

RIGHTS SHOULD NOT VARY BASED ON OFFENSE SEVERITY

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Some constitutional rights of criminal procedure apply unequally, varying based on offense (or punishment) severity. Of these, some vary proportionally, attaching or strengthening as offense severity increases. For example, the Sixth Amendment guarantees the rights to appointed counsel for indigents and jury trial for defendants charged with any felony but only some misdemeanors. In contrast, other rights are inversely proportional. For example, the strength or applicability of some aspects of the Fourth Amendment right against unreasonable searches and seizures and the Eighth Amendment right against excessive bail decrease as offense severity increases. This Article examines whether such rights should vary based on offense severity or whether they should apply equally. After finding the individual rationales for specific rights varying with offense severity unpersuasive, it next argues that the general rationale for allocating rights proportionally conflicts with the rationales for inversely proportional rights. Furthermore, both types of unequal allocation distort and undermine the very protections these rights were meant to afford. They encourage prosecutors to engage in a form of criminal justice arbitrage—exploiting and leveraging differences in rights—and unconstitutionally coerce defendants to relinquish some rights to obtain others. This Article concludes that constitutional rights of criminal procedure should be offense neutral, applying equally regardless of offense severity.

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I. INTRODUCTION

Should constitutional rights of criminal procedure apply equally, or should their application and strength vary with offense (or punishment) severity? Most apply equally¹: the rights to a public trial, to be informed of the nature and cause of the accusation, to confront one's accusers, to compulsory process for obtaining favorable

1. See, e.g., Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753, 755 (2002) ("As a general rule, constitutional criminal procedure does not recognize distinctions among crimes . . ."); *id.* at 757 ("Criminal procedure is independent of substantive criminal law, or so we are led to believe. On their face, the relevant constitutional provisions do not discriminate among the various categories of crime . . ."); William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 847 (2001) ("Like almost everything else in the law of criminal procedure, the Fourth Amendment [generally] treats one crime just like another.").

witnesses, to cross-examine adverse witnesses, to a speedy trial,² to have the prosecution prove each element of the offense beyond a reasonable doubt,³ to due process,⁴ and to equal protection of the laws.⁵ Nonetheless, some do not. “Every [American] jurisdiction provides for some procedural differences based upon a distinction between major and minor crimes.”⁶ As one commentator noted, “the seriousness of the offense is relevant in virtually every area of criminal law and procedure.”⁷

If some constitutional rights are to vary based on offense severity, we might expect them to all vary in the same direction. That is, with increasing offense severity, either all such rights would attach or strengthen or instead all would become inapplicable or weaken. But they do not. As a result, there are the following three principal approaches to, and types of, rights based on offense (or punishment) severity: (i) the strength or applicability of rights increases as offense or punishment severity increases (“proportional” rights);⁸ (ii) the strength or applicability of rights remains the same regardless of offense or punishment severity (offense-neutral, or equal, or “transsubstantive” rights);⁹ and (iii) the strength or applicability of rights decreases as offense or punishment severity increases (“inversely proportional” rights).¹⁰

2. See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25, 27–28 (1972) (listing rights that apply equally regardless of offense or punishment severity).

3. See *In re Winship*, 397 U.S. 358, 361 (1970) (applying the right equally).

4. See, e.g., *State v. Barnett*, 909 S.W.2d 423, 428 (Tenn. 1995) (“The due process principle of fundamental fairness applies to all criminal prosecutions, and does not rest upon the severity of the sanction sought or imposed.”).

5. See, e.g., *Mayer v. City of Chicago*, 404 U.S. 189, 197 (1971) (“The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed.”).

6. WAYNE R. LAFAYE ET AL., *CRIMINAL PROCEDURE* § 1.5(c), at 35 (6th ed. 2017).

7. William A. Schroeder, *Factoring the Seriousness of the Offense into Fourth Amendment Equations—Warrantless Entries into Premises: The Legacy of Welsh v. Wisconsin*, 38 U. KAN. L. REV. 439, 498 (1990); *id.* at 496–98 nn.236–40, 244 (citing the examples of bail, juvenile transfer, eavesdropping, strip searches, change of venue, and custodial arrests).

8. See *infra* Subparts II.A–C.

9. See *infra* Subpart III.A.1. Stuntz, *supra* note 1, at 843 (coining the term for rights that “ignore[] substantive criminal law[] distinctions among crimes” and thus apply equally to all offenses).

10. See *infra* Part III. Proportional rights do not necessarily continuously strengthen with ever increasing offense severity. They may attach or strengthen as a threshold is attained—for example, when an offense rises to the level of a felony. See, e.g., *Scott v. Illinois*, 440 U.S. 367, 373 (1979) (holding that further extension of the right to counsel to any misdemeanor would “impose unpredictable” costs on the states; thus, the attachment point for the right to

How rights should be allocated has surprisingly received little scholarly focus. True, the allocation of particular rights has garnered some attention. Commentators nearly universally condemn the proportional allocation of the Sixth Amendment right to appointed counsel for indigents in favor of an equal allocation.¹¹ They also widely reject the predominantly equal allocation of the Fourth Amendment right against unreasonable searches and seizures, favoring instead an inversely proportional allocation.¹² But nearly twenty years ago, scholars lamented the paucity of comprehensive analysis of whether constitutional rights should apply equally or instead vary with offense or punishment severity.¹³ Today, there are still no such comprehensive analyses. This Article seeks to redress that scholarly deficit. With the Supreme Court possibly on the cusp of supplanting its long-standing, largely equal allocation of Fourth Amendment rights with an inversely proportional allocation,¹⁴ a general assessment of the relationship between the application or strength of constitutional rights and the severity of the suspected or charged offenses to which they are applied is not only long overdue but ever more timely.

This Article argues against rights varying with offense or punishment severity. After examining whether there is any rhyme or reason for which constitutional rights are allocated which way, it finds the rationales claimed to support unequal allocations deficient in three ways. First, the rationale for each specific right's unequal allocation is unpersuasive. For example, consider the rationale for an inversely proportional Fourth Amendment right against

counsel is any felony and only those misdemeanors for which incarceration is imposed). Similarly, inversely proportional rights do not necessarily continuously weaken with ever increasing offense severity. They may weaken or become inapplicable upon the passing of a threshold. See, e.g., *United States v. Salerno*, 481 U.S. 739, 753 (1987) (holding that “[a] court may . . . refuse bail in capital cases,” making a capital crime the threshold).

11. See *infra* notes 53–57 and accompanying text.

12. See *infra* notes 115–23 and accompanying text.

13. See Luna, *supra* note 1, at 778 (characterizing it as “a rather large normative issue [that] . . . has gone unanswered in the criminal justice literature”); Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957, 1961 (2004) (“Surprisingly, few works have so far discussed this matter broadly and systematically.”); *id.* at 1961 n.13 (citing articles that address the issue in connection with the Fourth Amendment only and suggesting that no articles address the issue in connection with other constitutional rights as well).

14. See Eric A. Gentes, *Incorporating Relative Offense Severity into the Supreme Court’s Fourth Amendment’s Jurisprudence*, 52 CRIM. L. BULL. 1290, 1293–94 (2016) (“[T]he current Court is distancing itself from a strict transsubstantive interpretation of the Fourth Amendment and . . . a majority of the current Justices are more willing than their former colleagues to consider relative offense severity when determining the reasonableness of a search or seizure.”).

unreasonable searches and seizures: with increasing offense severity, the suspect's privacy interests remain the same but the state's interest in the evidentiary fruits of the search or seizure increases.¹⁵ As a result, with increasing offense severity, the state's interest exceeds the individual suspect's, thereby yielding a weakening Fourth Amendment right.¹⁶ But the comparison of interests is apples and oranges. While conceding that the privacy interests of a guilty suspect would increase with increasing offense severity,¹⁷ proponents of the rationale insist that the suspect's interests be limited to that of an innocent suspect.¹⁸ Yet the tacit and undefended assumption is that the state's evidentiary interest is based on the suspected guilt of the suspect. Otherwise, why would the state have *any* interest in searching or seizing a suspect believed to be innocent let alone an interest that increases with increasing offense severity?

Even if limited to the perspective of the interest of an innocent suspect, the claimed rationale is still wrong. It falsely assumes that innocents could not possibly have an interest in avoiding searches that yield incriminating evidence.¹⁹ But just as the guilty have an interest in avoiding searches uncovering genuinely incriminating evidence, innocents also have an interest in avoiding searches that yield misleading, planted, fabricated, and circumstantial incriminating evidence.²⁰ And such an innocent's interest increases, no less than a guilty suspect's, with increasing offense severity.²¹

15. See, e.g., Stuntz, *supra* note 1, at 847 (comparing the relative interests of a suspect and the state as to a search for marijuana and a search for a murder weapon); Volokh, *supra* note 13, at 1964 (concluding that with respect to Fourth Amendment rights, "the increasing strength of the government interest isn't generally matched by corresponding increases in the strength of the private interest").

16. See, e.g., Stuntz, *supra* note 1, at 847 (arguing for a Fourth Amendment right that weakens with increasing offense severity); Volokh, *supra* note 13, at 1964.

17. See Jeffrey Bellin, *Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 97 IOWA L. REV. 1, 15 n.55 (2011) (acknowledging that "a *guilty* defendant's interest in avoiding detection increases as the severity of the crime investigated increases").

18. See, e.g., *id.* ("[T]he law (properly) does not consider a desire to conceal guilt as a legitimate privacy interest.") (citing *Illinois v. Caballes*, 543 U.S. 405, 408–09 (2005) ("We have held that any interest in possessing contraband cannot be deemed 'legitimate,' and thus, governmental conduct that *only* reveals the possession of contraband 'compromises no legitimate privacy interest.'")).

19. See Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 7 (1991).

20. See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 765 (1994).

21. See Bellin, *supra* note 17, at 15 n.55; Slobogin, *supra* note 19, at 7.

Most fundamentally, even apart from these difficulties, the rationale's conclusion does not follow from its premises. Even if (as offense severity increases) the suspect's interest remains the same while the state's interest increases, that does not clearly establish the state's interest exceeding the suspect's. That an interest increases does not necessarily mean that it exceeds an interest remaining the same. A lesser (albeit increasing) interest may still be less than a greater (albeit static) interest.

Second, the general rationales for unequal allocations are unpersuasive. For example, a rationale for proportional rights is that rights "aimed at making factfinding more accurate" should strengthen with increasing crime severity.²² But accuracy fails to explain existing proportional rights such as the rights to appointed counsel and jury trial which minimize wrongful convictions rather than promote accuracy.²³ If instead the rationale is to minimize wrongful convictions,²⁴ the rationale cannot explain why the right to have the prosecution prove guilt beyond a reasonable doubt is offense neutral. According to the Court, the reasonable doubt standard of proof is the "prime instrument for reducing the risk of convictions resting on factual error."²⁵ As such, according to the rationale, if any right should be allocated proportionally, then it should be the reasonable doubt standard of proof.²⁶ But it is not. Thus, the general rationales for proportional rights fail to explain both existing proportional rights (that fail to satisfy the rationale) and existing offense-neutral rights (that do satisfy the rationale).

Third, the rationale for each type of unequal allocation might seem persuasive in isolation, but collectively, the rationales are inconsistent and thus unpersuasive. For example, Paul Crane notes that proportional allocations are axiomatically assumed as a "basic . . . [and] important principle underlying the criminal justice system: serious sanctions require serious procedures."²⁷ Akhil Amar declares that an inversely proportional allocation of Fourth Amendment rights "clearly states a global truth . . . : serious crimes

22. Volokh, *supra* note 13, at 1964.

23. See, e.g., Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1590 (2005) ("Right-to-counsel (and later, effective-assistance) cases repeatedly described defense lawyers as improving the accuracy of adjudication. But defense counsel's commitment is not to accuracy; it is to his or her clients, many of whom want inaccuracy to mask their guilt.").

24. See, e.g., *Maryland v. Craig*, 497 U.S. 836, 867–68 (1990) (Scalia, J., dissenting) (maintaining that the interest in preventing wrongful convictions is heightened with "innocent defendants accused of particularly heinous crimes").

25. *In re Winship*, 397 U.S. 358, 363 (1970).

26. See discussion *infra* Subpart II.C.

27. Paul T. Crane, *Charging on the Margin*, 57 WM. & MARY L. REV. 775, 782, 830 (2016).

and serious needs can justify more serious searches and seizures.”²⁸ Invoking fundamental principles and global truths, could either rationale be doubted? In isolation, each seems obviously true. But since the former claims that rights should strengthen as offense severity increases and the latter claims that one set of rights should weaken, can both rationales be right? This Article argues that the rationale for each type of unequal allocation conflicts with the other.

Apart from their problematic rationales, unequal allocations trigger two problems that distort and weaken defendants’ constitutional rights. First, rights varying with offense severity induce the state to engage in a form of criminal justice arbitrage by exploiting and leveraging differences in rights.²⁹ By reclassifying misdemeanors as felonies, legislatures can dilute the strength of inversely proportional rights.³⁰ Similarly, prosecutors sometimes engage in strategic undercharging because less is more: a lesser charge of a misdemeanor weakens proportional rights thereby triggering a more likely conviction.³¹ One might think that any temptation by the prosecution to manipulatively overcharge so as to decrease inversely proportional rights will be held in check by the temptation to manipulatively undercharge so as to decrease proportional rights.³² That is, each type of manipulation will be limited by the equal and opposite manipulation—a vicious circle with virtuous results. Rather than each manipulative effect neutralizing the other, however, each may exacerbate the other. “[T]he prosecutor can investigate the crime as a felony” (thereby weakening inversely proportional rights) and then “prosecute it as a . . . misdemeanor” (thereby weakening proportional rights).³³ Rather than each type of manipulation curbing the state’s appetite for the other, the state can

28. Amar, *supra* note 20, at 802.

29. See Stuart P. Green, *Rationing Criminal Procedure: A Comment on Ashworth and Zedner*, 2 CRIM. L. & PHIL. 53, 54 (2008).

30. See, e.g., Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531, 581 (2005) (“[A]ny rule that hinges governmental power on the type of offense creates a strong incentive for Congress to expand the list of eligible offenses over time, watering down the protection All it takes is one compelling case involving a crime not on the list for Congress to expand the list to include that crime.”).

31. See, e.g., Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 659–60 n.133, 662 n.142 (2014) (noting that it is “standard practice” among New York City prosecutors to reduce charges to ensure a bench trial so as to increase the likelihood of convictions).

32. See Schroeder, *supra* note 7, at 517 (noting that “legislatures inclined to reclassify crimes would face the competing problem that more severe treatment for minor crimes could mean more jury trials and thus more expense.”).

33. Volokh, *supra* note 13, at 1974.

have its cake and eat it too. By exploiting the unequal allocations of rights, the state maximizes the minimization of defendants' rights.³⁴

Second, one type of unequal allocation places suspects and defendants in unconstitutionally coercive dilemmas.³⁵ To see this, consider that defendants generally exercise their rights to raise exculpatory evidence and suppress inculpatory evidence.³⁶ In turn, this has the effect of lowering the severity of charges, lessening the likelihood of guilt, and lessening the likelihood of severe punishment.³⁷ But by doing so, defendants reduce the strength or eliminate the applicability of their proportional rights.³⁸ Forced to choose between the exercise of some beneficial rights and maintaining the applicability of proportional rights, defendants are unconstitutionally coerced to relinquish one constitutional right in order to exercise another.³⁹

This Article proceeds as follows. Part II introduces proportionally allocated rights, focusing on the Sixth Amendment rights to appointed counsel and jury trial. After briefly presenting arguments against the specific rationales undergirding proportional allocations of these rights, it examines the general rationales asserted for proportional allocations. Part II concludes that neither of the general rationales—accuracy of verdicts and minimizing wrongful convictions—is persuasive. They neither explain existing proportional rights (that fail to satisfy the rationales) nor existing offense-neutral rights (that do).

Part III addresses inversely proportional rights, specifically aspects of the Fourth Amendment right against unreasonable searches and seizures and the Eighth Amendment right against excessive bail. After chronicling the debate over the preferable allocation of Fourth Amendment rights—offense neutral or inversely proportional—this Part presents the latter allocation's most influential rationale. It next argues that the rationale for such allocation—as offense severity increases, the state's interest exceeds

34. Cf. Green, *supra* note 29, at 53 (“[T]o require judges to calibrate the amount of process due in accordance with the sentence that might be imposed would introduce into the criminal justice system an unwelcome measure of . . . gamesmanship.”).

35. See Russell L. Christopher, *Appointed Counsel and Jury Trial: The Rights that Undermine the Other Rights*, 75 WASH. & LEE 703, 709, 723–40 (2018) (arguing that proportional allocations unconstitutionally coerce defendants to relinquish at least ten different constitutional rights).

36. *Id.* at 708–09.

37. *Id.*

38. *Id.*

39. See, e.g., *Simmons v. United States*, 390 U.S. 377, 394 (1968) (“[W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another.”); *Green v. United States*, 355 U.S. 184, 193 (1957) (“The law should not, and in our judgment does not, place the defendant in such an incredible dilemma.”).

the individual's—is unpersuasive for four reasons. First, it overlooks that even an innocent suspect has a legitimate interest in avoiding a search that could be incriminating by either planted or circumstantial evidence. Second, the rationale is completely inapplicable to one type of seizure—the use of police force to apprehend a fleeing suspect. Third, the rationale utilizes an impermissibly shifting and inconsistent perspective on the interests of each party. Fourth, even if all of the premises of the rationale's argument are accepted, the argument is invalid. Finally, this Part contends that the rationales for inversely proportionally allocating the Fourth and Eighth Amendment rights are incompatible.

Part IV demonstrates that the rationales for each type of unequal allocation conflict with each other and prove too much by providing a rationale for the opposing allocation. The rationale for inversely proportionally allocating the Fourth Amendment right against unreasonable seizures also applies to proportional rights. Conversely, the rationale for proportional allocations also applies to the inversely proportional Eighth Amendment right against excessive bail. By conflicting and proving too much, the rationale for at least one type of unequal allocation is wrong, thus rendering both types suspect. Attempting to avoid these conflicting and problematic rationales, this Part proposes the two most promising alternative rationales. But neither proposed alternative rationale succeeds. Thus, there may be no adequate explanation for unequally allocating rights.

Apart from the claimed and proposed alternative rationales failing to explain satisfactorily why which rights are allocated which way, Part V presents two additional difficulties caused by unequally applied rights. First, by deviating from an offense-neutral allocation, both types of unequal allocations incentivize prosecutors and legislators to manipulate the severity of offenses and punishments so as to minimize suspects' and defendants' constitutional rights. Second, proportional allocations place suspects and defendants into unconstitutionally coercive dilemmas in which they must forego exercising one constitutional right in order to exercise another. This Article concludes that constitutional rights of criminal procedure should apply equally to all suspects and defendants without regard to offense or punishment severity.

II. PROPORTIONALLY ALLOCATED RIGHTS

This Part examines proportional rights—those that attach or strengthen as offense severity increases.⁴⁰ Generally, “[f]elony defendants possess a bundle of heightened procedural entitlements—such as rights to a grand jury, a preliminary hearing, increased

40. Green, *supra* note 29, at 53.

discovery . . . that misdemeanor defendants are often denied.”⁴¹ The most serious type of punishment and felony offense—capital—triggers even greater procedural protections.⁴² This Part focuses on two proportionally allocated constitutional rights—the rights to appointed counsel and jury trial. After presenting the specific rationales for proportionally allocating each of these rights and their criticisms, it identifies and critiques the two general rationales for proportional allocations—accurate verdicts and minimizing wrongful convictions. This Part concludes that neither the specific nor general rationales are persuasive.

A. *Appointed Counsel*

The right to the assistance of counsel—including both retained and appointed—at various times throughout Anglo-American history has applied equally, proportionally, and inversely proportionally.⁴³

41. Crane, *supra* note 27, at 780; accord Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 MINN. L. REV. 571, 611 (2005) (citing, in addition, states increasing the size of the jury as offense severity increases).

42. See, e.g., LAFAYETTE ET AL., *supra* note 6, § 1.5(e), at 36–37 (noting that capital offenses may require “special venue requirements . . . individualized and sequestered *voir dire* of jurors . . . a greater number of peremptory challenges. . . . [and] special qualifications for counsel . . .”); Green, *supra* note 29, at 54 (“[D]efendants charged with capital offenses are entitled to additional protections . . . including, a bifurcated trial at which guilt and sentencing are decided separately, special jury selection procedures, special rules regarding the introduction of aggravating and mitigating evidence, and an automatic right of appeal.”).

43. As to the right to retained counsel, the long-standing English common law rule in effect at the time of the adoption of the Sixth Amendment utilized an inversely proportional allocation: misdemeanor, but not felony, defendants enjoyed the right. See, e.g., *Powell v. Alabama*, 287 U.S. 45, 60 (1932) (“Originally, in England, a person charged with treason or felony was denied the aid of counsel . . . [but] persons accused of misdemeanors were entitled to the full assistance of counsel.”); JAMES J. TOMKOVICZ, *THE RIGHT TO THE ASSISTANCE OF COUNSEL* 3 (Jack Stark ed., 2002) (“For less serious crimes . . . a defendant could employ a lawyer to present his defense. . . . Until the middle of the eighteenth century, the British courts strictly adhered to a common law rule that prohibited those accused of these serious offenses from employing lawyers to assist in their defense.”). Even then, the inversely proportional allocation faced heated criticism. *Powell*, 287 U.S. at 60 (“[T]he rule was constantly, vigorously and sometimes passionately assailed by English statesmen and lawyers.”); 4 WILLIAM BLACKSTONE, *COMMENTARIES* *349 (“For upon what face of reason can that assistance [of counsel] be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass?”). The English rule found little favor in colonial America as well. See, e.g., *Powell*, 287 U.S. at 61 (“The rule was rejected by the colonies.”); TOMKOVICZ, *supra*, at 9 (“[M]ost of the colonies departed dramatically from the restrictive approach to counsel of the British common law.”). Twelve of the original thirteen colonies granted a right to retain

Allocating the right equally, the Sixth Amendment provides: “In *all* criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.”⁴⁴ In recognizing a right to appointed counsel for indigents, the Supreme Court differentiated the right on a basis that the Sixth Amendment rejected for retained counsel—offense severity. At first, only indigents charged with capital offenses enjoyed a right to appointed counsel.⁴⁵ Next, the Court extended the right to indigent federal defendants charged with felonies.⁴⁶ In expanding the right to indigent state felony defendants, *Gideon v. Wainwright*⁴⁷ dramatic language augured even further extension: “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”⁴⁸ *Argersinger v. Hamlin*⁴⁹ upheld *Gideon*’s “any person” standard as including indigents charged with misdemeanors who receive sentences that include imprisonment.⁵⁰ But the right’s continual expansion terminated with *Scott v. Illinois*.⁵¹ The Court claimed any further extension would “impose unpredictable, but necessarily substantial, costs on 50 quite diverse States.”⁵² Thus the Sixth Amendment right to appointed counsel for indigents is proportionally allocated: it applies to all felonies but only some misdemeanors.

counsel for serious offenses and most also granted the right for all offenses. *See, e.g., Powell*, 287 U.S. at 64–65 (“[I]n at least twelve of the thirteen colonies the rule of the English common law . . . had been definitely rejected and the right to counsel fully recognized in [almost] all criminal prosecutions . . .”); TOMKOVICZ, *supra*, at 9 (“[A]t least eleven of the thirteen states had enacted, either by constitution or statute, a general right to be represented by counsel and one accorded the right as a matter of common law.”).

44. U.S. CONST. amend. VI (emphasis added).

45. *See Powell*, 287 U.S. at 69 (explaining that, both historically and in practice, indigent persons’ right to counsel has been consistently upheld).

46. *See Johnson v. Zerbst*, 304 U.S. 458, 463, 469 (1938) (extending Sixth Amendment protections to a defendant who had been convicted in federal court for “possessing and uttering counterfeit money”).

47. 372 U.S. 335 (1963).

48. *Id.* at 344 (emphasis added).

49. 407 U.S. 25 (1972).

50. *Id.* at 37 (“[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial.”).

51. 440 U.S. 367 (1979). Under *Scott*’s “actual imprisonment” standard, in order for imprisonment to be imposed posttrial, the judge must appoint counsel pretrial. *See, e.g., id.* at 374 (Powell, J., concurring) (noting that trial judges must decide whether or not to appoint counsel “in advance of hearing any evidence and before knowing anything about the case except the charge”). Thus, in deciding whether to appoint counsel, the judge must determine pretrial the likelihood of guilt and the imposition of imprisonment.

52. *Id.* at 373.

Numerous judges and commentators have criticized *Scott's* proportional allocation.⁵³ Justice Brennan argued that the “plain wording” of both the Sixth Amendment and *Gideon* establish that all indigents should have the right to appointed counsel.⁵⁴ “*Gideon* involved a felony prosecution, but that fact was not crucial to the decision; its reasoning extended, in the words of the Sixth Amendment, to ‘all criminal prosecutions.’”⁵⁵ Justice Powell reasoned that “an indigent accused’s need for the assistance of counsel does not mysteriously evaporate” when charged only with a misdemeanor in which imprisonment will not be imposed.⁵⁶ “The logic [*Argersinger*] advances for extending the right to counsel to all cases in which the

53. See, e.g., John D. King, *Beyond “Life and Liberty”: The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 15 (2013) (“[I]f due process and fundamental fairness require counsel in serious cases, how could it be otherwise in petty cases?”); Paul Marcus, *Why the United States Supreme Court Got Some (But Not a Lot) of the Sixth Amendment Right to Counsel Analysis Right*, 21 ST. THOMAS L. REV. 142, 189 (2009) (“*Scott* was wrongly decided and the Constitution truly does mandate . . . that indigent defendants should be given appointed counsel in *all* criminal cases, not just in *some* criminal cases.”); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1372 (2012) (urging the appointment of counsel for indigents “to all misdemeanants”).

Others criticize the proportional allocation on a number of grounds without arguing for an offense-neutral allocation. First, indigents’ right to appointed counsel should at least be coextensive with the right to jury trial. See, e.g., *Scott*, 440 U.S. at 389–90 (Blackmun, J., dissenting); *id.* at 378–82, 389 (Brennan, J., dissenting); *Argersinger*, 407 U.S. at 45–46 (Powell, J., concurring); *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 1, 86 (1979). Second, rather than based on offense or punishment severity, appointment of counsel should be based on need, as determined by the factual and legal complexity of the case. See, e.g., *Argersinger*, 407 U.S. at 47 (Powell, J., concurring); LAWRENCE HERMAN, *THE RIGHT TO COUNSEL IN MISDEMEANOR COURT* 83–84 (1973). Third, rather than only offense or punishment severity, the right should consider the seriousness of the collateral consequences from conviction. See, e.g., *Scott*, 440 U.S. at 374 (Powell, J., concurring); *id.* at 383 (Brennan, J., dissenting); *Argersinger*, 407 U.S. at 48 (Powell, J., concurring); B. Mitchell Simpson, III, *A Fair Trial: Are Indigents Charged with Misdemeanors Entitled to Court Appointed Counsel?*, 5 ROGER WILLIAMS U. L. REV. 417, 437–38 (2000). Fourth, rather than punishment severity, the right should be allocated whenever necessary for a fair trial. See, e.g., *Argersinger*, 407 U.S. at 47 (Powell, J., concurring); Simpson, *supra*, at 424, 437. For criticism of *Scott* on other grounds, see Russell L. Christopher, *Penalizing and Chilling an Indigent’s Exercise of the Right to Appointed Counsel for Misdemeanors*, 99 IOWA L. REV. 1905, 1908 (2014).

54. *Scott*, 440 U.S. at 375–79 (Brennan, J., dissenting). Justice Brennan argued that “the plain wording of the Sixth Amendment and the Court’s precedents compel the conclusion that *Scott’s* uncounseled conviction violated the Sixth and Fourteenth Amendments . . .” *Id.* at 376.

55. *Id.* at 378.

56. *Argersinger*, 407 U.S. at 47 (Powell, J., concurring).

penalty of any imprisonment is imposed applies equally well to cases in which other penalties may be imposed.”⁵⁷

B. Jury Trial

The literal and emphatic words of the source of our right to jury trial, as well as two separate constitutional provisions, declare an offense-neutral allocation of the right. The Magna Carta famously declared: “No free man shall be taken or imprisoned [or dispossessed] or outlawed or exiled or in any way destroyed . . . except by the lawful judgment of his peers and the law of the land.”⁵⁸ Article III of the Constitution provides: “The trial of *all* Crimes, except in Cases of Impeachment, shall be by Jury.”⁵⁹ Similarly, the Sixth Amendment states: “In *all* criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury.”⁶⁰

Nonetheless, construing “all” to mean only “some,” beginning in 1888,⁶¹ the Supreme Court has consistently allocated the right to jury trial proportionally.⁶² “It has long been settled that ‘there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision.’”⁶³ In a landmark decision almost one hundred years later holding that the Sixth Amendment right to jury trial applied to the states through the Fourteenth Amendment, *Duncan v. Louisiana*⁶⁴ reaffirmed the right’s application to only “serious” offenses.⁶⁵ Distinguishing between petty and serious offenses, the Court in *Baldwin v. New York*⁶⁶ ruled that offenses authorizing imprisonments exceeding six months necessarily triggered the constitutional right to jury trial.⁶⁷ Most recently, *Blanton v. City of North Las Vegas*⁶⁸ clarified that offenses at or below

57. *Id.* at 52 (Powell, J., concurring).

58. MAGNA CARTA cl. 39 (U.K. Nat’l Archives trans.) (emphasis added).

59. U.S. CONST. art. III, § 2, cl. 3 (emphasis added).

60. *Id.* amend. VI (emphasis added).

61. *See Callan v. Wilson*, 127 U.S. 540, 557 (1888) (exempting from the constitutional right of trial by jury “that class or grade of offenses called ‘petty offenses’”).

62. *See, e.g., Baldwin v. New York*, 399 U.S. 66, 68 (1970) (noting “the long-established view that so-called ‘petty offenses’ may be tried without a jury”).

63. *Blanton v. City of North Las Vegas*, 489 U.S. 538, 541 (1989) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968)).

64. 391 U.S. 145 (1968).

65. *Id.* at 159.

66. 399 U.S. 66 (1970).

67. *See id.* at 68–69 (“[W]e have concluded that no offense can be deemed ‘petty’ for purposes of the right to trial by jury where imprisonment for more than six months is authorized.”).

68. 489 U.S. 538 (1989).

the six-month threshold were presumptively, but not necessarily, petty.⁶⁹

The Court has offered three rationales for limiting the right to jury trial to only serious offenses. First, historical precedent: “So-called petty offenses were tried without juries both in England and in the Colonies and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment’s jury trial provisions.”⁷⁰ Second, original intent: “There is no substantial evidence that the Framers intended to depart from this established common-law practice.”⁷¹ Third, the administrative efficiency of nonjury trials outweighs their disadvantages to defendants: “[T]he possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications.”⁷² *Baldwin* and *Blanton* reiterated the latter rationale of administrative efficiency outweighing harm to defendants.⁷³

Critics supply two principal objections to proportionally allocating the right to jury trial.⁷⁴ First, it is inconsistent with the Constitution’s literal text.⁷⁵ Justice Black argued that any differentiation in the right based on crime severity is an impermissible “judicial amendment” of the Sixth Amendment.⁷⁶ Denying the right to jury trial when the “administrative

69. *See id.* at 543.

70. *Duncan*, 391 U.S. at 160.

71. *Id.*

72. *Id.*

73. *See Blanton*, 489 U.S. at 543 (quoting *Baldwin v. New York*, 399 U.S. 66, 73 (1970)) (defending the disadvantages to defendants of nonjury trials for petty offenses because they “may be outweighed by the benefits [to the state] that result from speedy and inexpensive nonjury adjudications”).

74. For scholarship critical of the right to jury trial being limited to non-petty offenses, see Colleen P. Murphy, *The Narrowing of the Entitlement to Criminal Jury Trial*, 1997 WIS. L. REV. 133, 176 (1997) (“[T]he Supreme Court’s doctrine has eroded the jury’s constitutional role as a buffer between the defendant and the powers of the state.”); Stephen A. Siegel, *Textualism on Trial: Article III’s Jury Trial Provision, the “Petty Offense” Exception, and Other Departures from Clear Constitutional Text*, 51 HOUS. L. REV. 89, 151 (2013) (“By textualist norms, or the norms of any other interpretive technique, the petty offense exception is a departure from clear and concrete constitutional text.”); and T. Ward Frampton, Comment, *The Uneven Bulwark: How (and Why) Criminal Jury Trial Rates Vary by State*, 100 CALIF. L. REV. 183, 202–04 (2012) (explaining that legislatures “manipulate” sentences below the petty-offense threshold so as to avoid the cost of jury trials).

75. *See, e.g., Baldwin*, 399 U.S. at 74 (Black, J., concurring) (noting that “[t]he Constitution guarantees a right of trial by jury in two separate places but in neither does it hint of any difference between ‘petty’ offenses and ‘serious’ offenses”).

76. *Id.* at 75.

inconvenience of the state” outweighs the disadvantages to the defendant is “little more than judicial mutilation of our written Constitution. Those who wrote and adopted our Constitution and Bill of Rights engaged in all the balancing necessary. They decided that the value of a jury trial far outweighed its costs for ‘all crimes’ and ‘[i]n all criminal prosecutions.’”⁷⁷

Second, as Justice Harlan suggested, the rationale for a right to jury trial for serious offenses applies equally to petty offenses.⁷⁸ If a jury trial is, as *Duncan* declares, “an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge,”⁷⁹ then it is no less so when the defendant is facing only six months’ imprisonment. If a jury trial is necessary to “prevent oppression by the Government,” “to protect against unfounded criminal charges,” and “as a defense against arbitrary law enforcement,”⁸⁰ those concerns do not magically evaporate for defendants charged with lesser offenses.⁸¹

C. *General Rationales*

The rationale offered by the Supreme Court for allocating unequally both the rights to appointed counsel and jury trial is that the administrative costs of an equal allocation would outweigh the benefits in reducing erroneous convictions and minimizing harm to defendants.⁸² Some commentators reject such practical arguments on principle: “These pragmatic arguments are not ones we would accept, since they involve a sacrifice of principle on the basis of a political calculation about the costs and benefits of diminishing procedural protections that is open to considerable doubt.”⁸³ Even if the Court’s administrative efficiency rationale persuasively supports an unequal

77. *Id.* (alteration in original) (quoting U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI).

78. *See* *Duncan v. Louisiana*, 391 U.S. 145, 192 (1968) (Harlan, J., dissenting) (“There is no obvious reason why a jury trial is a requisite of fundamental fairness when the charge is robbery, and not a requisite of fairness when the same defendant, for the same actions, is charged with assault and petty theft.”).

79. *Id.* at 156.

80. *Id.* at 155–56.

81. *See* Natapoff, *supra* note 53, at 1352 (“[T]he value of fair process does not disappear merely because the potential punishment is petty.”).

82. *See supra* notes 52, 72–73 and accompanying text; *see also* Frase, *supra* note 41, at 611–12.

83. Andrew Ashworth & Lucia Zedner, *Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions*, 2 CRIM. L. & PHIL. 21, 48 (2007). *But see* Green, *supra* note 29, at 57 (“[T]he diminution of procedural protections for defendants charged with less serious offenses might prove to be the unavoidable cost of preserving such protections for defendants charged with more serious crimes.”).

allocation, it does not explain which type of unequal allocation. It fails to explain why the allocation is proportional rather than inversely proportional.

Surprisingly, explicit argument supporting the proportional allocation of rights is sparse. Such an allocation is apparently considered to be self-evident.⁸⁴ Proportional allocations are axiomatically assumed as a “basic . . . [and] important principle underlying the criminal justice system: serious sanctions require serious procedures.”⁸⁵ Antony Duff posits the “general principle that the greater the burden that state action imposes on those subjected to it, the more certain those who implement it should be that it is warranted.”⁸⁶ Justice Scalia contended that the interest in preventing wrongful convictions increases for “innocent defendants accused of particularly heinous crimes.”⁸⁷ In opposing certain rights being inversely proportional, Eugene Volokh indirectly argues in favor of a proportional allocation.⁸⁸ “The case against relaxing the constitutional rules [as offense severity increases] is especially strong for provisions at least partly aimed at making factfinding more accurate. The more severe the crime, the more we want to convict the guilty, but the more we also want to avoid convicting the innocent.”⁸⁹

These comments suggest two different strands of the rationale supporting proportional rights. First, we have an interest in accurate verdicts. As offense severity increases, the interest in accurate verdicts increases.⁹⁰ But that fails to explain the proportional rights of appointed counsel for indigents and jury trials. Those rights do not make verdicts more accurate; they merely make acquittals more likely.⁹¹ But if appointed counsel for indigents did, in fact, make verdicts more accurate, then an accuracy rationale would support a right for indigents to receive appointed counsel on subsequent

84. See, e.g., Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 809, 818–19 (2004) (noting that limited funds require that the right to appointed counsel be “rationed” to those facing the most serious offenses); Green, *supra* note 29, at 53–54 (assuming that if rights are to be rationed for efficiency reasons, then the allocation should be proportional); Natapoff, *supra* note 53, at 1350 (“If the United States Supreme Court can be said to have a misdemeanor theory, it is that lesser punishments should trigger reduced procedural entitlements.”).

85. Crane, *supra* note 27, at 782, 830.

86. R. A. Duff, *Presumptions of Innocence*, in *THE NEW PHILOSOPHY OF CRIMINAL LAW* 193, 195 (Chad Flanders & Zachary Hoskins eds., 2016).

87. *Maryland v. Craig*, 497 U.S. 836, 867–68 (1990) (Scalia, J., dissenting).

88. Volokh, *supra* note 12, at 1964.

89. *Id.*

90. *Id.*

91. See, e.g., Brown, *supra* note 23, at 1590 (“Right-to-counsel (and later, effective-assistance) cases repeatedly described defense lawyers as improving the accuracy of adjudication. But defense counsel’s commitment is not to accuracy; it is to his or her clients, many of whom want inaccuracy to mask their guilt.”).

appeals as offense severity increases. Appeals serve to correct errors in verdicts and thus promote accuracy.⁹² But instead, there is no right for indigents to receive appointed counsel after the first appeal regardless of offense severity.⁹³

In addition to appeals, the Sixth Amendment right to a speedy trial also helps ensure accuracy. It does so by encouraging that evidence at trial has not degraded and the memory of witnesses has not dimmed.⁹⁴ Yet this right is allocated regardless of offense severity.⁹⁵ Thus, the accuracy rationale not only fails to explain why some rights are proportional (despite failing to promote accuracy) but also fails to explain why some rights are offense neutral (that do promote accuracy). The accurate verdicts rationale is thus both over- and underinclusive.

Second, perhaps the rationale for proportional allocations is ensuring a special type of accurate verdict—the accurate conviction. That is, as offense severity increases, our interest in preventing wrongful convictions increases.⁹⁶ Unlike the accurate verdicts rationale, this rationale does explain proportionally allocating the rights to jury trial and appointed counsel.⁹⁷ But like the accurate verdicts rationale, this rationale fails to explain why there is no right of indigents to receive appointed counsel for subsequent appeals regardless of offense severity. Moreover, it fails to explain why the right to have the prosecution bear the burden of proving guilt beyond a reasonable doubt is offense neutral.⁹⁸ According to the Court, the reasonable doubt standard of proof is the “prime instrument for reducing the risk of convictions resting on factual error.”⁹⁹ If the interest in preventing wrongful convictions increases with offense severity, then the burden of proof on the prosecution should increase with offense severity. But it does not. As the criminal justice system’s “prime instrument” for reducing wrongful convictions, if any right should be allocated proportionally, it should be the reasonable doubt

92. Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 381–82 (1995).

93. See *Ross v. Moffitt*, 417 U.S. 600, 609–12 (1974).

94. See, e.g., *Barker v. Wingo*, 407 U.S. 514, 521 (1972) (“As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade.”).

95. See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25, 27–28 (1972) (including the right to speedy trial in list of rights that apply equally).

96. See *Volokh*, *supra* note 13, at 1964 n.18.

97. See *id.* at 1971–72, 1972 n.51 (explaining that the rights to appointed counsel and jury trial have been held to apply only when the crime, and therefore the punishment, is sufficiently serious).

98. See *In re Winship*, 397 U.S. 358, 361–62 (1970) (applying the right equally).

99. *Cage v. Louisiana*, 498 U.S. 39, 40 (1990) (per curiam) (quoting *In re Winship*, 397 U.S. at 363).

standard of proof. But it is not. Thus, the accurate convictions rationale fails to explain why some existing equally allocated rights that do prevent wrongful convictions are not proportional.

III. INVERSELY PROPORTIONALLY ALLOCATED RIGHTS

This Part addresses inversely proportional rights—those rights that attach or strengthen as offense severity *decreases*.¹⁰⁰ It focuses on the Fourth Amendment right against unreasonable searches and seizures and the Eighth Amendment right against excessive bail. After presenting and critiquing the specific rationales for inversely proportionally allocating each of these rights, this Part critiques the compatibility of these rationales. It concludes that the specific rationales are either unpersuasive, incompatible with each other, or both.

A. *Unreasonable Searches and Seizures*

The Fourth Amendment right against unreasonable searches and seizures is the battleground for the issue of the preferable allocation of rights. It has drawn by far the most scholarly attention.¹⁰¹ This Subpart first explains to what extent the right is offense neutral and to what extent it is inversely proportional, and it provides a brief overview of the debate between the competing views. Second, it presents the rationale offered by proponents for an inversely proportional allocation. Third, this Subpart advances four criticisms of that rationale.

1. *Offense Neutral v. Inversely Proportional*

The right against unreasonable searches and seizures is mostly offense neutral.¹⁰² “Fourth Amendment law mostly ignores substantive criminal law; distinctions among crimes are usually irrelevant when it comes to regulating criminal investigations.”¹⁰³ For example, the Court in *Whren v. United States*¹⁰⁴ and *Atwater v. City of Lago Vista*¹⁰⁵ upheld the constitutionality of a search despite

100. *State v. Duncan*, 43 P.3d 513, 518–19 (Wash. 2002) (en banc) (describing the certain higher burdens for police officers when investigating misdemeanors and civil infractions, as opposed to felonies, as “inversely proportional”).

101. See Volokh, *supra* note 13, at 1961 n.13 (citing articles focused on the preferable allocation of Fourth Amendment rights).

102. See, e.g., Max Minzner, *Putting Probability Back into Probable Cause*, 87 TEX. L. REV. 913, 940 (2009) (“[T]he Fourth Amendment is blind to the type of crime underlying the search.”); William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2140 (2002) (“[M]ost constitutional limits on policing are transsubstantive—they apply equally to suspected drug dealers and suspected terrorists.”).

103. Stuntz, *supra* note 1, at 843.

104. 517 U.S. 806 (1996).

105. 532 U.S. 318 (2001).

it being based on a minor traffic infraction¹⁰⁶ and upheld a warrantless seizure despite it being based on a seatbelt violation, respectively.¹⁰⁷ In largely rejecting offense-based distinctions under the Fourth Amendment, the Court has pressed line-drawing concerns as to the difficulty, either in principle or in fact, for courts and police officers to make offense-severity differentiations.¹⁰⁸

However, when Fourth Amendment law does depart from an equal allocation, it allocates rights inversely proportional to offense severity. For example, the Supreme Court in *Welsh v. Wisconsin*¹⁰⁹ refused to find exigent circumstances sufficient to justify a search because the suspected violation was merely a nonjailable, “noncriminal, civil forfeiture offense.”¹¹⁰ In *Terry v. Ohio*,¹¹¹ the Court held that the police may constitutionally search or “frisk” a suspect pursuant to a street stop if there are reasonable grounds to believe the suspect has a weapon.¹¹² The California Supreme Court, in *People v. Sirhan*,¹¹³ found exigent circumstances sufficient to justify a search based in part on the gravity of the crime—the assassination of Robert Kennedy.¹¹⁴

In addition to some searches, an aspect of the right against unreasonable seizures is also inversely proportional. In *Tennessee v. Garner*,¹¹⁵ the Court ruled that police use of lethal force against a

106. See *Whren*, 517 U.S. at 810, 819.

107. See *Atwater*, 532 U.S. at 354. For an explanation of why the Court in those cases disfavored offense-based distinctions in Fourth Amendment rights, see *infra* note 108 and accompanying text.

108. See, e.g., Bellin, *supra* note 17, at 13 (“In the few cases where the Court explicitly rejects calls to consider offense severity, however, its emphasis has been on administrability.”); David Keenan & Tina M. Thomas, Note, *An Offensive-Severity Model for Stop-and-Frisks*, 123 YALE L.J. 1448, 1470 (2014). Keenan and Thomas identify three such concerns. First, courts cannot distinguish serious crimes from lesser crimes in a principled fashion. *Id.* (citing *Whren*, 517 U.S. at 818 (asserting that there is “no principle” for such a distinction)). Second, police officers in the field lack the knowledge to make such distinctions. *Id.* (citing *Atwater*, 532 U.S. at 348 (“[W]e cannot expect every police officer to know the details of frequently complex penalty schemes . . .”). Third, even if police could broadly make the requisite distinctions, they cannot make the requisite subtle distinctions, “such as whether ‘the weight of the marijuana [is] a gram above or a gram below the fine-only line.’” *Id.* at 1470–71 (quoting *Atwater*, 532 U.S. at 348–49).

109. 466 U.S. 740 (1984).

110. *Id.* at 753–54.

111. 392 U.S. 1 (1968).

112. *Id.* at 30–31 (“Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from who they were taken.”).

113. 497 P.2d 1121 (Cal. 1972).

114. See *id.* at 1140–41.

115. 471 U.S. 1 (1985).

fleeing murder suspect was constitutional, but it was an unconstitutional seizure when used against a fleeing burglary suspect.¹¹⁶ A fleeing suspect's Fourth Amendment right against an unreasonable seizure thereby varies depending on the severity of the suspected crime. The strength of the right decreases—thereby allowing lethal force—as the severity of the crime increases.¹¹⁷ Thus, comparatively more serious crimes—those involving weapons, violence, or public safety—trigger reduced Fourth Amendment rights; in contrast, comparatively less serious crimes trigger heightened Fourth Amendment rights.¹¹⁸

Following Justice Jackson's 1949 dissent that maintained "the government should have less power to engage in searches and seizures when it pursues petty criminals, such as alcohol smugglers, than when it pursues serious criminals, such as kidnappers,"¹¹⁹ many commentators and judges support an inversely proportional allocation of Fourth Amendment rights.¹²⁰ Amar declared that Justice Jackson's dissent "clearly states a global truth that makes intuitive sense to police officials and citizens alike: serious crimes and serious needs can justify more serious searches and seizures."¹²¹ In applying the Fourth Amendment, as William Stuntz argued, "one crime is *not* just like another."¹²² "[T]he worst crimes are the most important ones to solve, the ones worth paying the largest price in intrusions on citizens' liberty and privacy."¹²³ Volokh conjectures that

116. See *id.* at 11. For other examples of inversely proportional Fourth Amendment rights, see Bellin, *supra* note 17, at 15–17; Frase, *supra* note 41, at 612–17; Stuntz, *supra* note 1, at 847 n.16, 851–52.

117. See *Garner*, 471 U.S. at 11.

118. See *id.*

119. Volokh, *supra* note 13, at 1959 (citing *Brinegar v. United States*, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting)). Though *Brinegar* has been more influential, Justice Jackson advanced a similar view the previous year. See *McDonald v. United States*, 335 U.S. 451, 459 (1948) (Jackson, J., concurring) ("Whether there is reasonable necessity for a search without waiting to obtain a warrant certainly depends somewhat upon the gravity of the offense thought to be in progress . . .").

120. See Volokh, *supra* note 13, at 1959 (citing *Brinegar*, 338 U.S. at 183 (Jackson, J., dissenting)); *id.* at 1957 n.1 (exhaustively citing sources); see also Schroeder, *supra* note 7, at 440–41 nn.5–8 (citing commentators, Supreme Court justices, federal courts, and state courts that all support an inversely proportional allocation of Fourth Amendment rights). For other commentators supporting such an allocation, see, for example, Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness"*, 98 COLUM. L. REV. 1642, 1645 (1998) (arguing that an unreasonable search should be "whenever the intrusiveness of a search outweighs the gravity of the offense being investigated"); and Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in Atwater v. City of Lago Vista*, 71 FORDHAM L. REV. 329, 389–94 (2002).

121. Amar, *supra* note 20, at 802.

122. Stuntz, *supra* note 1, at 847.

123. *Id.* at 875.

but for practical concerns, an inversely proportional allocation of Fourth Amendment protections would entirely supplant the predominant offense-neutral approach.¹²⁴

Not all commentators agree that Fourth Amendment rights should be inversely proportional.¹²⁵ Arguing against such an allocation, Christopher Slobogin analogizes to both equally and proportionally allocated rights.¹²⁶ Slobogin observes that “[i]n analogous contexts, the nature of the crime committed does not lessen the state’s obligations to its citizens.”¹²⁷ As an example, Slobogin points out that the state’s greater interest in bringing a murderer to justice does not permit a relaxation of the rights to remain silent, enjoy a jury trial, have assistance of counsel, or have the prosecution bear the burden of persuasion of proving guilt beyond a reasonable doubt.¹²⁸ Agreeing with Slobogin, Erik Luna offers additional reasons against a sliding scale for constitutional rights based on crime severity.¹²⁹ Such a sliding scale sends the wrong message that “breaching an individual’s rights is acceptable so long as the ends justify the means,” causes a host of “administrative and practical problems,” and induces legislative manipulation and broadening of

124. See Volokh, *supra* note 13, at 1957–61 (citing “thorny” line-drawing difficulties); see also Stuntz, *supra* note 1, at 850 (“If every crime carried its own search and seizure law, police would find it too costly to learn search and seizure law, and that law would cease to function.”).

125. See, e.g., Ronald J. Bacigal, *The Fourth Amendment in Flux: The Rise and Fall of Probable Cause*, 1979 U. ILL. L.F. 763, 795–97 (1979) (cataloguing numerous problems with assessing the value of the state’s interest by the severity of the offense being investigated); Ronald M. Gould & Simon Stern, *Catastrophic Threats and the Fourth Amendment*, 77 S. CAL. L. REV. 777, 810–11 (2004) (arguing that a broadly applied inversely proportional allocation of Fourth Amendment rights “would be wholly unworkable” for both the police and courts); Yale Kamisar, *“Comparative Reprehensibility” and the Fourth Amendment Exclusionary Rule*, 86 MICH. L. REV. 1, 27–30 (1987) (rejecting application of the exclusionary rule turning on the gravity of the offense because serious offenses warranting lesser Fourth Amendment protections would inevitably expand, leading to dilution of Fourth Amendment rights).

126. For a critique of that view, see *Landry v. Hoepfner*, 840 F.2d 1201, 1209 n.17 (5th Cir. 1988) (dismissing the analogy and rejecting *Welsh*); and Schroeder, *supra* note 7, at 514–15 (arguing that Fourth and Sixth Amendment rights are simply disanalogous). See *supra* note 109 and accompanying text as relevant to the right to jury trial because “*Welsh* was a Fourth Amendment, not a right to jury trial, case.” *Landry*, 840 F.2d at 1209 n.17.

127. Slobogin, *supra* note 19, at 52.

128. See *id.*; see also Christopher Slobogin, *Proportionality, Privacy, and Public Opinion: A Reply to Kerr and Swire*, 94 MINN. L. REV. 1588, 1614 (2010).

129. See Luna, *supra* note 1, at 785 (“[T]he fact that a given crime is viewed as serious or harmful does not allow the state to circumvent or even relax other constitutional rights, such as the reasonable doubt standard or the right to trial by jury.”).

what constitutes serious crimes so as to gain the desired dilution of rights.¹³⁰ Anthony Amsterdam observes that a sliding scale approach will lead to manipulation, abuse, and “more slide than scale.”¹³¹ Orin Kerr views such an allocation as “problematic” for several reasons, focusing on line-drawing difficulties and manipulation of whatever line is drawn.¹³²

2. *Rationale for Inversely Proportional Allocation*

Stuntz has supplied the most influential rationale for an inversely proportional Fourth Amendment. Stuntz explained that because the Fourth Amendment prohibits “unreasonable searches and seizures,”¹³³ the assessment of what is unreasonable requires “balanc[ing] gains and losses, benefits and costs.”¹³⁴ This requires comparing the interests of the individual and the state for any given suspected crime.¹³⁵ Assessing the preferable allocation requires comparing how those interests change, if at all, as offense severity changes.¹³⁶ As an example, Stuntz compared the search of a murder suspect’s house for a murder weapon and a search of a marijuana selling suspect’s house for a stash of marijuana and concluded that each involve a “comparable . . . loss of privacy” to the suspects.¹³⁷ In contrast, the benefit for the state in the two searches is “strikingly different.”¹³⁸ The state’s interest in finding a murder weapon is much

130. *Id.* at 785–87.

131. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 394 (1974).

132. Kerr, *supra* note 30, at 581–82. “First, it is quite difficult to draw an *ex ante* line between compelling cases [warranting less Fourth Amendment protection] and low-level cases.” *Id.* at 581.

Second, any rule that hinges governmental power on the type of offense creates a strong incentive for Congress to expand the list of eligible offenses over time, watering down the protection All it takes is one compelling case involving a crime not on the list for Congress to expand the list to include that crime. Finally, settling on a list of specific crimes that should qualify [for less Fourth Amendment protection] . . . proves quite difficult. It is hard enough to come up with a single rule Coming up with different rules for different sets of crimes is exponentially more complicated.

Id. at 581–82.

133. Stuntz, *supra* note 1, at 847 (quoting U.S. CONST. amend. IV).

134. *Id.*; *accord* *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (quoting *Michigan v. Summers*, 452 U.S. 692, 700 n.12 (1981)) (“[T]he balancing of competing interests . . . [is] the key principle of the Fourth Amendment.”).

135. *See* Stuntz, *supra* note 1, at 847–50; *accord* Slobogin, *supra* note 19, at 5 (“As American courts have recognized, the regulation of search and seizure involves balancing the conflicting state and individual interests implicated by the investigative process.”).

136. *See* Stuntz, *supra* note 1, at 847–53.

137. *Id.* at 847–49.

138. *Id.* at 847.

higher than finding a marijuana stash.¹³⁹ Because the privacy interest of the murderer and the marijuana seller are the same, but the state has a much greater interest in obtaining evidence on the murderer, the state's comparatively greater interest in the search of the murderer might make that search reasonable even if the search of the marijuana seller was unreasonable.¹⁴⁰

Other commentators agree. Jeffrey Bellin observes that outside the Fourth Amendment, "any offense-gravity-based increase in the government's interest in conviction is offset by a countervailing consideration: the innocent defendant's interest in avoiding a more serious conviction."¹⁴¹ But in the Fourth Amendment context, Bellin concludes that with increasing offense severity, the innocent suspect's interests do not increase as the government's interest increases.¹⁴² At least with respect to First and Fourth Amendment rights, Volokh agrees.¹⁴³ "[T]he increasing strength of the government interest isn't generally matched by corresponding increases in the strength of the private interest."¹⁴⁴

Thus, the rationale for an inversely proportional allocation rests on the state's interest increasing, but the suspect's interest remaining the same, as offense severity increases. Because of this, as crime severity increases, the state's interest outweighs the individual suspect's interest.¹⁴⁵ According to the rationale, as crime severity increases, a search or seizure becomes increasingly likely to be reasonable and constitutional.¹⁴⁶

139. See *id.* at 847–49; accord Schroeder, *supra* note 7, at 486 ("It is difficult to argue with the abstract proposition that society's interest in obtaining a conviction for a given criminal offense is largely a reflection of the seriousness of that offense.").

140. See Stuntz, *supra* note 1, at 847–50.

141. Bellin, *supra* note 17, at 15 n.55.

142. See *id.* ("This mirror image of countervailing interests is largely absent in the Fourth Amendment context.").

143. See Volokh, *supra* note 13, at 1961–64.

144. *Id.* at 1964. Volokh offers support for his assertion regarding First Amendment rights. See *id.* at 1964 n.20 ("The free speech interest in describing how to kill, for instance, isn't greater than the free speech interest in describing how to infringe copyright."). But Volokh fails to support his assertion regarding Fourth Amendment rights. See *id.* at 1964 n.20.

145. See Stuntz, *supra* note 1, at 875; cf. *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 674–75 (1989) ("Where . . . the possible harm against which the Government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government's goal.").

146. See Stuntz, *supra* note 1, at 870.

3. *Criticisms of Inversely Proportional Allocation*

This Subpart presents four criticisms of the above rationale. First, rather than remaining the same, even an innocent suspect's privacy interest in avoiding a search—fearing that a search will involve planted evidence or yield circumstantial evidence and thereby result in a false conviction—increases with increasing offense severity. Second, the rationale is clearly inapplicable to seizures involving police force against fleeing suspects—those subject to lethal seizures clearly have a greater interest in not being seized than those subject to only nonlethal force. Third, the rationale inconsistently assesses the individual's privacy interest from the perspective of an innocent suspect and the state's evidentiary interest from the perspective of a guilty suspect. Fourth, even if all of the premises of the rationale's argument are accepted, the conclusion simply does not follow from the premises.

a. *Suspect's Interest as to a Search*

Most criticisms of the rationale accept its premise that the state's interest increases with increasing offense severity,¹⁴⁷ while rejecting its premise that the suspect's interest remains the same.¹⁴⁸ Rather than remaining the same, critics maintain that the suspect's interest also increases.¹⁴⁹ In Slobogin's view, the interests of the state and the suspect constitute a zero-sum game.¹⁵⁰ In balancing the costs and benefits to state and individual interests, "an approach which favors the former will often be costly to the latter, and one which benefits the latter will usually undermine the former."¹⁵¹ If, as crime severity increases, the benefit of a search or seizure increases to the state and thus the state's interest increases, then the cost to the suspect increases and the suspect's interest in avoiding that cost increases.¹⁵² Consequently, whenever the state's interest increases, the suspect's interest also increases.¹⁵³

Underlying Slobogin's view may be that the greater the jeopardy faced by a suspect, the greater the interest in privacy from a search that could lead to the imposition of that greater jeopardy. For

147. *But see* *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (characterizing the public interest in the investigation of crimes such as burglary as "comparable" to that of more serious crimes such as murder).

148. *See, e.g.*, Slobogin, *supra* note 19, at 52 ("[E]asing the state's investigative burden in cases of serious crime would not be the result of a 'balancing' process between state and individual interests, but rather would represent a unilateral surrender of privacy and autonomy protection merely because the state is particularly eager to garner evidence in these cases.").

149. Bellin, *supra* note 17, at 15 n.55.

150. *See* Slobogin, *supra* note 19, at 8.

151. *Id.*

152. Bellin, *supra* note 17, at 15 n.55.

153. *See id.*

example, if the police knock on your door and announce that you are a suspect in a murder and would like to search your house for the murder weapon, then your interest in the privacy protected by the Fourth Amendment could not be higher. But, if instead, they inform you that you are a suspect in a petty shoplifting and they would like to search your house for the stolen items, then surely your interest in the privacy protected by the Fourth Amendment is significantly less. This is evidenced by the fact that “[t]he police often are able to obtain consent to enter the home of a minor offender.”¹⁵⁴

While true regarding a guilty suspect,¹⁵⁵ does Slobogin’s view also apply to an innocent suspect? Proponents of an inversely proportional allocation maintain, and Slobogin acknowledges, that the appropriate perspective for assessing the suspect’s Fourth Amendment interest is that of an innocent suspect.¹⁵⁶ But Slobogin argues that even innocent suspects’ Fourth Amendment interests increase as offense severity increases.¹⁵⁷ “[T]he individual whose house is invaded by [the] police in the erroneous belief that he is a murderer . . . has much more to lose, in terms of both reputation and emotional stability, than the innocent individual whose home is searched upon suspicion of drug possession.”¹⁵⁸

What both proponents and critics of an inversely proportional allocation overlook is that not only the guilty but also innocents fear that a search will yield incriminating evidence.¹⁵⁹ While the guilty fear that a search will uncover genuinely incriminating evidence, the innocent may fear erroneously incriminating evidence.¹⁶⁰ Innocent people who distrust the police may fear that the police might plant

154. Schroeder, *supra* note 7, at 536.

155. See Bellin, *supra* note 17, at 15 n.55 (conceding that “a *guilty* defendant’s interest in avoiding detection increases as the severity of the crime investigated increases”).

156. See *id.* (“[T]he law (properly) does not consider a desire to conceal guilt as a legitimate privacy interest.” (citing *Illinois v. Caballes*, 543 U.S. 405, 408–09 (2005) (“We have held that any interest in possessing contraband cannot be deemed ‘legitimate,’ and thus, governmental conduct that *only* reveals the possession of contraband ‘compromises no legitimate privacy interest.’”)); Christopher Slobogin, *Why Crime Severity Analysis is Not Reasonable*, 97 IOWA L. REV. BULL. 1, 10 (2012) (“[A]s the Supreme Court has made clear, the correct perspective for evaluating Fourth Amendment interests is that of a target who has done nothing wrong.” (citing *Florida v. Bostick*, 501 U.S. 429, 438 (1991) (citation omitted) (“[T]he potential intrusiveness of the officers’ conduct must be judged from the viewpoint of an innocent person in [the target’s] position.”))).

157. See Slobogin, *supra* note 19, at 7 (“[T]he innocent individual can legitimately claim an interest in avoiding the stigma, embarrassment, and inconvenience of a mistaken investigation.”).

158. Slobogin, *supra* note 156, at 5.

159. Amar, *supra* note 20, at 765.

160. *Id.*

evidence. Or even if trusting the police, they may fear that the police will find circumstantial evidence tying them to the crime and that they will be falsely accused and convicted. For innocents, mistaken investigations may lead to erroneously incriminating evidence that leads to mistaken prosecutions that, in turn, may lead to mistaken convictions. Just as the Court acknowledges that innocent persons nonetheless have reasonable grounds to fear self-incrimination,¹⁶¹ so also innocent persons may have a legitimate privacy interest against incriminating searches.

Innocents' legitimate interest in avoiding erroneously incriminating evidence generates an increasing interest as offense severity increases. If, as a leading proponent of an inversely proportional allocation notes, "[t]he more severe the crime . . . the more we also want to avoid convicting the innocent,"¹⁶² then we, along with innocent defendants, have a legitimate interest in avoiding false convictions. Because one way a false conviction might result is through a search or seizure yielding false or misleading incriminating evidence, then we, along with innocent suspects, similarly have a legitimate interest in avoiding searches that might yield such evidence. Because the interest in avoiding false convictions increases with increasing offense severity,¹⁶³ then both our and an innocent suspect's interests in avoiding searches that yield false or misleading evidence also increases with increasing offense severity.¹⁶⁴ As a result, the rationale for an inversely proportional allocation—

161. *Ohio v. Reiner*, 532 U.S. 17, 21 (2001) (per curiam) (quoting *Grunewald v. United States*, 353 U.S. 391, 421 (1957)) ("[W]e have emphasized that one of the Fifth Amendment's 'basic functions . . . is to protect *innocent* men . . .").

162. Volokh, *supra* note 13, at 1964.

163. *See id.*

164. One might object that this is conflating an innocent suspect's interest in avoiding incriminating searches with their legitimate privacy interests. But this objection is unpersuasive. True, an interest in avoiding genuinely incriminating evidence is not part of a legitimate privacy interest. That is why, in assessing the reasonableness of a search, the Court pointedly declines to adopt the perspective of a guilty person. *See supra* note 156 and accompanying text. Rather, the perspective must be that of an innocent person. But an innocent person might well have reasonable fears regarding a search yielding false or misleading evidence. Because the requisite perspective is that of an innocent person, and an innocent person might well have reasonable fears about false or misleading incriminating evidence, such fears necessarily are part of an innocent person's legitimate privacy interest. If fear of incriminating evidence were irrelevant to legitimate privacy interests, then there would be no need to adopt the perspective of an innocent. We could merely state that *any* fear of incriminating evidence is irrelevant to privacy. It is because fear of incrimination is part of privacy that we do adopt the perspective of an innocent in order to exclude from a legitimate privacy interest the guilty person's interest of avoiding the uncovering of genuinely incriminating evidence.

dependent on an innocent suspect's interest remaining the same—fails.

b. Suspect's Interest as to a Seizure

In one type of seizure context, the rationale for an inversely proportional allocation is even less persuasive. In *Tennessee v. Garner*, the Supreme Court held that police use of lethal force to apprehend a burglary suspect was an unreasonable seizure in violation of the Fourth Amendment, though it would be a reasonable seizure of a fleeing murder suspect.¹⁶⁵ Surely fleeing suspects subject to lethal seizures have a greater interest in not being seized than fleeing suspects subject to only nonlethal seizures. As *Garner* states, “[t]he intrusiveness of a seizure by means of deadly force is unmatched.”¹⁶⁶ Finding the suspect's interest against an unreasonable seizure to increase as offense severity (and thus the degree of force) increases to be so obvious as to be hardly worth arguing, the Court declared that “[t]he suspect's fundamental interest in his own life need not be elaborated upon.”¹⁶⁷

As a result, as crime severity increases, the degree of permissible force to effect a seizure increases, and the suspect's interest in avoiding that forceful seizure increases. And this would be as true for innocent suspects of murder as guilty ones. Both the innocent and guilty equally fear being killed. Thus, contrary to the premise of the rationale for an inversely proportional allocation, a fleeing suspect's interest in her Fourth Amendment rights *does* increase as crime severity increases. Because both the state's and the fleeing suspect's interests increase with increasing offense severity, the rationale for an inversely proportional allocation of Fourth Amendment rights is clearly inapplicable.

c. Inconsistent Comparison

The rationale depends on shifting and inconsistent perspectives on the suspect. In assessing the suspect's interest, proponents of the rationale insist that we adopt the perspective of an innocent suspect.¹⁶⁸ But in assessing the state's interest, the suspect is suspected, if not presumed to be, guilty.¹⁶⁹ (Otherwise, why would the state have *any* interest in searching or seizing an innocent individual let alone an interest that increases with increasing offense

165. See *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (holding that police use of lethal force against a fleeing suspect requires probable cause that the victim has committed a crime involving the use or threatened use of lethal force or serious bodily injury).

166. *Id.* at 9.

167. *Id.*

168. See *supra* note 156 and accompanying text.

169. See *supra* notes 18–19 and accompanying text.

severity?) The rationale depends on an apples and oranges comparison. This is a skewed—to the advantage of the state and proponents of an inversely proportional allocation—and inappropriate comparison.

d. Invalid Argument

Most fundamentally, the argument favoring an inversely proportional allocation of the Fourth Amendment right against unreasonable searches and seizures is invalid. Even if all of the premises of the argument are accepted, the conclusion simply does not follow. That is, the conclusion does not follow even if all of these premises are accepted: (i) the suspect's interest remain the same as offense severity increases, (ii) the state's interest increases with increasing offense severity, and (iii) suspects are assumed to be innocent for the purpose of determining the suspect's interest, but they are assumed to be guilty for the purpose of determining the state's interest. That the suspect's interest remains the same and the state's interest increases as offense severity increases does not entail that the state's interest in obtaining evidence regarding serious crimes will necessarily outweigh the individual's interest in privacy. It may well be the case that the individual's interest in privacy, despite remaining the same regardless of offense severity, still outweighs the state's increasing interest (with increasing offense severity) in obtaining evidence. It may well be the case that the suspect's interest, though stagnant, is very high and the state's interest, though increasing, is nonetheless very low. A low but increasing interest will not necessarily outweigh a high but stagnant interest.

The argument of the rationale can establish two things, neither of which are helpful to the rationale. First, if the suspect's interest outweighs the state's interest for a minor crime, the margin by which it outweighs will narrow as offense severity increases. But a narrowing margin does not necessarily entail the state's interest ever exceeding the suspect's interest. Second, if the state's interest outweighs the individual's interest for a minor crime, the margin by which it outweighs will widen as offense severity increases. But neither of the two establish what the argument needs to establish: that the state's interest exceeds the individual's as offense severity increases. As a result, even if all of the premises are accepted, the argument's conclusion does not follow.

To see this invalidity another way, consider the following expression of the rationale's argument:

- Suspect's privacy interest regarding minor crimes =
Suspect's privacy interest regarding major crimes
- State's evidentiary interest regarding major crimes >
State's evidentiary interest regarding minor crimes

- Therefore, State's evidentiary interest regarding major crimes > Suspect's privacy interest regarding major crimes

The argument is invalid because the conclusion in step three does not follow from the premises in steps one and two. The argument fails to support an inversely proportional allocation for the Fourth Amendment right against unreasonable searches and seizures.

B. Excessive Bail

The Eighth Amendment right against excessive bail¹⁷⁰ is generally understood as inversely proportional.¹⁷¹ As offense severity increases, the conditions for release on bail become more restrictive and may preclude release altogether.¹⁷² Determinations of whether, and at what amount of bail, to release a defendant pretrial involve the seriousness of the charged offense.¹⁷³ Defendants charged with capital offenses are generally not released on bail, but defendants

170. U.S. CONST. amend. VIII ("Excessive bail shall not be required . . .").

171. See, e.g., Bail Reform Act of 1984, 18 U.S.C. § 3142(e) (providing that seriousness of crime is a factor in determining whether a rebuttable presumption of detention arises); *id.* § 3142(f)(1) (stating that seriousness of crime is a factor in determining whether detention will be imposed); *id.* § 3142(g)(1) (announcing that "the nature and circumstances of the offense charged" is a factor in determining whether defendant may be released); *Stack v. Boyle*, 342 U.S. 1, 8 (1951) (Jackson, J., concurring) (citing FED. R. CRIM. P. 46(a)(1)) (recognizing "the nature and circumstances of the offense charged" as among the typical standards to be applied in determining bail); Frase, *supra* note 41, at 604 (noting the application of "an offense-based criterion" in setting bail amounts and deciding on pretrial detention).

172. See, e.g., BRIAN A. REAVES, BUREAU OF JUST. STAT., U.S. DEPT OF JUST., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 – STATISTICAL TABLES 15 (2013) ("The release rate for defendants charged with a violent offense ranged from 18% for murder defendants to 63% for assault defendants. Roughly half of robbery (44%) and rape (52%) defendants were released . . ."); *id.* ("[D]etained defendants had a median bail amount of \$25,000, compared to \$6,000 for released defendants. Detained murder defendants had the highest median bail amount (\$1,000,000), followed by detained rape defendants (\$100,000)."); LAFAVE ET AL., *supra* note 6, § 12.2(a), at 817 ("[T]he nature of the offense and in particular the 'risk' the defendant is running in terms of the potential punishment is an important factor in the Eighth Amendment equation.").

173. See, e.g., *United States v. Salerno*, 481 U.S. 739, 747 (1987) ("The Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes."); *id.* at 750 ("The Act operates only on individuals who have been arrested for a specific category of extremely serious offenses."); LAFAVE ET AL., *supra* note 6, § 12.1(b), at 813 ("Judges are inclined to give primary consideration to the seriousness of the offense charged . . ."); Note, *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125, 1127 (2018) ("Many jurisdictions assign a defendant a predetermined bond amount based on the criminal charge . . .").

charged with minor crimes are routinely released.¹⁷⁴ The rationale is that as crime severity increases, the jeopardy defendants face increases, and thus, defendants have a greater interest in not being present for their trial.¹⁷⁵ To offset or deter defendants' comparatively greater interest in fleeing rather than attending trial, as offense severity increases, courts impose conditions for release on bail that are concomitantly more restrictive and onerous.¹⁷⁶ The next Subpart assesses the persuasiveness of this rationale by examining its consistency with the rationale of another inversely proportional right.

C. Inconsistency Between Inversely Proportional Rationales

The rationale for inversely proportionally allocating the Eighth Amendment right against excessive bail undermines the rationale for such allocation of Fourth Amendment rights. The former relies on defendants having a greater interest in release prior to trial, and thus a greater interest in the right, as offense severity increases.¹⁷⁷ The latter's rationale depends on the suspect's interest in privacy remaining the same, and thus having an unvarying interest in the right, as offense severity increases.¹⁷⁸ If even an innocent defendant's interest in release prior to trial increases as offense severity increases, then why would not an innocent suspect's interest in privacy from a search also increase with increasing offense severity? If innocent defendants can legitimately and increasingly fear false convictions (and thus wish release prior to trial) as offense severity increases, then why cannot innocent suspects legitimately and increasingly fear planted or circumstantial evidence that lead to false charges as offense severity increases? Because false charges may lead to false convictions, there is little reason why a suspect's fear about one would be different than about the other.

174. See, e.g., *Salerno*, 481 U.S. at 753 ("A court may, for example, refuse bail in capital cases."); *id.* at 765 n.6 (Marshall, J., dissenting) ("[D]enial of bail in capital cases has traditionally been the rule rather than the exception."); *Carlson v. Landon*, 342 U.S. 524, 557 (1952) (Black, J., dissenting) ("[I]n criminal cases bail is not compulsory where the punishment may be death.").

175. See, e.g., *Salerno*, 481 U.S. at 765 n.6 (Marshall, J., dissenting) ("[I]t has been the considered presumption of generations of judges that a defendant in danger of execution has an extremely strong incentive to flee."); Laurence H. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56 VA. L. REV. 371, 401 (1970) (noting the historical rationale that more serious offenses "carried heavier penalties and therefore involved a greater temptation to flee").

176. See, e.g., LAFAVE ET AL., *supra* note 6, § 12.2(a), at 817 ("[A] court confronted with a high risk defendant will in all probability proceed to set the bail in an unreachable amount . . .").

177. See *supra* notes 177–78 and accompanying text.

178. See *supra* Subpart III.A.2.

IV. CONFLICTING AND ALTERNATIVE RATIONALES FOR UNEQUAL ALLOCATIONS

This Part argues that the claimed rationale for an inversely proportional right also applies to proportional rights; and, the claimed rationale for proportional rights also applies to yet another inversely proportional right. As a result, the rationales prove too much (by also supporting the opposing type of allocation) and conflict. With the rationales conflicting, at least one of them is wrong. Because at least one of them is wrong, and the fact that they conflict cannot tell us which one is wrong, both are at least suspect. Next, attempting to avoid these unsatisfactory rationales, this Part proposes the two most promising alternative rationales. The first alternative rationale reflects a distinction between adjudicative and investigative rights and builds on the distinctive rationales of *Miranda v. Arizona*¹⁷⁹ and its public-safety exception, *New York v. Quarles*.¹⁸⁰ The second concerns accuracy. However, neither of these proposed alternative rationales succeed. With neither the existing nor the most promising alternative rationales persuasive, there may be no satisfactory explanation for why which unequally allocated rights are allocated which way.

A. *Rationale for an Inversely Proportional Right Also Applies to Proportional Rights*

The rationale for inversely proportionally allocating the right against unreasonable seizures (involving police force against fleeing suspects) also applies to proportional rights. The Court in *Garner* held that though unreasonable to use to apprehend a fleeing burglary suspect, lethal force constituted a reasonable seizure in apprehending a fleeing murder suspect.¹⁸¹ Because a burglary suspect poses no appreciable threat of serious bodily harm to others, “the harm resulting from failing to apprehend him does not justify the use of deadly force.”¹⁸² But because a murder suspect does pose such a threat, the harm from failing to apprehend does justify lethal force.¹⁸³ Lethal force against a fleeing suspect is thus constitutionally reasonable if there was “probable cause to believe that he has committed a crime involving the infliction or threatened infliction of

179. 384 U.S. 436, 460–61 (1966) (extending the Fifth Amendment privilege against self-incrimination to suspects in police custody facing interrogation).

180. 467 U.S. 649, 655–56 (1984) (creating an exception to *Miranda* that when public safety is at risk, answers to police questions posed to suspects in custody constitute admissible evidence despite the absence of *Miranda* warnings).

181. *Tennessee v. Garner*, 471 U.S. 1, 11–12 (1985).

182. *Id.* at 11.

183. *Id.* at 11–12.

serious physical harm.”¹⁸⁴ Volokh explains the Court’s rationale for the reasonableness of such lethal force: “[T]he risks to the [suspected] murderer’s potential future victims are otherwise just too great.”¹⁸⁵

Those “too great” risks, however, are also present after an acquittal of a murder defendant. That there was insufficient evidence to establish guilt under the higher evidentiary standard of proof beyond a reasonable doubt does not necessarily negate or extinguish satisfaction of the lower evidentiary standard of probable cause.¹⁸⁶ Thus even after an acquittal, there may well be the very same probable cause to believe the defendant has committed a murder or crime involving the infliction or threatened infliction of serious bodily harm.¹⁸⁷ Therefore, releasing a murder defendant after an acquittal poses the same “too great” risks to potential future victims as failing to apprehend a fleeing suspected murderer. If those risks justify an inversely proportional allocation of the Fourth Amendment right against unreasonable seizures, then those equally present risks justify an inversely proportional allocation of such proportionally allocated rights as the right to appointed counsel and jury trial. Such proportionally allocated rights increase the prospect of acquittal¹⁸⁸ and thereby increase the risk to the murder defendant’s potential future victims. To reduce this “too great” risk, not only the Fourth Amendment right against unreasonable seizures but also the Sixth Amendment rights to appointed counsel and jury trial should decrease with increasing offense severity. Thus, the rationale for inversely proportionally allocating the Fourth Amendment right against unreasonable seizures also applies to the proportionally allocated Sixth Amendment rights to appointed counsel and jury trial.

B. Rationale for Proportional Rights Also Applies to an Inversely Proportional Right

A rationale for proportional rights—wrongful convictions for more serious offenses are worse than wrongful convictions for less serious offenses¹⁸⁹—also applies to an inversely proportional right. It applies to the Eighth Amendment right against excessive bail. As an inversely proportional right, increasing offense severity decreases the ability to obtain release on bail.¹⁹⁰ But pretrial detention hampers

184. *Id.* at 11.

185. Volokh, *supra* note 13, at 1967.

186. *See infra* notes 230–32 and accompanying text.

187. *See* Tribe, *supra* note 175, at 405–06 (“[Even after an acquittal t]here may be still a ‘substantial probability’ that he committed the offense charged, and whatever reasons previously existed for thinking him likely to commit a future crime are as valid after trial as before.”).

188. *See supra* note 91 and accompanying text.

189. *See* Maryland v. Craig, 497 U.S. 836, 867–68 (1990) (Scalia, J., dissenting); Volokh, *supra* note 13, at 1964.

190. *See supra* Subpart III.B.

defendants' ability to mount an effective defense in several ways.¹⁹¹ First, loss of income while detained impairs defendants' financial ability to pay for the best defense.¹⁹² Second, detention hinders defendants' capacity to obtain witnesses and evidence.¹⁹³ Third, communication and consultation with counsel is more limited.¹⁹⁴ Fourth, "[t]he pretrial prison experience may adversely affect [the defendant's] demeanor in court and on the witness stand."¹⁹⁵ Fifth, there is a "public stigma of having been found too dangerous to release (a stigma that could itself prejudice subsequent proceedings)."¹⁹⁶ Perhaps for these very reasons, there is a statistically greater chance of conviction for defendants unable to secure their pretrial release.¹⁹⁷

191. See, e.g., *Stack v. Boyle*, 342 U.S. 1, 4 (1951) ("Th[e] traditional right to freedom before conviction permits the unhampered preparation of a defense . . ."); Shima Baradaran Baughman, *The History of Misdemeanor Bail*, 98 B.U. L. REV. 837, 872 (2018) ("[A detained defendant] will have less of an opportunity to prepare her case, meet with counsel, find witnesses in her defense, and research legal matters.").

192. See, e.g., *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (stating that pretrial detention "may imperil the suspect's job [and] interrupt his source of income"); LAFAVE ET AL., *supra* note 6, § 12.2(c), at 820 (noting the diminished ability to finance pretrial investigation); Tribe, *supra* note 175, at 383–84 (referencing the "severe economic hardships" triggered by pretrial detention).

193. See, e.g., *Barker v. Wingo*, 407 U.S. 514, 533 (1972) (noting that a defendant detained pretrial is "hindered in his ability to gather evidence [and] contact witnesses"); *Stack*, 342 U.S. at 8 (Jackson, J., concurring) (noting that pretrial detention impedes "searching for evidence and witnesses"); LAFAVE ET AL., *supra* note 6, § 12.2(c), at 820 ("[Defendants are] unable to help locate witnesses or evidence that might be more accessible to him than to any outsider."); Tribe, *supra* note 175, at 384 ("These limitations [on the detainee's ability to prepare a defense] could easily be applied to frustrate the defendant's ability to seek out witnesses unhampered by the presence of a conspicuous federal agent and unconditioned by the required disclosure of defense strategy."). Though relief is rare, underscoring the burden pretrial detention places on the defendant's trial preparation, one court found the detainee's difficulty in obtaining witnesses as violative of the due process right to a fair trial. *Kinney v. Lenon*, 425 F.2d 209, 210 (9th Cir. 1970) (holding that the "failure to permit appellant's release for the purpose of aiding the preparation of his defense unconstitutionally interfered with his due-process right to a fair trial").

194. See, e.g., *Stack*, 342 U.S. at 8 (Jackson, J., concurring) (noting that pretrial detainees "are handicapped in consulting counsel"); LAFAVE ET AL., *supra* note 6, § 12.2(c), at 820 ("His contacts with counsel may be impeded, so that he must plan a defense in cramped jail facilities within the limited hours set aside for visitors."); Arpit Gupta et al., *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. LEGAL STUD. 471, 473 (2016) (noting "the difficulty detained defendants have communicating with their counsel").

195. LAFAVE ET AL., *supra* note 6, § 12.2(c), at 820.

196. Tribe, *supra* note 175, at 383.

197. See, e.g., Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 744 (2017) (concluding

Furthermore, defendants detained pretrial are more likely to be sentenced more severely.¹⁹⁸ Alternatively, paying the higher bail typically required for a more serious offense also curtails the ability to pay for the best defense.¹⁹⁹ In turn, this too increases the likelihood of conviction.²⁰⁰

As a result, if it is worse to wrongfully convict a defendant of a more serious offense than a less serious offense, then it is also worse to deny (or impose heightened financial requirements for) bail for more serious offenses than less serious offenses. Both denial of bail and the imposition of higher bail increase the likelihood of wrongful convictions.²⁰¹ If the rights to appointed counsel for indigents and jury trial should be proportionally allocated because they reduce the likelihood of wrongful convictions, then the right against excessive bail should also be proportionally allocated because it too reduces the likelihood of wrongful convictions. Thus, the rationale for proportionally allocated rights also applies to the Eighth Amendment right against excessive bail. That rationale supports the presently inversely proportional right being allocated proportionally.²⁰²

that pretrial detention increases the likelihood of conviction for misdemeanors by twenty-five percent); Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J.L. & ECON. 529, 530 (2017) (“We find that pretrial detention increases the probability that a felony defendant will be convicted by at least 13 percentage points.”); *id.* at 546 (citing two other studies finding that pretrial detention increases the probability of conviction by five and twelve percent).

198. See, e.g., Baughman, *supra* note 191, at 843 (citing a 2013 study finding that “defendants detained before trial are three to four times more likely to be sentenced to incarceration than those on pretrial release and tend to receive longer sentences”); Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 YALE L.J. 2236, 2256–57 (2013) (citing Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417, 1425–26 (2011)) (“A defendant granted bail is less likely to be sentenced to prison at the end of the case.”); Heaton et al., *supra* note 197, at 715 (finding that “pretrial detention causally increases . . . the likelihood of receiving a carceral sentence [and] the length of a carceral sentence”).

199. See *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (stating the financial implications of pretrial confinement).

200. See Gupta et al., *supra* note 194, at 472 (finding that assessments of money bail cause a twelve percent increase in the likelihood of conviction).

201. See *supra* notes 191–200 and accompanying text.

202. The argument is not advocating for a proportionally allocated right against excessive bail. Rather, the argument is that the rationale for a proportional allocation applies to the inversely proportionally allocated right against excessive bail. As a result, at least one of the types of unequal allocation, if not both, is problematic.

C. *Alternative Rationales*

The previous two Subparts argued that the claimed rationales for proportional and inversely proportional allocations conflict with each other and thus are problematic. Attempting to avoid the problems of the existing rationales and identify more satisfactory rationales, this Subpart proposes two promising alternative rationales. First, the differing explanations for the familiar *Miranda* right to remain silent²⁰³ and its less familiar public-safety exception²⁰⁴ might supply the differing rationales for adjudicative rights to typically be proportional and investigative rights to typically be inversely proportional. Second, the criminal justice system's arguably overarching goal of accuracy might at least furnish a rationale for inversely proportional rights. This Subpart concludes, however, that neither proposed rationale is entirely successful.

1. *Miranda and Its Public-Safety Exception*

The two types of unequal allocations of rights roughly track the distinction between the investigative and adjudicative phases of criminal procedure.²⁰⁵ Though not all proportional rights are trial rights²⁰⁶ and not all trial rights are proportional,²⁰⁷ proportional rights cluster around the adjudication of criminal charges.²⁰⁸ Similarly, though not all inversely proportional rights are police-limiting²⁰⁹ and not all police-limiting rights are inversely proportional,²¹⁰ inversely proportional rights cluster around the investigation and apprehension of suspects.²¹¹ A promising

203. *Miranda v. Arizona*, 384 U.S. 436, 460–61 (1966) (extending the Fifth Amendment privilege against self-incrimination to suspects in police custody facing interrogation).

204. *New York v. Quarles*, 467 U.S. 649, 655 (1984) (creating an exception to *Miranda* that when public safety is at risk, answers to police questions posed to suspects in custody constitute admissible evidence despite the absence of *Miranda* warnings).

205. See, e.g., JOSHUA DRESSLER ET AL., UNDERSTANDING CRIMINAL PROCEDURE § 1.03[A], at 7 (7th ed. 2017) (“Analytically and in law school curricula, ‘criminal procedure’ is often divided into two parts, the investigatory and the adjudicatory stages.”).

206. For example, rights to a grand jury and a preliminary hearing are proportionally allocated. See *Crane*, *supra* note 27, at 780.

207. For example, the Sixth Amendment rights from the Confrontation, Compulsory Process, and Speedy Trial right clauses are offense neutral. See *Argersinger v. Hamlin*, 407 U.S. 25, 27–28 (1972).

208. See *id.* at 27, 32.

209. For example, the right against excessive bail. See *supra* Subpart III.B.

210. For example, the Fourth Amendment right against unreasonable searches and seizures is largely offense neutral. See, e.g., Minzner, *supra* note 102, at 940.

211. See DRESSLER ET AL., *supra* note 205, § 1.03[B], at 7–8.

alternative rationale may lie in explaining why this is so. The differing bases for the *Miranda* right and its public-safety exception may provide such an explanation.

The claimed societal cost of generally recognizing (in the absence of a public-safety risk) the *Miranda* right is merely fewer convictions of the guilty.²¹² The Supreme Court reasoned that police issuing the *Miranda* warning will “deter a suspect from responding” to police questions, decrease the revelation of incriminating information, and thereby decrease the likelihood of conviction.²¹³ But in the view of the *Miranda* Court, the benefit exceeds the cost: “[T]he cost to society in terms of fewer convictions of guilty suspects . . . would simply have to be borne in the interest of enlarged protection for the Fifth Amendment privilege.”²¹⁴

In contrast, in the presence of a public-safety risk (for example, the presence of a gun or bomb), the claimed societal cost of recognizing the *Miranda* right is something greater than merely a diminution of convictions of the guilty. The Court in *Quarles* reasoned that were a *Miranda* warning to deter a suspect from responding to police questions about threats to public safety, “the cost would have been something more than merely the failure to obtain evidence useful in convicting” the suspect.²¹⁵ The greater cost would be “a threat to the public safety.”²¹⁶ By not issuing *Miranda* warnings prior to questioning suspects about public hazards, suspects are not deterred from responding, suspects are more likely to provide incriminating information helpful to the state, and public dangers are more likely avoided.²¹⁷ In the view of the *Quarles* Court, the benefit of the public-safety exception to *Miranda* exceeds the cost: “[T]he need for answers to questions in a situation posing a threat to the public safety outweighs the need for the [*Miranda*] rule protecting the Fifth Amendment’s privilege against self-incrimination.”²¹⁸

Perhaps the *Miranda* rationale serves to explain proportional rights in the adjudicative setting and the *Quarles* rationale accounts for inversely proportional rights in the investigative setting. The cost of allocating adjudicative rights proportionally is arguably merely fewer convictions of guilty defendants as offense severity increases. Paraphrasing and applying the *Miranda* rationale here, the cost to society in terms of fewer convictions of guilty suspects simply has to be borne in the interest of enlarged protection (as offense severity increases) for the Sixth Amendment rights of appointed counsel and

212. *New York v. Quarles*, 467 U.S. 649, 656–57 (1984).

213. *Id.* at 657.

214. *Id.* at 656–57 (construing the rationale of *Miranda*).

215. *Id.* at 657.

216. *Id.*

217. *See id.*

218. *Id.*

jury trial.²¹⁹ However, the cost of allocating investigative rights proportionally or even neutrally is that the most serious offenses will not be solved or the most dangerous offenders not apprehended. The failure to solve the worst crimes or apprehend the most dangerous offenders is akin to the *Quarles* situation of a public-safety hazard. Paraphrasing and applying the rationale for the public-safety exception here, as offense severity increases, the state's need to obtain incriminating evidence and apprehend offenders increases and outweighs individuals' need for Fourth Amendment protection of their privacy interests.²²⁰

The flaw of this proposed rationale, however, is the assumption that failing to apprehend a dangerous offender poses a greater degree of danger or social harm than failing to convict a dangerous offender. The public danger and social cost of each would seem to be the same. As Justice Stevens argued, a dangerous criminal is no less dangerous postacquittal than preapprehension.²²¹ The future victim of a crime suffers the same harm whether perpetrated by a dangerous criminal preapprehension or postacquittal.²²²

Nearly fifty years ago, leading constitutional law scholar Laurence Tribe made this very point. Tribe contended that a dangerous offender is no less dangerous postacquittal than preapprehension in the following argument against preventive

219. Cf. *Miranda v. Arizona*, 384 U.S. 436, 479–80 (1966) (emphasizing the need for the government to guard its citizens' rights as an example of decency and liberty).

220. Cf. *Quarles*, 467 U.S. at 657–58 (emphasizing the high stakes of exigencies relating to public safety).

221. See *United States v. Salerno*, 481 U.S. 739, 768 (1987) (Stevens, J., dissenting) (“If the evidence of imminent danger is strong enough to warrant emergency detention, it should support that preventive measure regardless of whether the person has been charged, convicted, or acquitted of some other offense.”). Justice Stevens is arguing that if a person is sufficiently dangerous to warrant postindictment, pretrial detention, then they are also sufficiently dangerous to warrant detention pre-indictment. Furthermore, just as it is unrealistic to assume that persons become more dangerous postindictment, “[i]t is equally unrealistic to assume that the danger will vanish if a jury happens to acquit them.” *Id.*

222. The majority in *Salerno* held the view that harm is the harm regardless of some feature of the perpetrator, procedural context, or legislative enactment. *Id.* at 749–50 (quoting *Schall v. Martin*, 467 U.S. 253, 264–65 (1984)) (“Indeed, ‘[t]he harm suffered by the victim of a crime is not dependent on the age of the perpetrator.’”); *Jackson v. Indiana*, 406 U.S. 715, 729–30 (1972) (holding that the existence of “pending criminal charges” supplies no basis to preventively detain mentally disabled persons under less exacting standards than such persons without pending charges); Schroeder, *supra* note 7, at 517 (“[M]urder is not less serious in a jurisdiction that lacks a death penalty . . . than in a jurisdiction that has a death penalty.”).

pretrial detention of defendants claimed to pose a danger to the community:

[T]here are persons not charged with any crime who give every indication of being at least as dangerous as anyone awaiting trial on a pending charge. If two men appear equally likely to commit a violent crime, it is arbitrary to imprison the man who is about to be tried for a past offense while imposing no restraint on the man who is not facing trial. Nor is it easy to explain why a man subjected to preventive confinement before trial should suddenly become immune to such detention upon acquittal. When a preventively detained defendant has been acquitted, either because critical evidence against him was ruled inadmissible, or because the jury failed to agree or found a reasonable doubt as to his guilt, the grounds on which he was imprisoned before trial ordinarily remain unchanged. There may still be a "substantial probability" that he committed the offense charged, and whatever reasons previously existed for thinking him likely to commit a further crime are as valid after trial as before.²²³

Tribe reasoned that because an acquittal based on the higher evidentiary standard of proof beyond a reasonable doubt does not negate the lower evidentiary standard of probable cause, a dangerous offender is not necessarily less dangerous postacquittal than preapprehension.²²⁴ Tribe concluded that treating persons who pose a similar danger to the community dissimilarly "simply makes no sense."²²⁵

The societal cost of each—the dangerous offender preapprehension and the dangerous offender postacquittal—being at large and a risk to commit future crime is apparently the same.²²⁶ If equally dangerous, why should constitutional procedural protections be strengthened, as offense severity increases, for the defendant at trial but weakened for the suspect under investigation? Unless there is a satisfactory answer to that question, the distinction between adjudicative rights and investigative rights fails to explain why some

223. Tribe, *supra* note 175, at 405–06.

224. *Id.*

225. *Id.* at 406 ("The only bases [sic] for detention that can rationally be said to arise with a criminal charge and vanish with an acquittal are those directly related to the demands of judicial administration—a risk of flight, witness or jury intimidation, evidence destruction, or other interference with trial.").

226. If there is any difference, the public danger posed by the dangerous criminal postacquittal is even greater. The acquitted dangerous criminal might well be emboldened by the justice system's failure to convict, thereby encouraging her commission of future crime. The unapprehended suspect might retain a greater fear of future conviction, be thereby deterred, and thus pose less of a danger.

rights should be proportional and some should be inversely proportional.

One might object that the dangerous criminal is more dangerous preapprehension than postacquittal because after an acquittal, there is a possibility that the acquittal was the result of the offender being exonerated. That is, the acquittal demonstrated that the defendant was factually and completely innocent.²²⁷ As factually and completely innocent, the acquitted defendant poses no danger. But if he posed no danger postacquittal because of complete innocence, then for the same reason, that same defendant posed no danger as a suspect preapprehension. The possibility of an acquittal suggesting complete innocence establishes only an equivalent lack of danger postacquittal and preapprehension. The objection fails to establish what it needs to establish—that individuals are more dangerous preapprehension than postacquittal.

One might object that an acquittal suggesting complete innocence provides a basis to believe the defendant poses no danger that we lacked preapprehension. That would seem to be irrelevant, however, to the claim that individuals are, in fact, more dangerous preapprehension than postacquittal. The claim is based on actual, not believed, danger.

Even if somehow believed danger was relevant, there is not a sufficient basis to believe that individuals are more dangerous preapprehension than postacquittal. Acquittals merely reflect the factfinder deciding the prosecution failed to meet the heightened standard of proving guilt beyond a reasonable doubt.²²⁸ Acquittals result even if the factfinder finds that there was clear and convincing evidence, a preponderance of the evidence, or probable cause that the defendant was guilty.²²⁹ Acquittals are too opaque to allow an inference of factual innocence.²³⁰

227. See *Bullington v. Missouri*, 451 U.S. 430, 445 (1981) (stating that the “verdict of acquittal on the issue of guilt or innocence” is final because otherwise, an innocent defendant may be found guilty).

228. See, e.g., Leslie J. Harris, *Constitutional Limits on Criminal Presumptions as an Expression of Changing Concepts of Fundamental Fairness*, 77 J. CRIM. L. & CRIMINOLOGY 308, 352 (1986) (“[R]equirements, such as those associated with proof beyond a reasonable doubt . . . mandat[es] acquittal when the defendant may be factually guilty.”).

229. See, e.g., *Victor v. Nebraska*, 511 U.S. 1, 14 (1994) (noting that in comparison to the preponderance of the evidence standard, and even the heightened clear and convincing evidence standard, the reasonable doubt standard requires a “very high level of probability”).

230. See, e.g., PAUL H. ROBINSON & MICHAEL T. CAHILL, CRIMINAL LAW § 2.9, at 100 (2d ed. 2012) (“If a reasonable doubt remains as to even a single element—even if the jury thinks the element is ‘probably’ satisfied, that is, more likely to be true than not—the jury is obliged to acquit the defendant.”); Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV.

One might still object that the mere possibility, however unlikely, of an acquittal resulting from a complete exoneration makes any given defendant statistically less dangerous postacquittal than preapprehension. But the percentage of acquittals that stem from a complete exoneration or result from the factfinder determining that the defendant was factually innocent may be exceedingly low.²³¹

Even if the exceedingly low possibility of an acquittal resulting from a complete exoneration was deemed significant enough to infer lower danger postacquittal than preapprehension, there are three offsetting factors. First, there might be a lessened deterrent effect postacquittal than preapprehension.²³² Preapprehension, the dangerous criminal might well have reason to fear apprehension, conviction, and punishment, and thereby be deterred. But an acquittal only emboldens the dangerous criminal. The acquitted dangerous criminal might well feel empowered to commit further crime, confident that even if apprehended and tried, the criminal justice system cannot convict and punish him. The deterrent effect on such a defendant would be weakened. Such a lessened deterrent effect postacquittal makes the offender more dangerous postacquittal than preapprehension.

Second, the evidence supporting the guilt of an ultimately acquitted defendant is likely greater postacquittal than preapprehension because of the preliminary hearing stage. The reliability and amount of evidence sufficient to satisfy a preliminary hearing is greater than that to satisfy a search.²³³ Though “[t]he standard of proof required of the prosecution is usually referred to as ‘probable cause,’ [nonetheless] in some jurisdictions it may approach a *prima facie* case of guilt.”²³⁴ Other jurisdictions conduct a “mini-

1369, 1405 (1991) (noting that as compared to the preponderance of the evidence standard, the reasonable doubt standard “requires that the defendant prevail in cases where the weight of the evidence points decidedly but not overwhelmingly towards her guilt”).

231. See ALAN M. DERSHOWITZ, *THE BEST DEFENSE*, at xxi (1982) (“Almost all criminal defendants are, in fact, guilty.”).

232. See *supra* note 224.

233. See, e.g., *Commonwealth v. Ricker*, 170 A.3d 494, 499 (Pa. 2017) (Saylor, C.J., concurring) (per curiam) (noting that “higher standards of proof pertain” to preliminary hearings than in assessing probable cause for pretrial detention). The “adversar[ial] safeguards [of the preliminary hearing] are not essential for the probable cause determination required by the Fourth Amendment.” *Gerstein v. Pugh*, 420 U.S. 103, 120 (1975). In contrast, “the full panoply of adversary safeguards—counsel, confrontation, cross-examination, and compulsory process for witnesses,” is required for determining probable cause at a preliminary hearing. *Id.* at 119–20.

234. *Gerstein*, 420 U.S. at 119. The *prima facie* case standard “is roughly analogous to the standard applied by a trial judge in deciding whether the prosecutor’s case is strong enough to send to the jury.” LAFAYE ET AL., *supra* note 6, § 14.3(a), at 907.

trial” preliminary hearing: “a screening procedure that arguably is much more exacting even though it requires no greater degree of probability.”²³⁵ Still other jurisdictions incorporate a “‘forward looking’ assessment” that “requires ‘more’ than the probable cause needed for an arrest or search warrant.”²³⁶ Even in jurisdictions rejecting such heightened standards and adopting a probable cause standard, nonetheless, the preliminary “hearing should be somewhat more rigorous in its procedural attributes than the issuance of an arrest or search warrant.”²³⁷ Wayne LaFave conjectured that even courts claiming to apply a probable cause standard may well actually apply the higher, *prima facie* case standard.²³⁸ Thus, the requisite level of probable cause supporting the guilt of an ultimately acquitted defendant is higher after a preliminary hearing than preapprehension. As a result, an acquitted defendant may be more dangerous postacquittal—because of greater evidence of dangerousness at the preliminary hearing stage—than preapprehension.

Third, evidence first presented at trial may further establish the defendant’s factual guilt and danger to the public. Prosecutors confident of obtaining a grand jury indictment or satisfying a preliminary hearing may purposefully withhold incriminating evidence so as to not give the defendant a peek at the state’s strategy or provide the defense with a basis to impeach the credibility of a witness.²³⁹ Furthermore, additional evidence not available before trial may come to light during trial.²⁴⁰ Though not enough to persuade the factfinder of guilt beyond a reasonable doubt, the amount of incriminating evidence supporting the defendant’s factual guilt and danger to the public may well be greater postacquittal than preapprehension because of incriminating evidence that is presented for the first time at trial.

In summary, the proposed rationale based on the *Miranda* rationale explaining proportional rights and its public-safety exception explaining inversely proportional rights fails. Its premise that dangerous offenders are more dangerous preapprehension than

235. LAFAVE ET AL., *supra* note 6, § 14.3(a).

236. *Id.* (“[Such an assessment] logically should require a higher and different degree of probability than that applied to the review of an arrest or search.”).

237. *Id.*

238. *Id.* at n.36 (“It may well be that magistrates apply a standard very much like the *prima facie* case standard even where appellate courts speak of the probability traditionally required for Fourth Amendment probable cause.”).

239. *Id.* § 14.1(a) (noting that the prosecution often “seeks to limit defense discovery and reduce the burden on its witnesses by introducing just enough evidence to meet the bindover standard” for a preliminary hearing).

240. *See, e.g., id.* § 14.3(a) (referring to the “automatic presumption that the prosecution may be able to ‘strengthen its case at trial’”).

postacquittal is unpersuasive. A dangerous criminal is no less dangerous postacquittal than preapprehension. If acquittals are thought to establish complete innocence and the utter lack of danger of the defendant, then that same person as a suspect preapprehension is equally nondangerous. At best, an acquittal provides an epistemic basis postacquittal (that is lacking preapprehension) for individuals to be less dangerous postacquittal than preapprehension. But this is irrelevant because the proposed alternative rationale relies on actual danger, not merely believed danger. But even if merely believed danger was relevant, there are three bases for believing individuals to be more dangerous postacquittal than preapprehension.

2. Accuracy

Another possible basis for a rationale for unequally allocating rights is accuracy of verdicts. The Supreme Court has enshrined accuracy as “central to,”²⁴¹ “the central purpose of,”²⁴² “a fundamental goal [of],”²⁴³ and the “ultimate objective [of]”²⁴⁴ the criminal trial and justice system. Though rejected as a satisfactory rationale for proportional rights,²⁴⁵ perhaps accuracy will be more successful explaining the unequal allocation of rights in general or inversely proportional rights in particular. By providing a basis for an asymmetry between the interests of the individual and the state as offense severity increases, accuracy shows promise in explaining inversely proportional allocations.

The state’s interest in accuracy might well increase with increasing offense severity while the individual’s interest remains the same. Because the state is interested in justice,²⁴⁶ and justice is achieved either through a correct acquittal or a correct conviction,²⁴⁷ accuracy is an unalloyed good for the state. In contrast, accuracy is a mixed bag for individual suspects or defendants—either a blessing

241. *Arizona v. Fulminante*, 499 U.S. 279, 295 (1991) (“The search for truth is indeed central to our system of justice . . .”).

242. *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) (citing *United States v. Nobles*, 422 U.S. 225, 230 (1975)) (“[T]he central purpose of a criminal trial is to decide the factual question of the defendant’s guilt or innocence.”).

243. *United States v. Havens*, 446 U.S. 620, 626 (1980) (citing *Oregon v. Hass*, 420 U.S. 714, 722 (1975)).

244. *Herring v. New York*, 422 U.S. 853, 862 (1975) (referring to the criminal justice system’s “ultimate objective that the guilty be convicted and the innocent go free”).

245. *See supra* text accompanying notes 84–95.

246. *See, e.g.*, *Connick v. Thompson*, 563 U.S. 51, 65–66 (2011) (“Prosecutors have a special ‘duty to seek justice, not merely to convict.’”); *Berger v. United States*, 295 U.S. 78, 88 (1935) (observing that the state’s fundamental objective in a criminal prosecution is “not that it shall win a case, but that justice shall be done”).

247. *See, e.g.*, *Crist v. Bretz*, 437 U.S. 28, 33–34 (1978) (explaining that a “conviction or an acquittal” constitutes a complete trial and final judgment).

(for the innocent) or a curse (for the guilty).²⁴⁸ As offense severity increases, individuals' interest in accuracy depends on their guilt or innocence.²⁴⁹ The innocent's interest increases but the guilty person's interest decreases. Thus, with increasing offense severity, the state's interest in accuracy increases while individuals' interests (accounting for both the innocent and guilty) remain the same, in the aggregate. Therefore, according to the same reasoning underpinning the argument for an inversely proportional Fourth Amendment,²⁵⁰ with increasing offense severity, the state's interest in accuracy outweighs the individual's interest in accuracy. Thus, the accuracy rationale purports to explain the inversely proportional allocation of rights that impair accuracy—Fourth Amendment protections from the police uncovering genuinely incriminating evidence.

Though promising, accuracy as a rationale fails for numerous reasons. First, the rationale relies on an argument exposed above as invalid.²⁵¹ That the state's interest increases while the individual's remains the same, with increasing offense severity, does not entail that the state's interest exceeds the individual's interest. Second, though claimed to furnish a rationale for the proportional rights to appointed counsel and jury trial,²⁵² it does not. As discussed above, those rights do not increase accuracy; they decrease the likelihood of conviction.²⁵³ Third, accuracy fails to explain why the right against excessive bail is inversely proportional.²⁵⁴ Decreasing the ability to obtain bail as offense severity increases fails to promote accuracy. It merely hampers defendants' ability to mount an effective defense and increases the likelihood of conviction.²⁵⁵

Fourth, even if accuracy explains some inversely proportional Fourth Amendment rights, it fails to explain the permissibility of an increasing degree of police force to effectuate a seizure as offense severity increases.²⁵⁶ The use of lethal force against a fleeing murder

248. See, e.g., LAFAVE ET AL., *supra* note 6, § 1.5(b) (“[T]ruth-deflecting values commonly operate to benefit the defendant.”); Brown, *supra* note 23, at 1590 (“[D]efense counsel’s commitment is not to accuracy; it is to his or her clients, many of whom want inaccuracy to mask their guilt.”).

249. Brown, *supra* note 23, at 1643 (“The guilty and innocent both want to discredit state evidence—the guilty have little interest in accuracy.”).

250. See *supra* Subpart III.A.2.

251. See *supra* Subpart III.A.3.d.

252. See *supra* notes 90–99 and accompanying text.

253. See *supra* note 91 and accompanying text.

254. See *supra* Subpart III.B.

255. See, e.g., *Gerstein v. Pugh*, 420 U.S. 103, 123 (1975) (noting that pretrial detention impairs the defendant’s “ability to assist in preparation of his defense”); *Barker v. Wingo*, 407 U.S. 514, 533 (1972) (stating that pretrial detention undermines the defendant’s ability to “prepare his defense”); *supra* notes 190–200 and accompanying text.

256. See *supra* Subpart III.A.3.b.

suspect fails to promote accuracy. Fifth, accuracy fails to explain why the Sixth Amendment right to a speedy trial is offense neutral.²⁵⁷ The “most serious” forms of prejudice to the defendant this right is meant to prevent are the death, disappearance, or fading memories of witnesses and the degradation or disappearance of physical evidence.²⁵⁸ Because “excessive delay presumptively compromises the reliability of a trial,”²⁵⁹ this equally allocated right should be proportionally allocated based on the accuracy rationale. Sixth, accuracy fails to explain why the offense-neutral right that the prosecutor bears the burden of proving guilt beyond a reasonable doubt²⁶⁰ is not inversely proportional. Because the evidentiary standard is “truth-impairing,”²⁶¹ and if our interest in accuracy increases with increasing offense severity, the reasonable doubt standard of proof should weaken with increasing offense severity so as to promote accuracy.

V. PROBLEMS WITH UNEQUALLY ALLOCATING RIGHTS

Part IV argued that the rationales for proportional and inversely proportional allocations of rights were in conflict and thus problematic. It next proposed the most promising alternative rationales. Those too failed. That neither the rationales offered by proponents of unequal allocations nor the most promising alternative rationales are adequate suggests that there is no satisfactory explanation of why unequally allocated rights are allocated which way. Even if satisfactory rationales could be identified, this Part identifies two additional problems for varying rights based on offense severity. First, such unequal allocations encourage prosecutors and legislatures to manipulate offense severity to minimize the rights of suspects and defendants. Second, proportionally allocating rights places suspects and defendants in unconstitutionally coercive dilemmas in which they must relinquish one constitutional right in order to exercise another.

A. *Manipulation by Prosecutors and Legislatures*

Prosecutors manipulate proportional rights.²⁶² They sometimes forego filing more serious charges to preclude defendants’ eligibility for proportional rights such as appointed counsel and jury trial,

257. See *Argersinger v. Hamlin*, 407 U.S. 25, 28 (1972) (noting that the speedy trial right applies equally regardless of offense severity).

258. *Barker*, 407 U.S. at 532.

259. *Doggett v. United States*, 505 U.S. 647, 655 (1992).

260. See *In re Winship*, 397 U.S. 358, 362 (1970) (allocating the right equally).

261. Stacy, *supra* note 230, at 1405 (“Depending on one’s definition of ‘accuracy,’ the reasonable doubt standard may be regarded as truth-impairing.”).

262. See Crane, *supra* note 27, at 782, 811–18; Schroeder, *supra* note 7, at 508–09.

thereby minimizing the chances of an acquittal.²⁶³ Paul Crane explains that because prosecutors are “conviction maximizers,” they engage in “strategic undercharging” to deny defendants the procedural advantages, such as the rights to appointed counsel and jury trial that attach to more serious charges, so as to increase the likelihood of conviction.²⁶⁴ Issa Kohler-Huasmann notes that it is “standard practice” among New York City prosecutors to engage in charge reductions “to ensure a bench trial” to increase convictions.²⁶⁵ That is, prosecutors sometimes engage in strategic undercharging because a lesser charge of a misdemeanor may entail a more likely conviction.²⁶⁶ Because of the enhanced procedural safeguards and lower probability of conviction for felony charges, “the defendant who is charged with a misdemeanor may be left at a greater disadvantage than if he had been charged with a felony.”²⁶⁷

Inversely proportional allocations of rights also induce government manipulation.²⁶⁸ Justice Marshall noted the historical trend toward broadening the scope of felonies and expressed concern about the applicability or strength of constitutional rights relying on, or deferring to, legislative distinctions between felonies and misdemeanors.²⁶⁹ As Volokh observes, “when [increasing crime] severity leads to less constitutional protection, the legislature would often be able to easily get that lowering of protection just by upgrading the offense.”²⁷⁰ William Schroeder agrees that the

263. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 192 n.51 (1968) (Harlan, J. dissenting) (quoting ERNST W. PUTTKAMMER, *ADMINISTRATION OF CRIMINAL LAW* 87–88 (1953)) (noting “that the ‘huge proportion’ of criminal charges for which jury trial has not been available in America is increased by the judicious action of weary prosecutors”).

264. See Crane, *supra* note 27, at 782, 811–18.

265. Kohler-Hausmann, *supra* note 31, at 659 n.133, 662 n.142.

266. See Crane, *supra* note 27, at 796.

267. *Id.* at 781.

268. See, e.g., Kamisar, *supra* note 125, at 23–29 (asking skeptically as to an inversely proportional allocation of the exclusionary rule: “Is a Short List of ‘Serious Crimes’ Likely to Stay Short?”); Kerr, *supra* note 30, at 581 (“[A]ny rule that hinges governmental power on the type of offense creates a strong incentive for Congress to expand the list of eligible offenses over time, watering down the protection. . . . All it takes is one compelling case involving a crime not on the list for Congress to expand the list to include that crime.”); Luna, *supra* note 1, at 786 (“Even a sliding scale adopting limited categories of serious offenses will face tremendous pressure to expand upon those crimes exempted from the exclusionary rule.”). But see Stuntz, *supra* note 1, at 869 (arguing that an offense-neutral Fourth Amendment “creates enormous potential for government manipulation”); *id.* at 870 (“[Such an allocation] encourages prosecutors to use some crimes as excuses for investigating others . . .”).

269. See *United States v. Watson*, 423 U.S. 411, 438–43 (1976) (Marshall, J., dissenting).

270. Volokh, *supra* note 13, at 1974.

felony/misdemeanor distinction can be “manipulated and abused” by both the prosecution and the legislature.²⁷¹ Inversely proportional allocations give “legislatures . . . an incentive to readily expand the permissible range of searches by increasing the authorized penalties for various offenses.”²⁷²

Schroeder, however, dismisses this minimization of rights by manipulation of crime gradations as a serious problem.²⁷³ Along with the incentive to expand the scope of searches by increasing offense or punishment severity, there is an equal and opposite incentive: “[L]egislatures inclined to reclassify crimes would face the competing problem that more severe treatment for minor crimes could mean more jury trials and thus more expense.”²⁷⁴ Under Schroeder’s view, any temptation by the prosecution to manipulatively overcharge so as to decrease inversely proportional rights will be held in check by the temptation to manipulatively undercharge so as to decrease proportional rights.²⁷⁵ That is, each type of manipulation will be checked and balanced by the equal and opposite manipulation.

But rather than equal and opposite manipulative incentives neutralizing each other, they may exacerbate the manipulative effect. As Volokh acknowledges, by legislators upgrading the offense but still supplying sufficient alternative charges or sentences, “the prosecutor can investigate the crime as a felony but prosecute it as a nonjailable misdemeanor.”²⁷⁶ Rather than cancelling each other out, the equal and opposite incentives may compound the problem. Notice how this minimizes both proportional and inversely proportional rights. If investigated (and initially charged) as a greater crime, the suspect’s or defendant’s inversely proportional rights, including the Fourth and Eighth Amendment rights, are weaker.²⁷⁷ But if ultimately charged and tried as a lesser crime, the defendant’s proportional rights, including appointed counsel and jury trial, are weaker.²⁷⁸ By manipulation of both types of unequally allocated rights, the state can maximize the minimization of defendants’ rights.

B. Unconstitutionally Coercive Dilemmas for Defendants

The previous Subpart addressed how both proportional and inversely proportional allocations incentivize both legislatures and prosecutors to manipulate and weaken suspects’ and defendants’

271. Schroeder, *supra* note 7, at 508–09, 517; *id.* at 508 (“In many jurisdictions the same conduct can be either a misdemeanor or felony depending on how it is prosecuted or depending on the institution to which the offender is sentenced.”).

272. *Id.* at 517.

273. *See id.*

274. *Id.*

275. *See id.*

276. Volokh, *supra* note 13, at 1974.

277. *See supra* Subpart III.A–B.

278. *See supra* Subpart II.A–B.

rights. This Subpart argues that proportional allocations manipulate suspects and defendants into unconstitutionally coercive dilemmas in which one constitutional right must be relinquished in order to exercise another.²⁷⁹ Proportional rights do this because, by their very nature, they have a heightened capacity to conflict with the general function of other rights.²⁸⁰ By their nature, proportional rights “attach or strengthen with increasing offense or punishment severity.”²⁸¹ “But the general function of defendants’ other constitutional rights facilitates just the opposite—minimizing the seriousness of charge, minimizing the likelihood of guilt, and minimizing the likelihood and severity of punishment.”²⁸²

For example, “the Fifth Amendment privilege against self-incrimination²⁸³ and the Sixth Amendment Confrontation Clause right to cross-examine adverse witnesses²⁸⁴ facilitate a defendant’s minimization of inculpatory evidence.”²⁸⁵ “Other constitutional rights—the Due Process Clause²⁸⁶ rights to testify in one’s own defense²⁸⁷ and discover evidence in the prosecutor’s possession²⁸⁸—facilitate the development of exculpatory evidence.”²⁸⁹ Suppressing inculpatory and raising exculpatory evidence through the successful exercise of these rights minimize the gravity of the charge, the likelihood of conviction, and the severity of punishment.²⁹⁰ As I explained in a previous article:

In turn, that reduction of offense or punishment severity reduces applicability of proportional rights—rights that attach or strengthen as the severity of the offense or punishment increases. Consequently, successful exercise of some rights may result in the loss of or failure to attain proportional rights. Maintaining or attaining proportional rights may require

279. This Subpart is based on Christopher, *supra* note 35, at 707–12.

280. *Id.* at 717.

281. *Id.* at 708.

282. *Id.*

283. U.S. CONST. amend. V (“No person . . . shall be compelled in any criminal case to be a witness against himself . . .”).

284. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .”).

285. Christopher, *supra* note 35, at 708.

286. U.S. CONST. amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .”).

287. *See* *Ferguson v. Georgia*, 365 U.S. 570, 596 (1961) (holding that a defendant has a Fourteenth Amendment Due Process Clause “right to have his counsel question him to elicit his statement”).

288. *See* *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (ruling that the prosecution’s suppression of exculpatory evidence violated the Fourteenth Amendment’s Due Process Clause).

289. Christopher, *supra* note 35, at 708–09.

290. *Id.* at 709

foregoing exercise of other rights that reduce offense or punishment severity. Proportional rights, by their very nature, potentially place right-holders in the dilemma of having to choose between rights.²⁹¹

To enjoy proportional rights, “defendants may have to forego exercise of other constitutional rights; exercise of these other rights may preclude enjoyment of [proportional rights].”²⁹²

To illustrate how this heightened potential for conflict could result in an actual conflict, suppose an indigent is charged with both a misdemeanor (ineligible for constitutionally guaranteed appointed counsel and jury trial)²⁹³ and a felony (triggering constitutional guarantees of those rights).²⁹⁴ Because the misdemeanor and felony arise out of the same act or transaction, the indigent will be tried jointly²⁹⁵ before a jury²⁹⁶ and be represented by appointed counsel on

291. *Id.* at 718.

292. *See id.* at 709.

In contrast to proportional rights, neither [offense-neutral] nor [inversely proportional] rights have the same enhanced capacity for conflict. A defendant reducing the severity of offense or punishment by the successful exercise of rights does not diminish applicability of [offense-neutral] rights because they apply equally regardless of offense or punishment severity. Similarly, defendants reducing the severity of offense or punishment by the successful exercise of rights only increase, not decrease, applicability of [inversely proportional] rights because those attach or strengthen as offense or punishment severity decreases. As a result, [offense-neutral] and [inversely proportional] rights, by their very nature, lack the same potential for conflict with other rights as proportional rights.

Id. at 718.

293. *See* *Scott v. Illinois*, 440 U.S. 367, 369, 373–74 (1979) (holding that the Constitution does not require a state trial court to appoint counsel to an indigent defendant charged with a misdemeanor for which imprisonment was not imposed); *Callan v. Wilson*, 127 U.S. 540, 557 (1888) (exempting from the constitutional right of trial by jury “that class or grade of offences called petty offences”).

294. *See* *Duncan v. Louisiana*, 391 U.S. 145, 154 (1968) (“[T]he right to jury trial in serious criminal cases is a fundamental right . . .”); *Johnson v. Zerbst*, 304 U.S. 458, 459–60, 463 (1938) (extending the right to appointment of counsel to indigent defendants charged with felonies).

295. *See, e.g.*, FED. R. CRIM. P. 8(a) (authorizing joinder of offenses that are “based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan”); *LAFAVE ET AL.*, *supra* note 6, § 17.1(a), at 1024 (“It is commonly provided that offenses committed at the same time and place or otherwise related to one another may be joined together so that the defendant may be prosecuted for all of them in a single trial.”).

296. *See, e.g.*, D.C. CODE § 16-705(b-1) (“If a defendant in a criminal case is charged with . . . at least one jury demandable offense and one non-jury demandable offense, the trial for all offenses charged against that defendant shall be by jury . . .”); *State v. Huebner*, 505 A.2d 1331, 1335 (Md. 1986) (holding that

both charges.²⁹⁷ The indigent has a Fifth Amendment double jeopardy²⁹⁸ claim only against the felony.²⁹⁹ But the indigent realizes that by prevailing on the double jeopardy claim, the dismissal of the felony would leave the sole charge of the misdemeanor, affording neither appointed counsel nor jury trial.³⁰⁰ (Alternatively, the indigent is charged only with the felony. But the indigent realizes that by prevailing on the double jeopardy claim and obtaining dismissal of the felony, the prosecutor will subsequently charge the misdemeanor, affording neither appointed counsel nor jury trial.³⁰¹)

because right to jury trial attached to one offense it also attached to all “other offenses [that] arose out of the same circumstances”).

297. Though not a formal rule, it is common practice for reasons of economy for an indigent charged with both a felony (constitutionally entitled to appointed counsel) and a misdemeanor (unentitled to appointed counsel) to be represented by appointed counsel on both charges. See Christopher, *supra* note 35, at 726 n.144 (citing Interview with Anonymous, Fed. Crim. Def. Prac. on Fed. Pub. Defs. Panel (Mar. 3, 2017); Interview with Jill Webb, Cmty. Res. Coordinator, Tulsa Cnty. Pub. Defs. Office (Mar. 16, 2017)).

298. The double jeopardy clause prohibits subjecting a defendant “for the same offence to be twice put in jeopardy of life or limb.” U.S. CONST. amend. V.

299. For example, the felony possibly constitutes the “same offense” for double jeopardy purposes as does a lesser offense for which the indigent was previously found guilty and punished. Prosecution of a crime following the punishment of a lesser-included offense arising out of the same incident violates double jeopardy. See *Brown v. Ohio*, 432 U.S. 161, 169 (1977) (“[T]he Fifth Amendment [Double Jeopardy Clause] forbids successive prosecution and cumulative punishment for a greater and lesser included offense.”).

300. A double jeopardy claim may be applicable to one charge but not another because there is no mandatory “same transaction” joinder protection under the Fifth Amendment prohibition against double jeopardy. See, e.g., *LAFAVE ET AL.*, *supra* note 6, § 17.4(c), at 1056 (citing *Brown*, 432 U.S. 161) (“[A] majority of the Court has refused to accept the ‘same transaction’ test as a constitutional imperative . . .”).

301. Similar conflicts can arise under alternative contexts. Suppose an indigent is charged with two misdemeanors (Misdemeanors *A* and *B*). Misdemeanor *A* is eligible for appointed counsel under *Scott* and guarantees a right to jury trial under *Duncan*, but Misdemeanor *B* is eligible for neither. Based on Misdemeanor *A*, the indigent receives a jury trial and appointed counsel. Because both misdemeanors arose out of the same act or transaction, the indigent will be jointly tried before a jury and represented by appointed counsel on both charges. The indigent has a double jeopardy claim only against Misdemeanor *A*. But the indigent realizes that by prevailing on the double jeopardy claim, the dismissal of Misdemeanor *A* would leave the sole charge of Misdemeanor *B*, affording neither appointed counsel nor jury trial.

Alternatively, the indigent is charged only with Misdemeanor *A*. She realizes that by prevailing on the double jeopardy claim and obtaining dismissal of Misdemeanor *A*, the prosecutor will subsequently charge her with Misdemeanor *B*, affording neither appointed counsel nor jury trial.

The indigent defendant faces the following dilemma. Exercising their Fifth Amendment right against double jeopardy risks loss of their Sixth Amendment rights to jury trial and appointed counsel. Ensuring appointed counsel and a jury trial requires foregoing their Fifth Amendment right. A proportional allocation causes the rights to conflict and compels the indigent to choose between their Sixth Amendment rights to appointed counsel and jury trial and their Fifth Amendment right against double jeopardy. As to a coercive choice between the double jeopardy right and another right, the Court declared that “[t]he law should not, and in our judgment does not, place the defendant in such an incredible dilemma.”³⁰² Similar conflicts arise between those proportional rights and as many as ten other constitutional rights.³⁰³

These conflicts between proportional rights and defendants’ other rights are arguably unconstitutional. Generally, burdening, penalizing, chilling, or deterring the exercise of a constitutional right is unconstitutional.³⁰⁴ More specifically, a “defendant should not be forced to relinquish one constitutional right to obtain another.”³⁰⁵ As

302. *Green v. United States*, 355 U.S. 184, 193 (1957).

303. See Christopher, *supra* note 35, at 726–40 (depicting conflicts between the proportional rights of appointed counsel for indigents and jury trial and the following ten constitutional rights: (i) Fifth Amendment right against double jeopardy, (ii) Sixth Amendment speedy trial right, (iii) Due Process Clause right against vindictive prosecution, (iv) Due Process Clause right to discovery, (v) Fifth Amendment privilege against self-incrimination, (vi) Sixth Amendment Confrontation Clause right, (vii) Eighth Amendment right against cruel and unusual punishment, (viii) Fourth Amendment right against unreasonable searches and seizures, (ix) Sixth Amendment right to effective assistance of counsel, and (x) Due Process Clause right to testify in one’s own defense).

304. See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (citing *Chaffin v. Stynchcombe*, 412 U.S. 17, 32–33 n.20 (1973)) (noting that “penaliz[ing] a person’s reliance on his legal rights is ‘patently unconstitutional’”); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) (“There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price.”). This principle, however, is not uniformly applied. See, e.g., *Corbitt v. New Jersey*, 439 U.S. 212, 218 (1978) (“[N]ot every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid.”).

305. LAFAVE ET AL., *supra* note 6, § 11.2(g), at 727. Of course, some constitutional rights—those that are “logical converses” to one another—do conflict constitutionally. Peter Westen, *Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another*, 66 IOWA L. REV. 741, 743 n.7 (1981). For example, defendants have both the right to testify and to remain silent. *Id.* Defendants cannot possibly simultaneously exercise both rights—defendants must necessarily choose one or the other “because the two activities are logically incompatible.” *Id.* But the appointed counsel and jury trial rights and the rights with which they conflict are not such logically opposed rights. As rights meant to protect and complement other rights, the rights to appointed counsel and jury trial are to be enjoyed *in tandem* with the other rights. See, e.g., Alexandra Natapoff, Gideon *Skepticism*, 70 WASH. & LEE L. REV. 1049, 1051

the Court in *Simmons v. United States*³⁰⁶ declared, “we find it intolerable that one constitutional right should have to be surrendered in order to assert another.”³⁰⁷ Based on the *Simmons* principle, the proportional allocation unconstitutionally places indigents in a coercive dilemma in which their Fifth Amendment right must be relinquished in order to ensure enjoyment of their Sixth Amendment rights to jury trial and appointed counsel, and vice versa.³⁰⁸

VI. CONCLUSION

Constitutional rights of criminal procedure should apply equally regardless of the severity of the offense suspected or charged or the severity of the punishment. Neither the rationale for rights varying proportionally nor the rationale for rights varying inversely proportionally with increasing offense severity is persuasive. Moreover, even if each rationale seems persuasive in isolation, the rationales are collectively unpersuasive and are thus inconsistent. The rationale supporting a proportional allocation applies to inversely proportional rights; the rationale supporting an inversely proportional allocation also applies to proportional rights. As a result, the conflicting rationales prove too much. Therefore, at least one of the rationales is wrong. Even if satisfactory principled rationales can be identified for proportional and inversely proportional rights, they nonetheless incur problems. Both types of unequal allocation are subject to abuse and manipulation by legislatures and prosecutors who can exploit gradations of offense severity to minimize suspects’ and defendants’ constitutional rights. In addition, proportional allocations enhance the possibility of conflicting constitutional rights. They place defendants in unconstitutionally coercive dilemmas in which they must relinquish one constitutional right in order to enjoy another. Because of these problems and the lack of a satisfactory rationale to explain why which rights are allocated which way, constitutional rights of criminal

(2013) (quoting *Penson v. Ohio*, 488 U.S. 75, 84 (1988)) (referring to the right to the assistance of counsel as “the right that ensures that ‘all other rights of the accused are protected’”). Similar to the importance of the assistance of counsel, a jury trial is “fundamental to the American scheme of justice.” *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). It is meant to “complement” all the other rights of defendants. *Id.* at 149 n.14.

306. 390 U.S. 377 (1968).

307. *Id.* at 394.

308. For an argument as to how the proportional allocation of the Sixth Amendment right to appointed counsel (but not the right to jury trial) can conflict with other constitutional rights in a way that violates both the Fourteenth Amendment Due Process and Equal Protection Clauses, see Christopher, *supra* note 35, at 754–63.

procedure should apply equally regardless of offense or punishment severity.