiently ambiguous to justify applying lenity.<sup>78</sup> As a result of the Court’s continuous tightening of the standard for lenity throughout the latter half of the twentieth century, “the bar for ambiguity may now be so high that lenity is nearly useless to protect individual rights.”<sup>79</sup>

### III. LENITY AND RACE

The rule of lenity sprang from a common-law protection against the casual application of harsh criminal sanctions. For centuries, it was a critical means of ensuring that no one would “be deprived of life, liberty, or property without due process of law.”<sup>80</sup> Chief Justice Marshall recognized its antiquity and fundamental importance to the common law

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<sup>75</sup> *Chapman*, 500 U.S. at 463 (1991) (quoting *Huddleston v. United States*, 415 U.S. 814, 831 (1974); *United States v. Bass*, 404 U.S. 336, 347 (1971)); see also *Muscarello v. United States*, 524 U.S. 125, 138–39 (1998) (“The simple existence of some statutory ambiguity [] is not sufficient to warrant application of [the] rule [of lenity] . . . . To invoke the rule, we must conclude that there is a grievous ambiguity or uncertainty in the statute.” (internal citations omitted)).

<sup>76</sup> *Id.* at 463–64.

<sup>77</sup> William N. Eskridge, Jr. et al., *Cases and Materials on Statutory Interpretation* 369 (2012). For a state specific example of this, see *Ariz. Rev. Stat. Ann.* § 13-104 (“[T]he general rule that a penal statute is to be strictly construed does not apply to this title.”).

<sup>78</sup> Romantz, *supra* note 53, at 554–57.

<sup>79</sup> *Id.* at 553–54.

<sup>80</sup> U.S. Const. art. V.

system.<sup>81</sup> But due process was an early casualty of the War on Drugs,<sup>82</sup> and the fall of lenity hastened with it.<sup>83</sup> White supremacy quietly became the predominant driver of American criminal law.<sup>84</sup> Lenity could have served to restrain laws tailor-made to be especially punitive to Black people. But when we needed lenity most, it vanished.<sup>85</sup>

The fact that Justice Gorsuch's defense of lenity<sup>86</sup> arose in the context of the ACCA provided an opportunity to reflect upon the racial disparities of American criminal law—an opportunity he missed. While Black people account for less than a third of federal prisoners serving a mandatory minimum sentence, they make up over 70% of those serving such minimums under the ACCA.<sup>87</sup> This injustice is compounded by the uneven application of the ACCA from place to place.<sup>88</sup> Whether driven by racist statutory schemes, racist policing, or both, firearms enforcement

<sup>81</sup> See *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820).

<sup>82</sup> See Paul Finkleman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. Cal. L. Rev. 1389, 1399 (1993) (“[T]he war on drugs has subverted fundamental concepts of due process and a reasonable administration of the justice system.”).

<sup>83</sup> But see *Yates v. United States*, 574 U.S. 528, 547–48 (2015) (“[I]f our recourse to traditional tools of statutory construction leaves any doubt about the meaning of ‘tangible object,’ . . . we would invoke the rule that ‘ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.’” (quoting *Cleveland v. United States*, 531 U.S. 12, 25 (2000))). In the white-collar context of the Sarbanes-Oxley Act, suddenly the rule of lenity comes roaring back to life. But then, the collars usually aren’t the only thing that’s white in white-collar crime. See Hon. Stephen J. Fortunato, Jr., *Judges, Racism, and the Problem of Actual Innocence*, 57 Maine L. Rev. 481, 491 (2005) (“Everything I have encountered in both the scholarly and general literature shows that people locked in our nation’s jails and penitentiaries are disproportionately men of color sent there for street crimes, while corporate criminals are overwhelming white and rarely hear the prison door slam shut behind them.”).

<sup>84</sup> See also Brandon Hasbrouck, *The Antiracist Constitution*, B.U. L. Rev. 87, 117 (2022) (discussing the use of the War on Drugs to replace the abolished Jim Crow system).

<sup>85</sup> See generally *Avatar: The Last Airbender* (Nickelodeon 2005).

<sup>86</sup> See generally *Wooden*, 142 S. Ct. at 1082–87.

<sup>87</sup> See *Re-Visiting the Armed Career Criminal Act, Clause 40 Found.: Ad Justitiam* (Toward Justice) (Feb. 25, 2021), <https://clause40.org/blog/f/re-visiting-the-armed-career-criminal-act> [<https://perma.cc/N5HU-K64R>].

<sup>88</sup> See Rachel E. Barkow, *Categorical Mistakes: The Flawed Framework of the Armed Career Criminal Act and Mandatory Minimum Sentencing*, 133 Harv. L. Rev. 200, 236 (2019) (“The use of the ACCA is not always correlated with higher rates of violent crime, as some districts with little violent crime use the ACCA extensively while other areas with greater rates of urban violence use it sparingly.”); Haley E. Roach, Note, *Location, Location, Location: How the ACCA’s Categorical Approach Produces Vast Sentencing Discrepancies, and Why the Sentencing Guidelines Should Replace It*, 52 Ind. L. Rev. 511, 511–12 (2019) (demonstrating how the same conduct in two different jurisdictions, even with the same application of prosecutorial discretion, could result in one defendant being subjected to the ACCA’s mandatory minimum and another being sentenced under the guidelines).

is concentrated in urban areas, disproportionately targeting young Black men.<sup>89</sup> The ACCA provides a stark case study in the racially disparate outcomes of our criminal legal system, but it is hardly an isolated phenomenon. Rather, it is typical of Congress and the Supreme Court's approaches to criminal law over the past sixty years, applied in an area traditionally reserved to state law.

This Part examines the consequences of courts' weakening of the rule of lenity. First, when courts and states do away with lenity, Black, Brown, and poor people feel the effects more than majority groups. Second, this Part discusses how purportedly race-neutral doctrines developed to increase police powers while studiously ignoring the race of policed people are not at all neutral in their application to people of different races. Third, this Part sets out race and mass incarceration as an explanation for the courts' and states' narrowing of lenity. Finally, it exposes the dangerous colonialism lurking beneath the Court's refusal to acknowledge this historical relationship.

#### *A. The Majestic Inequality of Lenity*

The Court's weakening of the rule of lenity has disproportionately impacted Black, Brown, and poor people. Judges' refusal to apply lenity when criminal statutes are ambiguous impacts minority groups more than majority groups for the simple reason that it is more likely that the law will label Black, Brown, and poor people as criminals in the first place.<sup>90</sup> The shift in lenity away from its previous broad application<sup>91</sup> feeds mass incarceration and fuels racial disparities.

Briefly examining recent statistics, as of 2020 Black men were 5.7 times as likely to be incarcerated as white men; young Black men were

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<sup>89</sup> See Jacob D. Charles & Brandon L. Garrett, *The Trajectory of Federal Gun Crimes*, 170 U. Penn. L. Rev. 637, 678 (2022) ("Relying upon FBI data, the Bureau of Justice Statistics reports that arrest rates for such firearms offenses more than doubled in the three decades after 1965, with arrests concentrated in urban areas, arrest rates rising dramatically for teenage males, and arrest rates five times greater for Black than White persons.").

<sup>90</sup> See Brandon Hasbrouck, *Movement Constitutionalism*, Okla. L. Rev. (forthcoming 2022) [hereinafter Hasbrouck, *Movement Constitutionalism*] (manuscript at 3–7) (on file with author) (documenting how the law punishes Blackness); Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 U. Toledo L.J. 511, 565–68 (2002) (describing the disproportionate racial impact of mass incarceration as related to lenity).

<sup>91</sup> See *supra* Part II.

12.5 times as likely to be incarcerated as white men of the same age.<sup>92</sup> Similar trends held true for Black women.<sup>93</sup> The disparities are so severe that there are more incarcerated Black people than white people in the United States, despite white Americans representing over five times as large a portion of the overall population.<sup>94</sup> Every time judges fail to apply the rule of lenity, they help sustain these statistics.<sup>95</sup> David S. Romantz has argued that declining to apply lenity allows “the Court to avoid . . . any pretense of respecting a criminal defendant’s due process right.”<sup>96</sup> These due process rights, which justify the application of lenity,<sup>97</sup> are even more crucial for Black, Brown, and poor people. And courts are significantly less likely to respect the due process rights of these groups.<sup>98</sup>

Scholars have linked lenity to our current carceral state and its racist results. Intisar A. Rabb discusses lenity “against the backdrop of the ailing criminal justice system, whose widespread abuses resulting in mass incarceration that disproportionately affect black men call for greater regard for defendants’ liberty interests and other constitutional rights.”<sup>99</sup> Lael Weinberger points out that “[t]he rule of lenity stands as a check on criminal prosecutions when the law is less than clear. This function should not be underestimated in a time of mass incarceration and high rates of criminalization.”<sup>100</sup> Phillip M. Spector has noted that judges can use lenity as a means of “quietly wag[ing] a war of resistance” against the racist effects of mass incarceration “far below the radar of the press and

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<sup>92</sup> E. Ann Carson, Prisoners in 2020—Statistical Tables 23, Bureau of Just. Stat. (Dec. 2021), <https://bjs.ojp.gov/content/pub/pdf/p20st.pdf> [<https://perma.cc/V7Z7-TGDD>].

<sup>93</sup> See *id.* (explaining that Black women were more likely to be incarcerated than white women and young Black women were 4.1 times more likely to be incarcerated than young white women of the same age).

<sup>94</sup> See John Gramlich, Black Imprisonment Rate in the U.S. Has Fallen by a Third Since 2006, Pew Rsch. Ctr. (May 6, 2020), <https://www.pewresearch.org/fact-tank/2020/05/06/share-of-black-white-hispanic-americans-in-prison-2018-vs-2006/> [<https://perma.cc/GCZ7-YAK6>].

<sup>95</sup> See Brandon Hasbrouck, *The Just Prosecutor*, 99 Wash. U. L. Rev. 627, 633 (2021) (explaining how Blackness is punished).

<sup>96</sup> Romantz, *supra* note 53, at 555–56.

<sup>97</sup> See *supra* Part I.

<sup>98</sup> See Brandon Hasbrouck, *Movement Judges*, 97 N.Y.U. L. Rev. 631, 640 (2022) (describing how current judges “do what they were appointed to do: defer to the policy objectives of the executive and legislative branches of government . . . at the expense of the values and interests of ordinary citizens”).

<sup>99</sup> Intisar A. Rabb, *The Appellate Rule of Lenity*, 131 Harv. L. Rev. F. 179, 186 (2018).

<sup>100</sup> Lael Weinberger, *Making Mistakes About the Law: Police Mistakes of Law Between Qualified Immunity and Lenity*, 84 U. Chi. L. Rev. 1561, 1580 (2017).

academia, and bearing a marked resemblance to the British judiciary's [use of lenity to] attack [] the death penalty 350 years ago."<sup>101</sup>

Judges' collective refusal to do so, as evidenced in the twentieth-century shift in the rule of lenity,<sup>102</sup> props up mass incarceration and its attendant racist oppression. The pattern of denying lenity in cases involving drug statutes demonstrates the power the doctrine's derogation gives prosecutors.<sup>103</sup> This shift in lenity, which narrows and weakens what could be a substantive protection of the rights of the vulnerable, is feeding into the oppression of Black, Brown, and poor people.

### *B. Race-Neutral Doctrines Aren't Actually Race-Neutral*

Many ostensibly race-neutral doctrines promulgated by the Court are in fact rooted in racism.<sup>104</sup> Even doctrines developed independently of American white supremacy can take on racially disparate applications because white supremacy has permeated the American justice system throughout its development, often with conscious attention in the judiciary to maintaining white supremacy.<sup>105</sup> As Michelle Alexander has meticulously catalogued, criminal law doctrines established as part of the War on Drugs have served to enforce white supremacy through mass incarceration of poor people and people of color.<sup>106</sup> The War on Drugs,

<sup>101</sup> Spector, *supra* note 90, at 566.

<sup>102</sup> See *supra* Part II.

<sup>103</sup> See, e.g., *United States v. Gonzalez*, 407 F.3d 118, 124 (2d Cir. 2005) (refusing to extend the rule of lenity to an ambiguous application of the sentencing guidelines to the facts, where the jury had made no finding as to the weight of drugs involved); *United States v. Speakman*, 330 F.3d 1080, 1083–84 (8th Cir. 2003) (denying the application of lenity to sentencing enhancements when the number of prior charges was a matter of prosecutorial discretion); *United States v. Jackson*, 64 F.3d 1213, 1219–20 (8th Cir. 1995) (determining that the rule of lenity has no application to the disparities in sentencing for cocaine and crack, despite the similarities between the two drugs); *United States v. Marshall*, 908 F.2d 1312, 1318 (7th Cir. 1990) (declining to apply lenity to statutory language, resulting in the inclusion of the weight of an inactive carrying medium in the amount of LSD).

<sup>104</sup> See Brandon Hasbrouck, *Abolishing Racist Policing with the Thirteenth Amendment*, 67 *UCLA L. Rev.* 1108, 1120 (2020) (“[The War on Drugs] armed the police with the most sophisticated, and largely constitutional, arsenal with which to enforce racial subjugation: racial profiling, stop and frisk, pretextual stops, excessive force, and qualified immunity.”).

<sup>105</sup> See Leah M. Litman, *The Myth of the Great Writ*, 100 *Tex. L. Rev.* 219, 222 (2021) (“While habeas is sometimes a device for securing individual liberty, it has also served as a vehicle for the racialization and subordination of disadvantaged groups and for normalizing excesses of government power, and that is not merely because habeas courts failed to grant relief in some cases.”).

<sup>106</sup> See, e.g., Michelle Alexander, *The New Jim Crow* 59 (2010).

which saw its inception in the 1970s, spurred mandatory minimum sentencing for drug crimes.<sup>107</sup> The racism inherent in these facially neutral, mandatory minimum drug sentences was thinly veiled. Indeed, sentences for crack cocaine (the form of cocaine generally associated with the Black community) were far more severe and draconian than sentences imposed for possession of powder cocaine (the form of cocaine associated with the white population).<sup>108</sup> The result was a “100:1 ratio between the triggering quantities necessary for powder cocaine and crack cocaine sentencing.”<sup>109</sup>

Mass incarceration of people of color proliferated as a result.<sup>110</sup> Unfortunately, Black communities were barred from seeking justice in connection with these facially neutral but functionally discriminatory sentencing policies after the Supreme Court’s 1976 interpretation of the Equal Protection Clause in *Washington v. Davis*.<sup>111</sup> There, the Supreme Court held that an Equal Protection Clause violation requires intentional discrimination.<sup>112</sup> In other words, under the Supreme Court’s current precedent, it is virtually impossible for a plaintiff to show that a facially neutral policy with a discriminatory impact violates the Equal Protection Clause.<sup>113</sup> As a consequence of this narrowing of the scope of Equal Protection, constitutional recourse for the discriminatory sentencing scheme is largely out of reach for Black, Brown, and poor folks.<sup>114</sup>

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<sup>107</sup> Angela J. Davis, Benign Neglect of Racism in the Criminal Justice System, 94 Mich. L. Rev. 1660, 1664 (1996).

<sup>108</sup> See Christopher J. Tyson, At the Intersection of Race and History: The Unique Relationship Between the *Davis* Intent Requirement and the Crack Laws, 50 How. L.J. 345, 378 (2007) (explaining that under the Anti-Drug Abuse Act of 1986, the amount of crack-cocaine required to trigger a mandatory minimum sentence was far lower than the triggering quantity of powder cocaine).

<sup>109</sup> *Id.*

<sup>110</sup> David Cole, No Equal Justice 214 (1999) (explaining that Black Americans are vastly overincarcerated for drug use compared to white Americans, even though both racial groups use drugs at approximately the same rate).

<sup>111</sup> 426 U.S. 229, 230 (1976).

<sup>112</sup> *Id.* at 245–46.

<sup>113</sup> See Tyson, *supra* note 108, at 359 (“In the same manner that *Plessy* provided a blueprint for racists to structure the formal contours of the Jim Crow system, *Davis* empowered modern-day policy makers to devise the logic, craft the legislation, and enforce the policies that could mask racial and discriminatory intent behind a façade of objectivity.”).

<sup>114</sup> See *id.* at 359–83 (cataloguing the rise of mass incarceration and the drug war as racist practices that have been permitted to proliferate due in part to the Supreme Court’s decision in *Washington v. Davis*).

While insisting on an exacting standard of proof for relief, the Court simultaneously upheld facially neutral doctrines that effectively enforce white supremacy.<sup>115</sup> In 1968, the Supreme Court decided *Terry v. Ohio*, which held that stop and frisks of citizens by law enforcement are permissible as long as the officer has “reasonable suspicion”—a standard that is extremely easy for an officer to meet.<sup>116</sup> Police have utilized *Terry* to incarcerate disproportionate numbers of Black and Brown Americans.<sup>117</sup>

In 1996, the Court further sanctioned racist policing when it held in *Whren v. United States* that as long as an officer can articulate an objective reason for his suspicion, he may conduct a pretextual, racially motivated stop and frisk.<sup>118</sup> The Court further insulated officers from liability for racist policing through the doctrine of qualified immunity, which makes it virtually impossible for police to be held civilly responsible for violating someone’s civil rights.<sup>119</sup>

The Supreme Court utilized the facially neutral justification of juror discretion to uphold discriminatory state-sanctioned killing of Black defendants in *McCleskey v. Kemp*.<sup>120</sup> There, the Court acknowledged findings of racial discrimination in the imposition of the death penalty—but nevertheless found no constitutional violation and justified the discrimination on the basis of the discretion of the sentencing body.<sup>121</sup> In the ensuing years, states have put disproportionately more Black defendants to death than white defendants—especially when the crime involved a white victim:

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<sup>115</sup> See *id.* at 382 (explaining that facially neutral justifications for racist policies are “uniquely characteristic of the immediate post-segregation era, particularly the demand for a race-neutral political and public policy lexicon to communicate the longstanding logic of racial subjugation and White-privilege in America”).

<sup>116</sup> 392 U.S. 1, 21–22 (1968). The racial implications of the case were obvious even before it was decided. See Brief for the NAACP Legal Defense & Educational Fund, Inc., as Amicus Curiae at 4–5, *Sibron v. New York*, 392 U.S. 40 (1968) (Nos. 63, 74), *Terry v. Ohio*, 392 U.S. 1 (1968) (No. 67). Yet there is no mention of race in the entirety of the Court’s opinion in *Terry*, nor in the concurrences and dissent. See generally *Terry*, 392 U.S. 1.

<sup>117</sup> See Alexander, *supra* note 106, at 62–63 (“In the years since *Terry*, stops, interrogations, and searches of ordinary people driving down the street, walking home from the bus stop, or riding the train, have become commonplace—at least for people of color.”).

<sup>118</sup> 517 U.S. 806, 819 (1996).

<sup>119</sup> See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (articulating the doctrine of qualified immunity).

<sup>120</sup> 481 U.S. 279 (1987) (sanctioning clear racial discrimination in the application of the death penalty). The Court not only upheld that discretion but praised it. See *id.* at 297.

<sup>121</sup> *Id.* at 305–08.

Among defendants who were sentenced to death for killing a white victim, 24.27% (25/103) were executed. Among defendants who were sentenced to death for killing a Black victim, 5.26% (1/19) were executed. Even among defendants already sentenced to death, defendants who were convicted of killing a white victim were about 4.6 times more likely to be executed (24.27/5.26) than defendants convicted of killing a Black victim. Having corrected a small number of errors in the data, the overall execution rate is about 38 times greater for defendants convicted of killing a white victim than for defendants convicted of killing a Black victim.<sup>122</sup>

No wonder *McCleskey* is the vote Justice Powell would have taken back.<sup>123</sup> We cannot in good faith maintain that the law's protections are equally applied in such a system.

As these examples demonstrate, the Court often utilizes facially neutral principles to justify doctrines that enforce and legislate the oppression of people of color. The shift in the rule of lenity that occurred in the second half of the twentieth century is another such example.

### C. A Different Justification for Lenity's Shift

The way courts and states have narrowed the rule of lenity over time corresponds to an uptick in the use of other purportedly race-neutral doctrines to lock up Black, Brown, and poor people. In other words, courts' refusal to apply lenity is simply another race-neutral doctrine that is not race-neutral because the effect is the imprisonment of a disproportionate number of Black, Brown, and poor people.<sup>124</sup> Like the race-neutral doctrines discussed above,<sup>125</sup> courts began weakening lenity in the second half of the twentieth century.<sup>126</sup> By the time the Supreme Court decided *Chapman*, which required a showing of a "grievous ambiguity" before applying lenity, the War on Drugs was in full swing.<sup>127</sup>

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<sup>122</sup> Scott Phillips & Justin Marceau, Whom the State Kills, 55 Harv. C.R.-C.L. L. Rev. 585, 613–14 (2020).

<sup>123</sup> See David von Drehle, Retired Justice Changes Stand on Death Penalty, Wash. Post (June 10, 1994), <https://www.washingtonpost.com/archive/politics/1994/06/10/retired-justice-changes-stand-on-death-penalty/9ccde42b-9de5-46bc-a32a-613ae29d55f3/> [https://perma.cc/JP4T-6QN5].

<sup>124</sup> See supra Section III.A.

<sup>125</sup> See supra Section III.B.

<sup>126</sup> See supra Part II.

<sup>127</sup> Id.

And the one legal doctrine that could potentially help defendants who were themselves victims of racial discrimination—lenity—had already received the final nail in its coffin.<sup>128</sup>

Justice Gorsuch did not discuss any of this context in his concurring opinion. But without this context, it is impossible to explain what happened and why. Courts' continued reluctance, with only a few notable exceptions,<sup>129</sup> to grapple with the racial dimensions of the cases they decide prevents them from addressing the systemic oppression that pervades every aspect of our legal system. Even if Justice Gorsuch's concurrence leads the Court down the path of reversing the twentieth-century shift in the rule of lenity, his failure to address the connection between lenity and race means that such a change would do little to address the pervasive rot in our system. Without addressing the underlying structural racism of our legal system, a reinvigorated lenity doctrine would be little better than a meaningless guarantee.<sup>130</sup>

In *Utah v. Strieff*, Justice Sotomayor voiced what judges often leave unsaid: she expressed the racial component of Fourth Amendment jurisprudence.<sup>131</sup> The *Strieff* majority, in an opinion authored by the Court's then-only Black Justice,<sup>132</sup> held "that the discovery of a warrant for an unpaid parking ticket will forgive a police officer's violation of your Fourth Amendment rights."<sup>133</sup> In other words, an outstanding warrant for a mere parking ticket permits police to violate a person's Fourth Amendment rights with impunity.<sup>134</sup> Justice Sotomayor called out the majority's dismissal of the police's glaringly unconstitutional conduct as an "isolated" incident<sup>135</sup> as instead perpetuating the racial injustices of the criminal justice system:

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<sup>128</sup> Romantz, *supra* note 53, at 554–57.

<sup>129</sup> See *infra* note 142 and accompanying text.

<sup>130</sup> See Alexandra L. Klein, *Meaningless Guarantees: Comment on Mitchell E. McCloy's "Blind Justice: Virginia's Jury Sentencing Scheme and Impermissible Burdens on a Defendant's Right to a Jury Trial"*, 78 Wash. & Lee L. Rev. 585, 593 (2021).

<sup>131</sup> 579 U.S. 232, 254 (2016) (Sotomayor, J., dissenting).

<sup>132</sup> Justice Clarence Thomas wrote the majority opinion in *Strieff*. *Id.* at 234 (majority opinion).

<sup>133</sup> *Id.* at 243 (Sotomayor, J., dissenting).

<sup>134</sup> *Id.*

<sup>135</sup> See *id.* at 242 (majority opinion) ("[A]ll the evidence suggests that the stop was an isolated instance of negligence that occurred in connection with a bona fide investigation of a suspected drug house.").

For generations, [B]lack and [B]rown parents have given their children “the talk” . . . all out of fear of how an officer with a gun will react to them . . . . 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 be anything but.<sup>136</sup>

Notably, unlike most criminal defendants, Strieff was white. As Justice Sotomayor pointed out, “The white defendant in this case shows that anyone’s dignity can be violated in this manner. But it is no secret that people of color are disproportionate victims of this type of scrutiny.”<sup>137</sup> William Dale Wooden (whose conviction was at issue in *Wooden v. United States*), too, was white.<sup>138</sup> The fact remains that the narrowed rule of lenity, like the Fourth Amendment question at issue in *Strieff*, serves mostly to punish Black and Brown people. It is also worth noting that Justice Gorsuch’s concurrence, advocating for a revitalization of the rule of lenity, came in a case in which doing so would have helped a white defendant, not the Black and Brown defendants most commonly in the clutches of the criminal legal system.

Justice Sotomayor’s opinion in *Strieff*, which echoes the cries of the Black Lives Matter movement, is not unique in her jurisprudence. To elaborate with just one more example, in *Terry v. United States*, in which the Court interpreted a provision of the First Step Act of 2018,<sup>139</sup> Justice Sotomayor vehemently objected to the majority’s “unnecessary, incomplete, and sanitized” history of the 100-to-1 crack cocaine sentencing ratio.<sup>140</sup> As in *Strieff*, Justice Thomas authored the majority opinion.<sup>141</sup> In more recent years, at least some judges are willing to recognize the role of race in American law, even while Justice Thomas stubbornly refuses to. Lower court and state court judges have also

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<sup>136</sup> Id. at 254 (Sotomayor, J., dissenting).

<sup>137</sup> Id.

<sup>138</sup> Prisoners Personal History Sheet, *State v. Wooden*, No. 37326-J (Ga. Super. Ct. Sept. 24, 1997).

<sup>139</sup> 141 S. Ct. 1858, 1860 (2021).

<sup>140</sup> Id. at 1864 n.1 (Sotomayor, J., concurring in part and concurring in the judgment).

<sup>141</sup> Id. at 234.

expressly identified the racial components of the cases before them.<sup>142</sup> Recognizing the racial roots and effects of neutral doctrines is the first step toward addressing the racial disparities that pervade not only the criminal justice system, but also everyday life; if we cannot call it what it is, we cannot hope to fix it.

#### *D. The Court's Persistent Failure to See Race in American Injustice*

It's not enough for scholars and lower court judges to acknowledge the racial dimensions of criminal law, though. Such awareness must reach the Supreme Court, which has persistently failed to recognize the racial consequences of its jurisprudence. Notably, while the late Justice Ginsburg joined most of Justice Sotomayor's dissent in *Strieff*, she did not join Part IV, in which Justice Sotomayor laid bare the persistence of structural racism in criminal law.<sup>143</sup> Despite Justice Ginsburg's history of jurisprudence and advocacy in pursuit of an egalitarian society,<sup>144</sup> even she turned away when given such an opportunity to speak the truth of racism in American law. Nor is this failure of courage or insight unique to Justice Ginsburg.

<sup>142</sup> See, e.g., *United States v. Curry*, 965 F.3d 313, 332 (4th Cir. 2020) (Gregory, C.J., concurring) (“There’s a long history of black and brown communities feeling unsafe in police presence.”); *Leaders of a Beautiful Struggle v. Balt. Police Dep’t*, 2 F.4th 330, 349 (4th Cir. 2021) (Gregory, C.J., concurring) (“Segregation effectively plundered Baltimore’s Black neighborhoods . . . and the consequences persist today. So it is no coincidence that gun violence mostly occurs in the portions of the city that never recovered from state-sanctioned expropriation.”); *United States v. Johnson*, 874 F.3d 571, 581 (7th Cir. 2017) (Hamilton, J., dissenting) (“It is true that Johnson has not made an issue of race, but we should not close our eyes to the fact that this seizure and these tactics would never be tolerated in other communities and neighborhoods.”); *Commonwealth v. Warren*, 58 N.E.3d 333, 342 (Mass. 2016) (“[W]here the suspect is a black male stopped by the police on the streets of Boston, the analysis of flight as a factor in the reasonable suspicion calculus cannot be divorced from the findings in a recent Boston Police Department . . . report documenting a pattern of racial profiling of black males in the city of Boston.”); *State v. Copley*, 839 S.E.2d 726, 731–32 (N.C. 2020) (Earls, J., concurring) (“We should not assume a statement [about the defendant’s race] is improper when the propriety of the statement is the very heart of what matters to the administration of criminal justice and the jurisprudence of this State.”).

<sup>143</sup> See *Strieff*, 579 U.S. at 252 (Sotomayor, J., dissenting) (“Writing only for myself, and drawing on my professional experiences, I would add that unlawful ‘stops’ have severe consequences much greater than the inconvenience suggested by the name.”).

<sup>144</sup> See generally Linda Greenhouse, Ruth Bader Ginsburg, Supreme Court’s Feminist Icon, Is Dead at 87, *N.Y. Times* (Sept. 24, 2020), <https://www.nytimes.com/2020/09/18/us/ruth-bader-ginsburg-dead.html> [<https://perma.cc/93FJ-HB7G>] (recounting Justice Ginsburg’s life and work).

Justice Thurgood Marshall, while acutely aware of the extent of racism in America, often joined in the purportedly race-neutral decisions that enable mass incarceration. He can be counted among the majorities of decisions weakening lenity, strengthening qualified immunity, and weakening *Bivens*.<sup>145</sup> Despite Justice Scalia's explorations of the historical basis for limiting searches and seizures, he authored the majority opinion giving judicial sanction to pretextual traffic stops.<sup>146</sup> Justice Breyer, despite his liberal colleagues' stern dissents, joined with the majority in *Strieff*.<sup>147</sup> Both progressive and conservative Justices join in the Court's tradition of making sweeping pronouncements in criminal law without examining their inevitable racial impacts.

But rather than simply paint a hopeless picture, we should explore potential avenues for shifting the Court's awareness of the racial dimensions of its criminal jurisprudence. Justice Gorsuch is particularly well-positioned for such an awakening. Justice Gorsuch's reputation as an expert in federal Indian law and a proponent of strict construction of statutes against federal intrusion into tribal sovereignty preceded his appointment to the Supreme Court.<sup>148</sup> This tendency was on full display in his opinion in *McGirt v. Oklahoma*, where the Court affirmed tribal sovereignty in a large portion of Oklahoma.<sup>149</sup> Despite the potentially large transformative effects of this decision, Gorsuch reasoned that "the magnitude of a legal wrong is no reason to perpetuate it."<sup>150</sup> In his concurrence in *Washington State Department of Licensing v. Cougar Den, Inc.*, Gorsuch recognized that antidemocratically imposed laws like

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<sup>145</sup> See *Huddleston v. United States*, 415 U.S. 814 (1973); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Bush v. Lucas*, 462 U.S. 367 (1983). In fairness to Justice Marshall, he was also a consistent voice against the expansion of warrantless searches and harmless error. See generally Tracey Maclin, Justice Thurgood Marshall: Taking the Fourth Amendment Seriously, 77 *Cornell L. Rev.* 723 (1992); Clarence Page, The Legacy of Thurgood Marshall, *Chi. Trib.* (June 30, 1991), <https://www.chicagotribune.com/news/ct-xpm-1991-06-30-9102270600-story.html> [<https://perma.cc/NP9Y-WRD5>] (remembering Justice Marshall's opposition to the Court's permissive attitude to coerced confessions and sloppy police work).

<sup>146</sup> See *Whren v. United States*, 517 U.S. 806 (1996).

<sup>147</sup> See *Utah v. Strieff*, 579 U.S. 232 (2016).

<sup>148</sup> See John Dossett, Justice Gorsuch and Federal Indian Law, *Am. Bar Ass'n* (Sept. 1, 2017), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/vol--43/vol--43--no--1/justice-gorsuch-and-federal-indian-law/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/vol--43/vol--43--no--1/justice-gorsuch-and-federal-indian-law/) [<https://perma.cc/YXB7-GL EU>] (highlighting several of Justice Gorsuch's cases favoring tribal sovereignty from his time on the Tenth Circuit).

<sup>149</sup> 140 S. Ct. 2452, 2479 (2020) ("Ultimately, Oklahoma fears that perhaps as much as half its land and roughly 1.8 million of its residents could wind up within Indian country.").

<sup>150</sup> *Id.* at 2480.

treaties between the United States and sovereign tribes must be construed strictly, with ambiguities resolved against the government.<sup>151</sup> Even at oral arguments, Gorsuch demonstrated his tendency to give considerable weight to the benefits sovereign tribes negotiated for themselves.<sup>152</sup>

These are not isolated bits of reasoning within a few select cases, but a through-line in Gorsuch's Indian law jurisprudence.<sup>153</sup> This line of reasoning recently boiled to a head in Gorsuch's dissent in *Oklahoma v. Castro-Huerta*.<sup>154</sup> Relying on a tradition of Supreme Court jurisprudence going back to *Worcester v. Georgia*<sup>155</sup> and legal practice stretching through the Continental Congress back to English rule, Gorsuch argued that the states have no inherent power to prosecute crimes involving Natives on tribal land.<sup>156</sup> Gorsuch recognized that "The real party in interest here isn't Mr. Castro-Huerta but the Cherokee . . . relegated to the filing of *amicus* briefs."<sup>157</sup> He pulled no punches in dissent, calling the majority opinion a "lawless act of judicial fiat."<sup>158</sup> Gorsuch's dissent so thoroughly laid out the legal, political, and international history of Indian Law that the Court's liberals simply joined it without writing a word of their own.

<sup>151</sup> See 139 S. Ct. 1000, 1016 (2019) (Gorsuch, J., concurring in the judgment) ("After all, the United States drew up this contract, and we normally construe any ambiguities against the drafter who enjoys the power of the pen. Nor is there any question that the government employed that power to its advantage in this case.").

<sup>152</sup> See Transcript of oral argument at 17, *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486 (2022) (No. 21-429), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2021/21-429\\_3e04.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/21-429_3e04.pdf) [<https://perma.cc/R9AR-P4GZ>] ("We have the treaties, okay, which have been in existence and promising this tribe since before the Trail of Tears that they would not be subject to state jurisdiction precisely because the states were known to be their enemies.").

<sup>153</sup> See Delilah Friedler, *How Native Tribes Started Winning at the Supreme Court*, Mother Jones (Aug. 5, 2020), <https://www.motherjones.com/crime-justice/2020/08/how-native-tribes-started-winning-at-the-supreme-court/> [<https://perma.cc/Q2G7-E9RZ>] (discussing the confluence of organizing within Native communities and the arrival of Justices Kagan, Sotomayor, and Gorsuch as the catalysts of a string of significant legal victories for those communities).

<sup>154</sup> 142 S. Ct. 2486 (allowing state jurisdiction over crimes committed by non-Natives against Native victims on tribal land).

<sup>155</sup> 31 U.S. (6 Pet.) 515 (1832).

<sup>156</sup> *Castro-Huerta*, 142 S. Ct. at 2505 (Gorsuch, J., dissenting) (recounting the early history of federal-tribal relations and concluding that "Native American Tribes retain their sovereignty unless and until Congress ordains otherwise").

<sup>157</sup> *Id.* at 2510–11 (Gorsuch, J., dissenting).

<sup>158</sup> *Id.* at 2510 (Gorsuch, J., dissenting).

Even when Gorsuch disagrees with a sovereign tribe, he still recognizes the relationship between the history behind federal Indian law and the injustice of the federal government's colonial behavior.<sup>159</sup> Nor is Indian law the only field where Gorsuch has argued that the United States should disentangle itself from the legacy of colonialism. In *United States v. Vaello Madero*, Gorsuch excoriated the reasoning of the Insular Cases:

The flaws in the Insular Cases are as fundamental as they are shameful. Nothing in the Constitution speaks of “incorporated” and “unincorporated” Territories. Nothing in it extends to the latter only certain supposedly “fundamental” constitutional guarantees. Nothing in it authorizes judges to engage in the sordid business of segregating Territories and the people who live in them on the basis of race, ethnicity, or religion.<sup>160</sup>

This stance comports with a good-faith originalism<sup>161</sup>—the United States was founded in rebellion against a colonial power, with new institutions to set itself up as the antithesis of perceived British abuses.<sup>162</sup> If the United States is to live up to its founding ideals, it must do so as an anti-colonial nation.

But American colonialism persists. The destruction of Indigenous populations—a form Gorsuch recognizes—is not a complete picture; anti-Black racism and the exploitation of immigrants are further symptoms of the disease—something he does *not* always recognize.<sup>163</sup> Discriminatory purpose infects much of the federal code. Judge Miranda Du recently found the criminalization of reentry following deportation was motivated

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<sup>159</sup> See *Denezpi v. United States*, 142 S. Ct. 1838, 1850 (2022) (Gorsuch, J., dissenting) (recounting the government's past abuses of Indigenous people as a prelude to arguing that double jeopardy should preclude prosecution of the appellant).

<sup>160</sup> *United States v. Vaello Madero*, 142 S. Ct. 1539, 1554 (2022) (Gorsuch, J., concurring).

<sup>161</sup> It remains possible that Justice Gorsuch holds other motivations for his jurisprudence, and this analysis may prove overly optimistic. The reasoning underlying his Indian Law cases may well be setting up some more nefarious doctrine in another area, a libertarian idiosyncrasy, or simply a consequence of his greater exposure to Indian Law on the Tenth Circuit.

<sup>162</sup> See also Aziz Rana, *Freedom Struggles and the Limits of Constitutional Continuity*, 71 Md. L. Rev. 1015, 1021–23 (2012) (contrasting the anti-imperial and egalitarian ideals of the Founders with the political realities facing marginalized people in America).

<sup>163</sup> See Monika Batra Kashyap, *U.S. Settler Colonialism, White Supremacy, and the Racially Disparate Impacts of COVID-19*, 11 Calif. L. Rev. Online 517, 518–19 (2020) (“A framework of settler colonialism understands that the three foundational processes upon which the United States was built—Indigenous elimination, anti-Black racism, and immigrant exploitation—are ongoing processes that continue to shape present-day systemic inequities.”).

by racial animus.<sup>164</sup> But then, much of Title 18 has similarly racist roots.<sup>165</sup> The injustices of our immigration and criminal law arise from the same colonialism as our mistreatment of Indigenous people. When Justice Gorsuch recognizes that colonialism, he correctly decries it as antithetical to the stated foundational ideals of America and seeks to exorcise it from our law. Carrying that project to its logical conclusion by excising the anti-Black and anti-immigrant strains of American law would be a massive and radical transformation. Both our substantive law and federal procedure would face thorough reevaluations, upending decades of decisions and legislation. Yet if Justice Gorsuch and his colleagues apply their principles and precedents honestly to lenity, harmless error, qualified immunity, and other doctrines, it is necessary. After all, the magnitude of the legal wrongs wrought by anti-Black and anti-immigrant colonialism is no reason to perpetuate them.

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<sup>164</sup> See *United States v. Carrillo-Lopez*, 555 F. Supp. 3d 996, 1007–17 (D. Nev. 2021) (recounting the legislative history of the enactment and reenactment of the relevant statute (citing Natsu Taylor Saito, *Tales of Color and Colonialism: Race Realism and Settler Colonial Theory*, 10 Fla. A&M U. L. Rev. 1 (2014))).

<sup>165</sup> While the era of facially discriminatory criminal law is mostly behind us, the animus that motivated it, and its effects, are not. See generally Alexander, *supra* note 106 (illustrating how explicitly racist laws and policies evolved into the modern-day criminal legal system). Beginning in the 1960s, conservative politicians linked race and crime in their rhetoric around federal campaigns. See Sara Sun Beale, *What's Law Got to Do With It? The Social, Political, and Other Non-legal Factors Influencing the Development of (Federal) Criminal Law*, 1 Buff. Crim. L. Rev. 23, 40–41 (1997). President Nixon delivered the War on Drugs to bring that rhetoric to legal reality. See Dan Baum, *Legalize It All: How to Win the War on Drugs*, *Harper's Mag.*, Apr. 2016, at 22, 22 (explaining how Nixon's heavy criminalization of drugs was meant to target the antiwar left and Black people after Nixon's campaign rhetoric associated them in the public consciousness). The wave of "tough on crime" statutes of the Reagan and G.H.W. Bush eras grew from attempts to covertly demonize minorities without openly engaging in bigoted rhetoric. See William N. Elwood, *Rhetoric in the War on Drugs: Triumphs and Tragedies of Public Relations* 11 (1994). These statutory efforts included excessively punitive mandatory minimum sentences, giving prosecutors greater tools to pressure defendants. See Walker Newell, *The Legacy of Nixon, Reagan, and Horton: How the Tough on Crime Movement Enabled a New Regime of Race-Influenced Employment Discrimination*, 15 *Berkeley J. Afr.-Am. L. & Pol'y* 3, 12 (2013) ("Capitalizing on overwhelming public opinion in favor of more rigid crime control, conservative politicians at the national and state levels stoked their constituents' fear of crime waves and endorsed policies designed to put more offenders in prison for longer periods of time."). The full scope of the racism at the heart of the federal criminal code is beyond the scope of this Essay but will be discussed further in future work.

## CONCLUSION

*“At this task they must labour in the face of the majestic equality of the laws, which forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread.”*<sup>166</sup>

– Anatole France

By failing to engage with the racial consequences of the rule of lenity, Justice Gorsuch and the rest of the Court—like the majority in *Strieff*—perpetuate white supremacy and the colorblind systems of oppression that have grown from it. The only way to dismantle such systems of oppression is if institutional actors recognize and verbalize the racist foundations of their neutrally framed pretexts.<sup>167</sup> This Essay sought to expose the context underlying lenity’s shift that Justice Gorsuch’s *Wooden* concurrence left out. In doing so, it shines a light on the pervasive nature of the rot in our system. But until the Court and other institutional actors make the racist roots and racial consequences of allegedly neutral doctrines explicit, mass incarceration and racial disparities in the criminal justice system are here to stay.

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<sup>166</sup> Anatole France, *The Red Lily* 95 (Frederic Chapman ed., Winifred Stephens trans., John Lane 5th ed. 1916).

<sup>167</sup> See Hasbrouck, *Movement Constitutionalism*, *supra* note 90.