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### Foreword: Criminal Procedure in Winter

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## FOREWORD: CRIMINAL PROCEDURE IN WINTER

*Daniel Epps\**

Six months before the 2016 presidential election, Harvard Law Professor Mark Tushnet charted a course for the future of constitutional law on the assumption—one that seemed eminently reasonable at the time—that Hillary Clinton would win. It was time for liberals to abandon “defensive crouch constitutionalism,” Tushnet argued.<sup>1</sup> Although the federal judiciary had been controlled by conservatives for decades, the time was finally nigh for a long-awaited, more liberal Supreme Court to aggressively rewrite constitutional doctrine.<sup>2</sup> Tushnet mapped out a number of priorities for the future, including overruling or narrowing a number of disfavored precedents and strategically deploying doctrines to aid liberal political causes on the ground.<sup>3</sup> Yet in closing, Tushnet recognized that he might have been jumping the gun: “Of course all bets are off if Donald Trump becomes President. But if he does, constitutional doctrine is going to be the least of our worries.”<sup>4</sup>

Tushnet did not acquit himself particularly well as a chicken-counter. But as to that last remark, he had a point. Given the great risks that many believe Trump’s ascension to the presidency poses for American democracy and for the world more generally, perhaps it’s silly to be too bothered about what sequences of words might appear printed in future volumes of the *United States Reports*. Still, that hasn’t stopped me, like many others, from wondering—and, yes, worrying—about the election’s consequences for constitutional

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1. Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKINIZATION (May 6, 2016), <https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html>.

2. *Id.*

3. *Id.*

4. *Id.*

doctrine. Particularly, the consequences for the large body of constitutional doctrine regulating the criminal justice system that we call criminal procedure.

And here there is reason to worry, at least for those who think that criminal procedure should do more to rein in the excesses of the American criminal justice system. Given possible changes to the Supreme Court's membership, numerous doctrines currently commanding the support of slim majorities could fall or be sharply curtailed. At the very least, the Court is unlikely to extend criminal procedure doctrine in novel ways in the immediate future. Those who were holding their breath for the Court to recognize new rights, or, say, to declare the death penalty categorically forbidden—possibilities that felt tantalizingly close just months ago, when Hillary Clinton appeared on her way to becoming President—are likely to be disappointed.

Given what might have been, criminal justice reformers will find these circumstances profoundly disappointing. But this situation has important lessons for how we think about constitutional criminal procedure—its past, and its future. This Foreword takes stock of where constitutional criminal procedure stands given the election's consequences for the membership of the Supreme Court. This forum provides a particularly appropriate opportunity for such reflection. Though the Supreme Court decided some criminal procedure decisions of some consequence in October Term 2016,<sup>5</sup> by far the most significant event that occurred that Term at the Court was not a case but a change in the Court's membership with the addition of Justice Gorsuch.

In what follows, I offer some predictions on the path of the Court's criminal procedure jurisprudence and provide some thoughts

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5. By my lights, the most important constitutional cases involving, or at least touching on, the criminal process include *Lee v. United States*, 137 S. Ct. 1958 (2017) (holding that defendant had shown prejudice from his attorney's errors about the immigration consequences of a guilty plea); *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) (holding unconstitutional a statute prohibiting registered sex offenders from using many social media sites); *County of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017) (holding that police officer defendants were entitled to qualified immunity arising out of a non-fatal shooting); *Nelson v. Colorado*, 137 S. Ct. 1249 (2017) (holding unconstitutional a state statute requiring defendants whose convictions were overturned to prove innocence by clear and convincing evidence to obtain refunds of fines and fees). Though the cases' implications for criminal justice are not yet fully clear, *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), which put significant restrictions on *Bivens* liability generally, might be last Term's most significant constitutional ruling overall.

about how criminal procedure scholarship might best respond to the future that looms ahead. In my view, present circumstances present an overdue opportunity for scholars to reconsider the notion that courts are the solution to democratic failure. Instead, energy would be better directed at questions of structure, power, politics, and localism.

### I. THE STORY SO FAR

To gain some perspective on our current situation, I'll provide here a very brief overview of the broad history of criminal procedure. Start with the beginning. The Constitution reflects significant concern for criminal justice. Its original text itself regulates the criminal process,<sup>6</sup> and four amendments of the original Bill of Rights do too.<sup>7</sup> Nonetheless, for the first century or so after the founding, federal constitutional law played a relatively small role in regulating American criminal justice. At first, federal constitutional law did not govern the state criminal process at all.<sup>8</sup> And federal criminal law represented a small slice of criminal justice generally.<sup>9</sup>

Both facts began to change in the twentieth century. Federal criminal law expanded as commerce between the states increased and as the federal government became hungrier for tax revenue and more eager to regulate economic activity.<sup>10</sup> And federal constitutional law started to have a lot more to say about state criminal justice because of the Fourteenth Amendment.<sup>11</sup>

Though ratified in 1868, that amendment was not immediately understood to impose the Bill of Rights' requirements on state

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6. See U.S. CONST. art. III, § 2, cl. 3 (jury trial guarantee); see also *id.* art. III, § 3 (regulating punishment of treason); *id.* art. IV, § 2, cl. 2 (providing for extradition of indicted criminals between states).

7. See *id.* amend. V (Grand Jury, Double Jeopardy, and Self-Incrimination clauses); *id.* amend. VI (speedy trial, impartial jury, confrontation, and compulsory-process guarantees); *id.* amend. VIII (cruel and unusual punishment); see also *id.* amend. IV (prohibiting unreasonable searches and seizures). I note the Fourth Amendment last because at the founding, it was not solely (or perhaps even primarily) aimed at *criminal* proceedings as such. See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 758 (1994) (“[U]nlike the Fifth, Sixth, and Eighth Amendments, which specially apply in criminal contexts, the Fourth Amendment applies equally to civil and criminal law enforcement.”).

8. Before the Fourteenth Amendment, the Bill of Rights was understood to apply only to the federal government. See *Barron v. Mayor of Baltimore*, 32 U.S. 243, 243 (1833).

9. See LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 261–62 (1993).

10. See *id.* at 261–67.

11. *Id.* at 267–69.

criminal prosecutions.<sup>12</sup> But over the coming years, the Court would increasingly use the hook of the Fourteenth Amendment's Due Process Clause in order to regulate the state criminal process. This effort picked up steam slowly at first; before 1920, the Supreme Court had overturned only a small number of state court convictions.<sup>13</sup> By 1940, the Court had become more aggressive in its interventions.<sup>14</sup> Yet as late as 1960, there was still not "a substantial body of law regulating the criminal process."<sup>15</sup>

That finally changed in the 1960s. In that decade, the Warren Court dramatically expanded the scope of constitutional criminal procedure, imposing most of the requirements of the Bill of Rights on the state criminal process.<sup>16</sup> *Mapp v. Ohio*<sup>17</sup> imposed the Fourth Amendment exclusionary rule on the states.<sup>18</sup> *Gideon v. Wainwright*<sup>19</sup> guaranteed state-provided counsel in all serious criminal prosecutions.<sup>20</sup> *Miranda v. Arizona*<sup>21</sup> imposed an elaborate set of rules on police conducting interrogations.<sup>22</sup> *Massiah v. United States*<sup>23</sup> prevented law enforcement from questioning defendants without counsel after indictment.<sup>24</sup> *Duncan v. Louisiana*<sup>25</sup> guaranteed trial by jury for non-petty offenses.<sup>26</sup> *Brady v. Maryland*<sup>27</sup> required prosecutors to give defendants exculpatory evidence.<sup>28</sup> These cases and others "produced what is widely known as the 'criminal procedure revolution.'"<sup>29</sup>

Yet this revolutionary fervor did not last. Rising crime became a

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12. See *Hurtado v. California*, 110 U.S. 516 (1884) (refusing to require states to comply with Fifth Amendment's grand-jury requirement).

13. Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 48 (2000).

14. *Id.*

15. RONALD J. ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 79 (2d ed. 2005).

16. *Id.* at 80.

17. 367 U.S. 643 (1961).

18. *Id.* at 660.

19. 372 U.S. 335 (1963).

20. *Id.* at 339–40, 348.

21. 348 U.S. 436 (1966).

22. *Id.* at 444–45.

23. 377 U.S. 201 (1964).

24. *Id.* at 204–06.

25. 391 U.S. 145 (1968).

26. *Id.* at 158–59.

27. 373 U.S. 83 (1963).

28. *Id.* at 90–91.

29. Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1363–64 (2004).

national political issue, and Richard Nixon was elected president in 1968 on a platform that included sharp criticism of the Warren Court.<sup>30</sup> Nixon was ultimately able to replace four Justices, including Chief Justice Warren (with Warren Burger), and he and other Republican presidents were responsible for eleven straight appointments to the Court between 1969 and 1991.<sup>31</sup>

The path of constitutional criminal procedure doctrine changed accordingly—if not immediately. The early Burger Court issued some opinions in the Warren Court spirit: *Bivens v. Six Unknown Named Agents*<sup>32</sup> recognized an implied constitutional tort cause of action against federal law-enforcement officers.<sup>33</sup> And *Furman v. Georgia*<sup>34</sup> essentially struck down every death penalty statute on the books nationwide.<sup>35</sup> But fairly quickly, the Court became less interested in heavy-handed supervision of criminal justice. In *Gregg v. Georgia*,<sup>36</sup> for example, the Court walked back from the precipice it had nearly jumped off in *Furman* just four years earlier, again approving states' use of the death penalty.<sup>37</sup>

Particularly notable about the new era was how the Court made it significantly harder to obtain meaningful remedies for constitutional violations.<sup>38</sup> *Teague v. Lane*<sup>39</sup> limited state prisoners' right to rely on new constitutional procedural rules announced after their convictions became final.<sup>40</sup> *Harlow v. Fitzgerald*<sup>41</sup> precluded liability for constitutional torts unless the defendant violated "clearly established law,"<sup>42</sup> a hole that the lower courts have driven trucks through with

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30. See TED GEST, CRIME & POLITICS 14–15 (2001).

31. See *Justices 1789 to Present*, SUP. CT. OF THE U.S., [https://www.supremecourt.gov/about/members\\_text.aspx](https://www.supremecourt.gov/about/members_text.aspx). In my enumeration, William Rehnquist is counted twice, as he was first appointed by President Nixon in 1972 before being elevated to Chief Justice by President Reagan in 1986. *Id.*

32. 403 U.S. 388 (1971).

33. *Id.* at 422.

34. 408 U.S. 238 (1972) (per curiam).

35. *Id.* at 239–40.

36. 428 U.S. 153 (1976). For a gripping history of the Supreme Court's capital punishment jurisprudence through *Gregg*, see EVAN J. MANDERY, A WILD JUSTICE (2013).

37. *Gregg*, 428 U.S. at 155.

38. See, e.g., Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2469 (1996).

39. 489 U.S. 288 (1989).

40. *Id.* at 290.

41. 457 U.S. 800 (1982).

42. *Id.* at 818.

little objection from the Court.<sup>43</sup> *United States v. Leon*<sup>44</sup> recognized a “good faith” exception to the exclusionary rule,<sup>45</sup> and later cases have continued to create or expand further exceptions.<sup>46</sup>

The last few decades have, to be sure, not provided an unbroken string of victories for government interests. Some scholars downplayed the idea that the Burger Court had effected a counter-revolution in criminal procedure.<sup>47</sup> In 1984, the Court recognized a right to effective assistance of counsel in *Strickland v. Washington*.<sup>48</sup> More recently, a line of Eighth Amendment decisions have restricted the circumstances under which capital punishment can be imposed,<sup>49</sup> as well as limiting the use of life without parole for juveniles.<sup>50</sup> And the Court, in large part due to efforts by Justice Scalia, reinvigorated the Sixth Amendment’s confrontation and jury trial rights.<sup>51</sup>

Still, in the bigger picture, it is hard to say that constitutional criminal procedure has had a particularly successful few decades. The United States prison population has grown to epidemic proportions.<sup>52</sup> A wave of DNA exonerations has undermined confidence in the

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43. For a troubling recent example, see *Young v. Borders*, where the Eleventh Circuit extended qualified immunity when “police tactically surrounded the home’s only exit, drew their guns, repeatedly slammed on the door without identifying themselves as law enforcement, and then shot and killed [the occupant] when he opened the door, as he was stepping back into his home.” 850 F.3d 1274, 1288 (11th Cir. 2017) (Martin, J., dissenting from denial of rehearing en banc). The Court seems content with the breadth of qualified immunity, and indeed reaffirmed the doctrine’s importance during October Term 2016 in *County of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017).

44. 468 U.S. 897 (1984).

45. *Id.* at 905.

46. See, e.g., *Davis v. United States*, 564 U.S. 229, 238–39 (2011) (holding that the good-faith doctrine applies when officers engage in unconstitutional search pursuant to binding but erroneous appellate precedent).

47. See, e.g., Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, in *POLICE PRACTICES AND THE LAW* 69, 72 (1982).

48. 466 U.S. 668, 687–88 (1984). *Strickland* broke little new ground, however; by 1984, “all the Federal Courts of Appeals and all but a few state courts” had recognized a constitutional right to “reasonably effective assistance” at trial. *Id.* at 683.

49. See *Kennedy v. Louisiana*, 554 U.S. 407, 446 (2008) (barring death penalty for child rape); *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (forbidding capital punishment for juvenile defendants); *Atkins v. Virginia*, 536 U.S. 304, 318–19 (2002) (forbidding capital punishment for intellectually disabled defendants).

50. See *Miller v. Alabama*, 567 U.S. 460, 479 (2012) (barring mandatory life without parole for juveniles); *Graham v. Florida*, 560 U.S. 48, 74–75 (2010) (forbidding life without parole for juvenile non-homicide offenders).

51. See *infra* notes 86–87.

52. Numerous observers in recent years have decried “mass incarceration.” See, e.g., TODD R. CLEAR & NATASHA A. FROST, *THE PUNISHMENT IMPERATIVE* (2014); MARIE GOTTSCHALK, *CAUGHT* (2014); JOHN PFAFF, *LOCKED IN* 1 (2017).

accuracy of adjudicative processes.<sup>53</sup> The justice system continues to produce disparate outcomes that are hard to call anything other than racist.<sup>54</sup> And despite increasing public attention to the problem of police violence, it remains difficult for victims to obtain justice through either tort suits<sup>55</sup> or criminal prosecution.<sup>56</sup> The Supreme Court has done little to address these problems.<sup>57</sup>

Quite recently, though, there were glimmers of change. Support for criminal justice reform had become increasingly mainstream, causing some scholars to argue that the political phenomenon that had driven mass incarceration was on its way out.<sup>58</sup> On the Court, several justices indicated interest in significant expansions of rights. Justice Breyer wrote to announce his newfound view that the death penalty was categorically cruel and unusual punishment, and Justice Ginsburg joined him.<sup>59</sup> Justice Kennedy signaled interest in declaring solitary confinement unconstitutional.<sup>60</sup> Justice Sotomayor made an impassioned plea for the Court to take greater account of how police practices impact people of color.<sup>61</sup> The Obama administration made some high-profile moves related to criminal justice issues,<sup>62</sup> and the President himself even published an article in the *Harvard Law*

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53. See generally BRANDON L. GARRETT, *CONVICTING THE INNOCENT* (2011) (analyzing the first 250 wrongful convictions that were later overturned based on DNA testing).

54. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW* (rev. ed. 2012) (arguing that the criminal justice system is a modern system of racial control).

55. Qualified immunity remains a difficult bar for plaintiffs to clear. See *supra* note 43.

56. See, e.g., Reuben Fischer-Baum, *Allegations of Police Misconduct Rarely Result In Charges*, FIVETHIRTYEIGHT (Nov. 25, 2014, 9:45 AM), <https://fivethirtyeight.com/features/allegations-of-police-misconduct-rarely-result-in-charges/>.

57. In some cases, the Supreme Court has exacerbated them. For example, the Court aggressively reined in damages suits against law-enforcement officers via its summary-reversal power. See William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 3 (2015) (noting multiple pro-government summary reversals in cases arising under § 1983); *Salazar-Limon v. City of Houston*, 137 S. Ct. 1277, 1282 (2017) (Sotomayor, J., dissenting from denial of certiorari) (noting “a disturbing trend regarding the use of this Court’s resources” in summary reversals).

58. See CLEAR & FROST, *supra* note 52. For an opposing view arguing that the political forces supporting mass incarceration are powerful and will not disappear overnight, see GOTTSCHALK, *supra* note 52.

59. See *Glossip v. Gross*, 135 S. Ct. 2726, 2756 (2015) (Breyer, J., dissenting).

60. See *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring).

61. See *Utah v. Strieff*, 136 S. Ct. 2056, 2069–71 (2016) (Sotomayor, J., dissenting).

62. For example, the Department of Justice announced efforts to reduce reliance on private prisons. This directive was quickly rescinded by new Attorney General Jeff Sessions. See Matt Zapotosky, *Justice Department Will Again Use Private Prisons*, WASH. POST (Feb. 23, 2017), [https://www.washingtonpost.com/world/national-security/justice-department-will-again-use-private-prisons/2017/02/23/da395d02-fa0e-11e6-be05-1a3817ac21a5\\_story.html?utm\\_term=.25fe1f5d0add](https://www.washingtonpost.com/world/national-security/justice-department-will-again-use-private-prisons/2017/02/23/da395d02-fa0e-11e6-be05-1a3817ac21a5_story.html?utm_term=.25fe1f5d0add).



*Review* trumpeting his efforts.<sup>63</sup>

And as the 2016 election approached, it looked like liberals might finally have a chance to control the Supreme Court after so long in the wilderness. Justice Scalia's death in February 2016 created an immediate vacancy. And it seemed possible, or even likely, that more vacancies on the Court would follow in short order, given the age of several of the sitting Justices. Tushnet likely spoke for many when he announced the impending end of "defensive crouch constitutionalism."<sup>64</sup>

To be sure, it was not obvious that change on criminal justice issues would happen overnight. President Obama's nominee, Merrick Garland, appeared fairly conservative on criminal issues.<sup>65</sup> Still, it was not totally clear that Clinton would re-nominate Garland if she won. And even if Garland took the bench, other, more liberal Justices might soon join him. It seemed not unrealistic to predict, for example, that soon a majority of the Court might hold the death penalty categorically forbidden.<sup>66</sup>

But then, of course, Donald Trump shocked the world by winning the election.

## II. WINTER IS COMING

Compared to what might have been, it's hard to overstate the consequences of the 2016 election for constitutional criminal procedure. Had things gone the other way, we might have seen a new flowering of rights and protections. Instead, what now approaches is a true winter for criminal procedure. A time of darkness and retreat. At the very least, a time in which little new can take root and grow.

Begin with the near future. Justice Gorsuch sits in Justice Scalia's seat. We don't know for sure how Justice Gorsuch might vote on criminal issues over the course of his career. He has been on the Court for a relatively short time, and we haven't seen his votes in many

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63. See Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811 (2017).

64. See Tushnet, *supra* note 1.

65. See Charlie Savage, *In Criminal Rulings, Garland Has Usually Sided with Law Enforcement*, N.Y. TIMES, (Mar. 22, 2016), <https://www.nytimes.com/2016/03/23/us/politics/merrick-garland-supreme-court-nominee.html>.

66. See CAROL S. STEIKER & JORDAN M. STEIKER, *COURTING DEATH* 255–80 (2016) (exploring the possibility that the Supreme Court could soon declare the death penalty unconstitutional).

criminal cases yet. But the few data points we have, plus a larger set of opinions from his time as a judge on the Tenth Circuit, provide some information. In what follows, I'll provide a brief analysis of Justice Gorsuch's criminal jurisprudence. That analysis has some intrinsic interest, but it's especially useful because of the seemingly close parallels between Justice Gorsuch's approach and that of his predecessor, Justice Scalia. I'll offer some thoughts as to what I think is good in the Scalia/Gorsuch approach, but I'll also stress the ways in which that approach is unable to address the most significant problems faced by the criminal justice system. Recognizing the shortcomings of the formalism championed by Justice Scalia, and that we should expect Justice Gorsuch to champion, is especially valuable, because that approach seems like the realistic best-case scenario for new appointments to the Court in the next few years.

Start with the good news. Justice Gorsuch won't be a reflexive vote in favor of the government's interests in criminal cases. He compares favorably to some of the potential alternatives—such as Eleventh Circuit Judge William Pryor, who could have been expected to vote more like Justice Alito (who usually favors government interests) on criminal issues. In some of his circuit opinions, Judge Gorsuch has appeared quite solicitous of defendants' rights—at least where those rights line up with his understanding of the Constitution's original meaning.

For example, in both *United States v. Carloss*<sup>67</sup> and *United States v. Ackerman*,<sup>68</sup> then-Judge Gorsuch ruled in favor of Fourth Amendment claims using originalist reasoning based on premises about common-law property protections,<sup>69</sup> an approach that Justice Gorsuch has seemed to adhere to in questions in oral argument in recent Fourth Amendment cases.<sup>70</sup> The journalist Radley Balko, an expert on police violence,<sup>71</sup> found these decisions “encouraging.”<sup>72</sup> In

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67. 818 F.3d 988 (10th Cir. 2016).

68. 831 F.3d 1292 (10th Cir. 2016).

69. See *Carloss*, 818 F.3d at 1006; *Ackerman*, 831 F.3d at 1301.

70. See Transcript of Oral Argument at 23, 46, *Byrd v. United States*, 138 S. Ct. 1518 (2018) (No. 16-1371); Transcript of Oral Argument at 45–46, *Collins v. Virginia*, 138 S. Ct. 1663 (2018) (No. 16-1027); Transcript of Oral Argument at 38, *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (No. 16-402).

71. See RADLEY BALKO, *RISE OF THE WARRIOR COP* (2013).

72. Radley Balko, *In Gorsuch, Trump Gave Democrats a Gift. They Should Take It.*, WASH. POST (Feb. 1, 2017), [https://www.washingtonpost.com/news/the-watch/wp/2017/02/01/in-gorsuch-trump-gave-democrats-a-gift-they-should-take-it/?utm\\_term=.7be7eef7de17](https://www.washingtonpost.com/news/the-watch/wp/2017/02/01/in-gorsuch-trump-gave-democrats-a-gift-they-should-take-it/?utm_term=.7be7eef7de17).

Balko's eyes, these opinions show that Justice Gorsuch is likely to hew closely to the Fourth Amendment approach of Justice Scalia, who "was often very good on the Fourth Amendment."<sup>73</sup>

Balko's assessment of Justice Scalia is correct as far as the substance of the Fourth Amendment is concerned. Especially in his later years on the Court, Justice Scalia wrote a number of important opinions defending Fourth Amendment rights. In *Kyllo v. United States*,<sup>74</sup> Justice Scalia concluded that police use of a thermal imaging device was a search normally requiring a warrant.<sup>75</sup> So too with GPS devices attached to cars in *United States v. Jones*.<sup>76</sup> Likewise, he authored the 5-4 opinion in *Florida v. Jardines*<sup>77</sup> holding that police use of a drug-sniffing dog on a homeowner's porch was a search.<sup>78</sup> In *Maryland v. King*,<sup>79</sup> another 5-4 decision, he dissented forcefully, arguing that taking DNA swabs from arrestees based on suspicion was unconstitutional.<sup>80</sup> And in *Arizona v. Gant*,<sup>81</sup> he provided the fifth vote to abandon a broad reading of *New York v. Belton*<sup>82</sup> that permitted automobile searches incident to the driver's arrest for any crime.<sup>83</sup> Though Justice Scalia's record as a Fourth Amendment champion is not spotless,<sup>84</sup> other good examples exist.<sup>85</sup>

Justice Scalia also defended defendants' rights in two aspects of Sixth Amendment jurisprudence: the jury trial right<sup>86</sup> and the

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73. *Id.*

74. 533 U.S. 27 (2001).

75. *Id.* at 34-35.

76. 565 U.S. 400 (2012).

77. 569 U.S. 1 (2013).

78. *Id.* at 11-12.

79. 569 U.S. 435 (2013).

80. *Id.* at 469.

81. 556 U.S. 332 (2009) (Scalia, J., concurring).

82. 453 U.S. 454 (1981).

83. *Gant*, 556 U.S. at 351-54.

84. Most notably, he authored *Whren v. United States*, 517 U.S. 806 (1996), which has been heavily criticized for approving the use of routine traffic stops as a pretext for investigating other crimes based on racial profiling. See, e.g., Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional: Racial Profiling and the Radical Objectivity of Whren v. United States*, 83 GEO. WASH. L. REV. 882, 884 (2015) (citing criticism). *Whren*, however, was a unanimous decision, so it's therefore weak evidence that Justice Scalia was particularly pro-government on Fourth Amendment issues. More troubling, perhaps, is his majority vote in the 5-4 *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), which permitted arrests for the violation of any crime.

85. See, e.g., *Bailey v. United States*, 568 U.S. 186, 204-05 (2013) (Scalia, J., concurring) (explaining why police lack authority to detain departing occupants of a home when executing a search warrant there).

86. In a long line of cases, the Court has held that the Sixth Amendment requires that juries, not judges, find facts that increase a defendant's sentence beyond the statutory maximum. Justice

Confrontation Clause.<sup>87</sup> On these issues, however, we have much less guidance from Judge Gorsuch's lower court opinions. A recent Sixth Amendment-focused analysis of those opinions found few useful data points outside of the ineffective-assistance-of-counsel context.<sup>88</sup>

But elsewhere there is more evidence of Justice Gorsuch's affinity for Justice Scalia's approach to criminal cases. Consider *United States v. Games-Perez*,<sup>89</sup> where then-Judge Gorsuch displayed a flair for textualism in criminal law—another Scalia trademark.<sup>90</sup> The defendant in *Games-Perez* was convicted of being a felon in possession of a weapon.<sup>91</sup> On appeal, he argued that the government should have had to prove he *knew* he was a felon when he possessed the weapon.<sup>92</sup> The majority rejected his argument as foreclosed by circuit precedent.<sup>93</sup>

Judge Gorsuch concurred in the judgment.<sup>94</sup> Though he found the case “easy” given precedent, he argued that the prior decision “simply can’t be squared with the text of the relevant statutes” and “defies

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Scalia played a crucial role in laying the intellectual foundation for these holdings. *See, e.g.,* *Almendarez-Torres v. United States*, 523 U.S. 224, 248 (1998) (Scalia, J., dissenting); *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring); *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220, 303 (2005) (Scalia, J., dissenting in part).

87. Dissenting in *Maryland v. Craig*, Justice Scalia argued that the majority had lost sight of the Confrontation Clause's meaning. *See* 497 U.S. 836, 863 (1990) (Scalia, J., dissenting); *see also* *White v. Illinois*, 502 U.S. 346, 359 (1992) (Thomas, J., concurring in part and in the judgment). Justice Scalia's reading of the Confrontation Clause ultimately prevailed in *Crawford v. Washington*, 541 U.S. 36, 69 (2004), overruling *Ohio v. Roberts*, 448 U.S. 56, 56–57 (1980).

88. *See* Abbee Cox & Katherine Moy, *Restraint and the Rights of Criminal Defendants: Judge Gorsuch on the Sixth Amendment*, 69 STAN. L. REV. ONLINE 140, 143 (2017). The authors concluded that Judge Gorsuch's approach in ineffective-assistance cases was fairly government-friendly. *See id.* at 143–45. Justice Gorsuch's votes as a Supreme Court justice provide some confirmation of that prediction; he joined the 5-4 majority in *Davila v. Davis*, 137 S. Ct. 2058 (2017), which held that federal habeas courts may not consider a procedurally defaulted claim of ineffective assistance of appellate counsel even if state post-conviction counsel provided ineffective assistance by failing to raise that claim. *Id.* at 2062–64.

89. 667 F.3d 1136 (10th Cir. 2012).

90. Justice Scalia often urged narrow textual readings of criminal statutes. *See, e.g.,* *Sekhar v. United States*, 133 S. Ct. 2720, 2723–27 (2013) (holding that Hobbs Act extortion does not include “attempting to compel a person to recommend that his employer approve an investment”); *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398 (1999) (upholding a narrow definition of bribery under 18 U.S.C. § 201). To be sure, though, Justice Scalia was an equal-opportunity textualist. *See, e.g.,* *Brogan v. United States*, 522 U.S. 398, 399, 408 (1998) (rejecting “an exception to criminal liability under 18 U. S. C. § 1001 for a false statement that consists of the mere denial of wrongdoing, the so-called ‘exculpatory no’”).

91. *Games-Perez*, 667 F.3d at 1136.

92. *Id.*

93. *Id.* at 1140.

94. *Id.* at 1142.

linguistic sense.”<sup>95</sup> When the Tenth Circuit denied rehearing en banc, Judge Gorsuch dissented, stressing the human stakes involved. “There can be fewer graver injustices in a society governed by the rule of law than imprisoning a man without requiring proof of his guilt under the written laws of the land,” he lamented.<sup>96</sup>

*Games-Perez* concerns substantive criminal law, not criminal procedure. But Justice Gorsuch’s opinions read as if they are motivated by concerns about constitutional values, rather than merely a preference for textualism for its own sake. Put another way: while there are many reasons one might endorse textualism,<sup>97</sup> Justice Gorsuch seems drawn to textualism at least in part because of deep-seated views about rule-of-law values. His concern for ensuring that defendants are convicted only under the correct interpretation of a criminal statute seems rooted in a faith that strictly following the formal separation of powers is the key to preserving liberty.

Indeed, one of the few data points from Justice Gorsuch’s brief tenure on the Supreme Court supports this take. In *Hicks v. United States*,<sup>98</sup> he concurred in the Court’s decision to grant certiorari, vacate the judgment below, and remand for further consideration.<sup>99</sup> The defendant had been sentenced to a 20-year mandatory minimum under a statute that was repealed by the Fair Sentencing Act before his sentencing.<sup>100</sup> The Court held in *Dorsey v. United States*<sup>101</sup> that defendants in that position were entitled to the benefit of the amended, more lenient, sentencing regime.<sup>102</sup> The defendant in *Hicks*, though, had failed to make that argument on appeal.<sup>103</sup> Over the Chief Justice’s strong objection, Justice Gorsuch agreed that Hicks should get to argue to the court of appeals that his sentence was plain error entitling him to relief.<sup>104</sup> Apparently troubled that “a man was wrongly

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95. *Id.* at 1143 (Gorsuch, J., concurring in the judgment).

96. *United States v. Games-Perez*, 695 F.3d 1104, 1117 (10th Cir. 2012) (Gorsuch, J., dissenting from denial of rehearing en banc).

97. For example, Adrian Vermeule defends textualism under an *institutional* rationale, arguing that, given judges’ limited capacities for acquiring information, the costs of judicial inquiry into extra-textual sources when interpreting statutes outweigh any benefits. See ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 183–205 (2006).

98. 137 S. Ct. 2000 (2017) (mem.).

99. *Id.* at 2000 (Gorsuch, J., concurring).

100. *Id.*

101. 567 U.S. 260 (2012).

102. *Id.* at 261.

103. *Hicks*, 137 S. Ct. at 2000.

104. *Id.*

sentenced to 20 years in prison,” Justice Gorsuch could not “think of a good reason to say no” to the defendant’s request.<sup>105</sup>

In several other circuit opinions, then-Judge Gorsuch wrote separately to emphasize separation-of-powers concerns. In *United States v. Nichols*,<sup>106</sup> for example, he dissented from denial of rehearing en banc to argue that the Sex Offender Registration and Notification Act<sup>107</sup> (SORNA) improperly delegated to the Attorney General the power to decide “whether and on what terms sex offenders convicted before the date of SORNA’s enactment should be required to register their location or face another criminal conviction.”<sup>108</sup> He argued that “[i]f the separation of powers means anything, it must mean that the prosecutor isn’t allowed to define the crimes he gets to enforce.”<sup>109</sup> And in two immigration opinions that have buoyed conservatives skeptical of the regulatory state, he questioned the *Chevron* doctrine on separation-of-powers grounds.<sup>110</sup>

Here, again, Justice Gorsuch has much in common with his predecessor. Justice Scalia was a staunch defender of formalism in the separation of powers, as he made clear in his famous dissent in *Morrison v. Olson*,<sup>111</sup> as well as in other writings.<sup>112</sup> Indeed, Justice Scalia often voiced his view that separation-of-powers issues were more important than Bill of Rights cases.<sup>113</sup> This was not because he thought individual rights were unimportant; instead, pointing to lofty individual-rights guarantees in the constitutions of totalitarian countries, he argued that rights were “not worth the paper they were printed on” if the constitution did not also “prevent the centralization of power in one man or one party, thus enabling the guarantees to be

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105. *Id.*

106. 784 F.3d 666 (10th Cir. 2015).

107. 42 U.S.C. § 16901 (2012).

108. *Nichols*, 784 F.3d at 668 (Gorsuch, J., dissenting). The Supreme Court ultimately reversed the defendant’s convictions on statutory grounds, thus avoiding any constitutional issue. *See Nichols v. United States*, 136 S. Ct. 1113 (2016).

109. *Nichols*, 784 F.3d at 668 (Gorsuch, J., dissenting).

110. *See Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring); *De Niz Robles v. Lynch*, 803 F.3d 1165, 1171 (10th Cir. 2015).

111. 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

112. *See, e.g., Mistretta v. United States*, 488 U.S. 361, 426 (1989) (Scalia, J., dissenting); *Freytag v. Comm’r*, 501 U.S. 868, 901 (1991); *Clinton v. City of New York*, 524 U.S. 417, 465 (1998) (Scalia, J., concurring in part and dissenting in part); *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2592 (2014) (Scalia, J., concurring in the judgment); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

113. *See, e.g., Antonin Scalia, Foreword: The Importance of Structure in Constitutional Interpretation*, 83 NOTRE DAME L. REV. 1417 (2008).

ignored.”<sup>114</sup>

Justice Gorsuch seems to share Justice Scalia’s view that “[s]tructure is everything.”<sup>115</sup> Consider this, from a 2016 speech:

To the founders, the legislative and judicial powers were distinct by nature and their separation was among the most important liberty-protecting devices of the constitutional design, an independent right of the people essential to the preservation of all other rights . . . . [R]ecognizing, defending, and yes policing, the legislative-judicial divide is critical to preserving other constitutional values like due process, equal protection, and the guarantee of a republican form of government.<sup>116</sup>

In a broad sense, it’s hard to dispute the importance of constitutional separation of powers. As Madison recognized, a written constitution’s guarantees of individual rights would be mere “parchment barriers” in the absence of appropriate structural checks “against the encroaching spirit of power.”<sup>117</sup> Some attention to dividing and diffusing governmental power is necessary, lest the Bill of Rights become as irrelevant as the Soviet Constitution, which Justice Scalia used as an example.<sup>118</sup>

The problem, though, is that Justice Gorsuch, like Justice Scalia before him, seems to place more faith in the precise details of the founders’ design than is deserved. Put another way, both seemed to think—especially when it came to criminal justice—that judges’ only job is to adhere strictly to the fine-grained formal rules about separation of powers that they saw as required by the original meaning of the Constitution, and that judges need not consider how present arrangements *practically* map on to the concerns about concentrated power that so worried Madison and other framers.

This point has the most relevance when it comes to plea bargaining, a practice that a chorus of commentators has sharply criticized.<sup>119</sup> A consistent complaint is that our system’s approach to

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114. *Id.* at 1418.

115. *Id.*

116. Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. L. REV. 905, 912 (2016).

117. THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).

118. See Scalia, *supra* note 113, at 1418.

119. One particularly common criticism is that plea bargaining is unfairly coercive, given the “trial penalty” that defendants pay if they insist on a jury trial. See, e.g., Conrad G. Brunk, *The*

plea bargaining—in which judges defer to prosecutors and provide little scrutiny of the bargaining process—puts far too much power in the hands of one person, the prosecutor. Rachel Barkow has argued, for example, that “the virtually unreviewable exercise of prosecutorial discretion over charging and bargaining . . . stands in sharp tension with the separation of powers” laid out in the Constitution.<sup>120</sup> Going even further, William Stuntz argued how a unity of interests on criminal justice issues between the political branches led to a strategy in which legislators broadly delegate to prosecutors by drafting overly broad laws and letting prosecutors decide who really deserves punishment through the only adjudicative process that really matters—the charging decision and plea negotiations.<sup>121</sup> As he put it, the true role of substantive criminal law “is to empower prosecutors, who are the criminal justice system’s real lawmakers.”<sup>122</sup>

Not everyone is quite so critical of the present state of affairs, to be sure.<sup>123</sup> But even those who are less troubled by modern plea-bargaining practices tend to recognize the realities of how power is actually concentrated. For example, Gerard Lynch—a former federal prosecutor, now a judge—has explained how, given the nature of plea bargaining today, prosecutors act as the frontline *adjudicators* in the criminal process.<sup>124</sup>

Whatever the merits of this approach, it is hard to square with the simple, three-branch system of separated powers of the founder’s design. Today trials are the exception, not the rule; the bargaining process, not the jury trial, is the only adjudication that most defendants receive. Yet I fear that due to interpretive method, Justice Gorsuch—like Justice Scalia before him—will simply be unwilling to grapple with this fundamental reality.

Consider *Williams v. Jones*.<sup>125</sup> Charged with first-degree murder,

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*Problem of Voluntariness and Coercion in the Negotiated Plea*, 13 L. & SOC’Y REV. 527, 542–52 (1979); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 13–14 (1978).

120. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1044 (2006).

121. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506 (2001).

122. *Id.*

123. For the best argument for delegation to prosecutors via broadly drafted laws, see Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491 (2008).

124. See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998).

125. 571 F.3d 1086 (10th Cir. 2009) (per curiam).



the defendant was offered a plea to second-degree murder with an accompanying ten-year prison term.<sup>126</sup> Though the defendant wished to accept the deal, defense counsel was so convinced of his client's innocence that he threatened to withdraw from representation if the defendant accepted the offer.<sup>127</sup> The case went to trial; the defendant was convicted of first-degree murder and sentenced to life without parole.<sup>128</sup> The state court system agreed that counsel was constitutionally ineffective, and ordered as a remedy a sentence of life *with* parole—the lowest sentence available for first-degree murder.<sup>129</sup> In a habeas posture, the Tenth Circuit panel majority found this remedy constitutionally inadequate.<sup>130</sup>

Then-Judge Gorsuch dissented. He did not dispute that counsel was constitutionally deficient.<sup>131</sup> Nonetheless, he argued that the defendant was not prejudiced by the ineffectiveness.<sup>132</sup> Because “the plea bargain is a matter of prosecutorial grace, not a matter of legal entitlement, a defendant who loses the chance for a deal cannot be said to have been treated unfairly,”<sup>133</sup> at least if he is convicted “after an entirely fair trial.”<sup>134</sup> When the en banc court denied rehearing, then-Judge Gorsuch protested vehemently.<sup>135</sup>

Here, again, Justice Gorsuch is on the same page as Justice Scalia. Three years after *Williams*, the Supreme Court addressed the same question in *Lafler v. Cooper*<sup>136</sup> and *Missouri v. Frye*.<sup>137</sup> Echoing Judge Gorsuch's views, Justice Scalia lamented in *Lafler* that the majority was setting aside a conviction even though the defendant “received the exorbitant gold standard of American justice—a full-dress criminal trial.”<sup>138</sup>

My goal is not to quibble with Justice Gorsuch's vote in *Williams* (or, really, even Justice Scalia's in *Lafler* and *Frye*). My real concern is about what *Williams* reveals about how Justice Gorsuch thinks about

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126. *Id.* at 1088.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 1092–94.

131. *Id.* at 1096 (Gorsuch, J., dissenting).

132. *Id.* at 1099.

133. *Id.* at 1101.

134. *Id.* at 1099.

135. *Williams v. Jones*, 583 F.3d 1254, 1259 (10th Cir. 2009) (Gorsuch, J., dissenting).

136. 566 U.S. 156 (2012).

137. 566 U.S. 134 (2012).

138. *Lafler*, 566 U.S. at 186 (Scalia, J., dissenting).

criminal justice more generally. It is one thing to conclude that courts cannot create a judicially enforceable remedy when an attorney erroneously advises a defendant to go to trial and reject a plea offer. But to insist that “a defendant who loses the chance for a deal *cannot be said to have been treated unfairly*”? That requires ignoring reality.<sup>139</sup>

Plea bargaining is how our system resolves the overwhelming majority of cases.<sup>140</sup> For most defendants, getting a good deal is the whole ballgame. And in a world where legislators draft criminal penalties *knowing* that almost all cases will be disposed of via plea, the harsh sentences imposed on defendants who insist on trial look less like the appropriate baseline from which to measure the plea-bargaining “discount,” and instead more like the “trial penalty” that many observers have decried.<sup>141</sup>

In such a world, to insist that a plea bargain is merely “a matter of prosecutorial grace”<sup>142</sup> seems to require willful blindness to how things really work. As the *Lafler* majority put it, the argument that “[a] fair trial wipes clean any deficient performance by defense counsel during plea bargaining . . . ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials.”<sup>143</sup> More generally, it’s baffling how a judge can say “[i]f the separation of powers means anything, it must mean that the prosecutor isn’t allowed to define the crimes he gets to enforce,”<sup>144</sup> while elsewhere seeming so blasé about plea bargaining—a system that, as noted, is particularly troubling for how it effectively concentrates so much power in one person’s hands.

But perhaps this all reads too much into *Williams*. Justice Gorsuch, in his off-the-bench comments, has expressed reservations about overcriminalization,<sup>145</sup> someone who recognizes that problem should recognize the dangers that it poses when combined with plea

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139. *Williams*, 571 F.3d at 1101 (Gorsuch, J., dissenting) (emphasis added).

140. See, e.g., LINDSEY DEVERS, U.S. DEP’T OF JUSTICE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 1 (2011), <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf> (noting estimates “that about 90 to 95 percent of both federal and state court cases are resolved through” plea bargaining).

141. See Stuntz *supra* note 121.

142. *Williams*, 571 F.3d at 1103.

143. *Lafler*, 566 U.S. at 169–70.

144. *United States v. Nichols*, 784 F.3d 666, 668 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc).

145. See Neil M. Gorsuch, *Law’s Irony*, 37 HARV. J. L. & PUB. POL’Y 743, 747–48 (2014).

bargaining. And perhaps Justice Gorsuch's majority vote in *Class v. United States*,<sup>146</sup> which held that a guilty plea does not inherently forfeit the right to challenge the constitutionality of the statute of conviction, suggests he will do more to rein in plea bargaining than *Williams* might suggest.<sup>147</sup> Still, given all Justice Gorsuch's similarities with Justice Scalia—and given that Justice Gorsuch himself seems to see Justice Scalia as a role model—it's more than fair to ask whether the newer Justice's jurisprudence will have the same limitations as that of the man whose seat he is filling.

Those limitations were real indeed. Though there is plenty to admire in Justice Scalia's decisions on the meaning of particular constitutional provisions, he seemed remarkably unconcerned about effective enforcement of constitutional rights. Take the Fourth Amendment. For all Justice Scalia's bluster about fidelity to the founders' values,<sup>148</sup> he consistently voted against rulings that would meaningfully *enforce* those values. In other words, despite a solid record on the substance of Fourth Amendment law, his record on Fourth Amendment remedies was weak.

He appeared dead-set against the exclusionary rule: He wrote *Hudson v. Michigan*,<sup>149</sup> which made the suppression remedy unavailable for violations of the Fourth Amendment's knock-and-announce requirement.<sup>150</sup> And he joined other opinions expanding further exceptions to exclusion.<sup>151</sup> To be sure, the exclusionary rule was a twentieth-century innovation, and so perhaps it's unsurprising that Justice Scalia, as a committed originalist, would disfavor it. But damages remedies for unreasonable searches and seizures, by contrast, were well known at the Founding.<sup>152</sup> Yet here too, Justice Scalia's contribution was mainly to limit access to meaningful remedies. He favored expanding qualified immunity,<sup>153</sup> making suits against

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146. 138 S. Ct. 798 (2018).

147. *Id.* at 803.

148. *See, e.g., Maryland v. King*, 569 U.S. 435, 482 (2013) (Scalia, J., dissenting) ("I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.").

149. 547 U.S. 586 (2006).

150. *Id.* at 599.

151. *See Herring v. United States*, 555 U.S. 135 (2009); *see also* Orin Kerr, *The Court after Scalia: Scalia's Absence May Help Preserve the Exclusionary Rule*, SCOTUSBLOG (Sept. 16, 2016, 10:51 AM), <http://www.scotusblog.com/2016/09/the-court-after-scalia-scalias-absence-may-help-preserve-the-exclusionary-rule/>.

152. *See Amar, supra* note 7, at 774.

153. *See Ashcroft v. Al-Kidd*, 563 U.S. 731, 741–43 (2011).

defendants who violated the constitution more difficult. And he also seemed to be no particular fan of liability for municipalities whose employees violated constitutional rights either.<sup>154</sup>

Yet if significant barriers exist for *all* of those potential remedies—exclusion, a suit against an individual officer, or a suit against the officer’s employer—it’s unclear what meaningful work substantive Fourth Amendment law is doing. If only a violation of “clearly established” law or an unconstitutional municipal policy enables a damages remedy, and if exclusion only applies when the violation is the result of willful wrongdoing (a direction in which the law seems to be heading)—many, perhaps most, violations of the Fourth Amendment will trigger no remedy. In such a world, government actors’ incentives to shape their conduct to the Fourth Amendment letter—rather than merely to avoid the most egregious violations—are quite attenuated.

It’s unclear whether Justice Gorsuch’s approach to Fourth Amendment remedies is as limited as Justice Scalia’s. The evidence is equivocal. On the Tenth Circuit, he upheld the rights of plaintiffs to seek damages for constitutional violations.<sup>155</sup> He dissented when his colleagues granted an officer qualified immunity after arresting a seventh grader for “trading fake burps for laughs in gym class.”<sup>156</sup> Nonetheless, an examination of his body of work in this area found that Justice Gorsuch “harbors a robust—though not boundless—vision of qualified immunity.”<sup>157</sup> Exactly how boundless a vision remains to be seen.

But let us emerge from the weeds. In the bigger picture, it seems fair to predict that Justice Gorsuch’s jurisprudence on criminal issues will look much like Justice Scalia’s. It will have many of the same virtues—a principled insistence on following the letter of the Constitution, even if doing so results in letting a criminal go free. But it will likely suffer from the same deficiencies, too. Like Justice Scalia, Justice Gorsuch will probably be quite talented at writing opinions zeroing in on the meaning of individual constitutional provisions, but

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154. See *Connick v. Thompson*, 563 U.S. 51, 72–76 (2011) (Scalia, J., concurring).

155. See, e.g., *Fisher v. City of Las Cruces*, 584 F.3d 888, 902 (10th Cir. 2009) (Gorsuch, J., concurring in the judgment) (agreeing with majority’s reversal of summary judgment in favor of defendant).

156. *A.M. v. Holmes*, 830 F.3d 1123, 1169 (10th Cir. 2016) (Gorsuch, J., dissenting).

157. Shannon M. Grammel, *Judge Gorsuch on Qualified Immunity*, 69 STAN. L. REV. ONLINE 163, 163 (2017).

he will be less likely to take consideration of how the larger legal framework effectuates or stymies underlying constitutional values. One whose vision is finely trained at discerning individual trees, but less able to see (or, perhaps, less interested in seeing) the forest as a whole.

What should be most sobering, though, is that going forward Justice Gorsuch likely represents the *best*-case scenario from the perspective of those who favor strong criminal procedure protections. And things seem likely to get worse: In summer 2018, Justice Kennedy retired and was replaced by Brett Kavanaugh after a contentious confirmation battle.<sup>158</sup> If Justice Kavanaugh turns out to be more conservative on criminal procedure issues than his predecessor—which seems likely—a number of precedents will be in jeopardy.<sup>159</sup> Indeed, the real question is likely to be whether Justice Kavanaugh will be a conservative like Justices Gorsuch and Scalia—whose originalist approach leads to results that favor defendants in some classes of cases—or one like Justice Alito, who is generally deferential to the government.

Even if the Court doesn't significantly contract existing doctrine, the more important point is that there is little prospect that the Court will significantly *expand* criminal procedure rights in the coming years, as reformers had hoped. It seems unlikely that Justice Breyer will get to five votes in his quest to declare the death penalty categorically impermissible. Nor, with his retirement, will Justice Kennedy ever get a chance to create constitutional doctrine limiting solitary confinement.

Most fundamentally, no one should expect the coming Court to take on responsibility for addressing the larger problems with

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158. Sheryl Gay Stolberg, *Kavanaugh Is Sworn In After Close Confirmation Vote in Senate*, N.Y. TIMES, Oct. 6, 2018, <https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html>.

159. Over the years, Justice Kennedy provided the crucial fifth vote in several important cases involving criminal justice. Most notable are the line of Eighth Amendment cases categorically limiting the imposition of particular punishments for particular classes of defendants. *See, e.g.*, *Miller v. Alabama*, 567 U.S. 460 (2012) (forbidding, by a 5-4 vote, mandatory life without parole for juvenile defendants); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (forbidding, by a 5-4 vote, capital punishment for the crime of child rape). Perhaps the most important example outside the Eighth Amendment context is *J.D.B. v. North Carolina*, 564 U.S. 261, 263 (2011) (holding, by a 5-4 vote, that a child's age is relevant to whether he is in custody for purposes of *Miranda*). *See also* *Brown v. Plata*, 563 U.S. 493, 499 (2011) (upholding, by a 5-4 vote, an order requiring California to release prisoners to remedy "serious constitutional violations in California's prison system" that "persisted for years").

American criminal justice. Mass incarceration, racial disparities in punishment, over-use of lethal force by police officers, prosecutorial misconduct, prison conditions, and civil forfeiture abuse are all problems that the political process has, thus far, been unable to solve on its own. Yet reformers will need to look beyond the Court for help. Where there is a clear and specific textual hook to an enumerated constitutional provision, the Court could further the cause of reform.<sup>160</sup> But the Justices likely to control the Court will not view it as their role to think creatively about how constitutional law can be brought to bear to improve the larger problems with the criminal justice system.

Perhaps that is all as it should be. There are good arguments that, in a system of separated powers, judges shouldn't think of themselves as having a roving commission to solve all the problems with the criminal justice system. My goal here is not to resolve that question. Instead, what matters here is a *prediction*: given the likely composition of the Court going forward, reformers will not be able to look to the federal judiciary to rescue the criminal justice system from problems created by democratic failure.

### III. THE PATH FORWARD

I've tried to predict the near future of constitutional criminal procedure. Perhaps those predictions are wrong. But assuming they are mostly right—what then? As I see it, there are a number of lessons that scholars—in particular, those who are at least partly motivated by a desire to reform the criminal justice system—should draw. In my view, scholars should reevaluate their assumptions about the role of courts in light of a future where there is little reason to expect counter-majoritarian heroics from the Supreme Court.

Criminal procedure scholarship and pedagogy was long dominated by a narrow focus on courts and on the Supreme Court in particular.<sup>161</sup> This emphasis made sense, at least if one thinks of criminal procedure as “basically, a subset of constitutional law” in

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160. Justice Thomas recently suggested he has concerns about the constitutionality of civil forfeiture. *See* *Leonard v. Texas*, 137 S. Ct. 847, 850 (2017) (mem.) (Statement of Thomas, J.).

161. *See, e.g.,* Stephanos Bibas, *The Real-World Shift in Criminal Procedure*, 93 J. CRIM. L. & CRIMINOLOGY 789, 789 (2003) (“For four decades, criminal procedure scholars have focused on federal constitutional rulings by the Supreme Court.”); David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1703 (2005) (“[T]hinking about criminal procedure has tended to focus on the questions taken up by courts . . .”).

which “the Supreme Court makes the relevant policy judgments.”<sup>162</sup> Scholarly articles thus often focused on judicial doctrine and couched reform proposals in the form of judge-directed arguments for doctrinal revision.

In recent decades, however, scholars came to realize that a great deal about criminal procedure that mattered was not captured by a study of case law. And so there has been a commendable shift towards focusing less on doctrine as such, and more on how criminal procedure’s “abstract rules play out in the real world.”<sup>163</sup> Scholars routinely ask questions that reading Supreme Court cases alone cannot answer—questions about racial disparities in criminal justice,<sup>164</sup> the collateral consequences of arrests,<sup>165</sup> and the realities of prosecutorial decision-making,<sup>166</sup> to name a few. And such scholarship, to the extent that it is accompanied by any policy recommendations, is not always directed at a judicial audience.

The decline of court-focused scholarship seems likely to continue if the courts become even less willing to intervene in the criminal justice system than they have been recently. To be sure, many forms of doctrinal scholarship still have great value; scholars do a great service by clarifying, organizing, and reconceptualizing the case law. But what is less likely to be particularly helpful is scholarship seeking to advance the cause of criminal justice reform using arguments directed at courts.

If such scholarship continues, it will be most fruitful to the extent that it is aimed at developing “conservative” arguments for criminal procedure protections. For example, consider recent work by both Beth Colgan and John Stinneford, both using historical evidence to argue in favor of understandings of the Eighth Amendment that are broader than those the Justices sympathetic to originalism have thus far been willing to embrace.<sup>167</sup> Or take William Baude’s recent claim that qualified immunity doctrine cannot be squared with fundamental

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162. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 6 (1997).

163. Bibas, *supra* note 161, at 790.

164. See, e.g., Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 1 (2013).

165. See, e.g., Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809 (2015).

166. See, e.g., Paul T. Crane, *Charging on the Margin*, 57 WM. & MARY L. REV. 775 (2016).

167. See Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277 (2014); John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739 (2008).

principles of statutory interpretation,<sup>168</sup> an argument to which Justice Thomas recently indicated he might be receptive.<sup>169</sup> While there is no guarantee that arguments like these will translate into changed doctrine (nor is that necessarily these particular authors' goals), such work is at least written in conservative judges' and justices' native language. Reform-minded scholarship directed at judges that proceeds largely from arguments about fairness and empirical realities, or that seeks to build on Warren Court-vintage cases without rooting its legal arguments further back in history, is unlikely to persuade a majority of the justices anytime soon.

But the situation today should prompt even deeper soul searching among students of criminal procedure. For a long time, scholars argued (or just assumed) that courts were the appropriate institutions to regulate the criminal justice system. Such an assumption made sense in a world where political actors had failed to set meaningful limits on law enforcement and where courts were ready and willing to step in. As Anthony Amsterdam made the point regarding the regulation of police practices, constitutional regulation was necessary in light of "longtime, wholesale 'legislative default.'"<sup>170</sup>

Indeed, that basic insight developed into the near-consensus justification for the Court's efforts during the revolutionary Warren Court years. The dominant narrative justifying the Court's aggressive intervention draws on John Hart Ely's political process theory.<sup>171</sup> Voters and their elected representatives lack sufficient regard for the interests of criminal suspects and defendants, the story goes. Courts—which are somewhat insulated from democratic political pressures—must step in to fill the void and provide appropriate regulation that political actors will not.<sup>172</sup> Criminal procedure's longstanding focus

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168. See William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45 (2018).

169. See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and in the judgment) (citing Baude, *supra* note 168) (noting that "some evidence supports the conclusion that common-law immunity as it existed in 1871 looked quite different from our current doctrine").

170. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 378 (1974). Amsterdam, though, did not treat courts as the complete solution; he also envisioned an important role for police self-regulation. See *id.* at 379.

171. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

172. See, e.g., Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1093–94 (1993); Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 766 (1991); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 850 (1994); see also William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 21 (1996) ("If there is a consensus theory of why



on courts, then, rested not just on the positive view that judicially created doctrine provided the rules that mattered, but also on a *normative* view about courts as the best-situated regulators of criminal justice.

In recent years, however, many scholars have started to urge a different course. There are several criticisms of the conventional argument in favor of courts. Perhaps the most common one is that courts simply lack the institutional capacity to regulate the criminal justice system effectively.<sup>173</sup> Courts, by design, can only intervene in the context of individual cases. This fact limits both their perspective (as many problems in the criminal justice system are systemic or structural) and their toolkit for solving constitutional problems. For this reason, a nascent movement has argued for a greater reliance on administrative agencies to regulate criminal justice.<sup>174</sup> Along similar lines, Orin Kerr makes a case for broader deference to legislatures, at least in areas like the regulation of emerging technologies where, he argues, courts are at a comparative institutional disadvantage.<sup>175</sup> There are other criticisms of courts, too; Stuntz went so far as to argue that constitutional regulation of criminal procedure by courts had perverse effects, contributing in part to mass incarceration.<sup>176</sup>

But other scholars have come out to defend courts from the skeptics. David Sklansky argues that Kerr and other critics of courts have overstated legislatures' willingness and ability to meaningfully protect privacy.<sup>177</sup> Andrew Crespo contends that courts actually have a much greater capacity to understand "systemic facts" about the criminal justice system than most have assumed.<sup>178</sup> And Stephen Schulhofer has strongly challenged Stuntz's perversity critique, arguing that evidence of any causal link between the Court's rulings

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the Warren Court's criminal procedure decisions got it right, the *Carolene Products*-Ely argument is it.").

173. See, e.g., Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1865–77 (2015).

174. See, e.g., *id.*; Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039, 1109–12 (2016).

175. Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 857–82 (2004).

176. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 236–43 (2011).

177. See David Alan Sklansky, *Two More Ways Not to Think about Privacy and the Fourth Amendment*, 82 U. CHI. L. REV. 223, 227–33 (2015).

178. See Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2050 (2016).

and penal severity is lacking.<sup>179</sup>

Present circumstances provide no clear answers to these debates. Yet, in my view, the situation raises even deeper questions. As noted, scholars have long looked to courts given their comparative advantages in political insulation. The story goes that courts must solve the problems that the political process cannot—or, perhaps more accurately, courts must solve the problems the political process creates. But it should be clear that the Supreme Court is unlikely to come to criminal defendants' rescue anytime soon. Given where things stand, it seems appropriate to ask whether the notion of courts as the cure for democratic failure really makes sense at all. Here, I confess to being a skeptic. The problem, as I see it, is that courts do not stand outside of politics as much as the classic process theory argument imagines. Supreme Court Justices do not stand for election, sure. But they are chosen by the President and confirmed by the Senate against a backdrop of public engagement. If voters and their elected officials really are strongly inclined towards severity on criminal matters, as scholars of criminal justice believe, the courts are unlikely to stand in the way—at least for any sustained period.

The history of criminal procedure proves the point. For starters, it is not clear that even the Warren Court's criminal procedure revolution itself is a paradigmatic example of process theory in action. As Corinna Lain has argued, much of the Warren Court's criminal procedure jurisprudence accorded with majority preferences, or at least was not quite as politically controversial as we assume today.<sup>180</sup> But even if Lain overstates the case, it is hard to extricate the criminal procedure revolution from the larger context of the Court's efforts to defeat the evils of segregation. As Klarman has shown, modern criminal procedure doctrine was born from cases dealing with Jim Crow justice.<sup>181</sup> Indeed, a number of Warren Court criminal procedure cases at the very least had race in the background.<sup>182</sup> Thus, "Warren-era constitutional criminal procedure began as a kind of

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179. See Stephen J. Schulhofer, *Criminal Justice, Local Democracy, and Constitutional Rights*, 111 MICH. L. REV. 1045 (2013) (reviewing STUNTZ, *supra* note 176).

180. See generally Lain, *supra* note 29.

181. See Klarman, *supra* note 13, at 65.

182. For example, *Duncan v. Louisiana*, 391 U.S. 145 (1968), did not mention the race of the defendant, but was unmistakably a case about unfair racial caste enforcement. See Nancy J. King, *Duncan v. Louisiana: How Bigotry in the Bayou Led to the Federal Regulation of State Juries*, in CRIMINAL PROCEDURE STORIES 262 (Carol S. Steiker ed., 2006).

antidiscrimination law.”<sup>183</sup> Whether the criminal procedure revolution would have happened absent the unique history of race is hard to know.

And even if the Warren Court cases lie within the process theory heartland, later events help illustrate that theory’s limits. After the high-water mark of the 1960s, Richard Nixon and later Presidents replaced the Warren Court Justices. With few exceptions, these appointments pushed the Court right on criminal issues. Since the 1960s, the Court has not completely capitulated to the political branches, to be sure. It has not forsworn all the Warren Court precedents; and in some areas the Court has certainly recognized new rights.<sup>184</sup> Yet few who envision a major regulatory role for courts would give the Justices’ efforts unqualified praise. The Court has done little to address, let alone solve, the biggest problems facing the criminal justice system. It has stayed on the sidelines as mass incarceration advanced. It has declined opportunities to stem racial profiling.<sup>185</sup> And it has done much less than it could have to address police violence.

Yet how realistic is it, really, to think the Court might have done more? The conventional narrative in criminal justice is that voters and their elected officials are not merely indifferent towards criminal issues, but that political winds blow strongly in favor of punitive policies.<sup>186</sup> In such a world, could anyone realistically expect that tough-on-crime political forces would work tirelessly to change the law through legislative efforts and prosecutorial elections—but ignore judicial selection, and let the courts do whatever they want? Far from it, victims’ rights advocates and law-enforcement interests have a big voice in the nomination and confirmation process. It’s thus anything but surprising that, for example, several Justices have prosecutorial experience, but not a single former criminal defense attorney has sat

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183. Stuntz, *supra* note 162, at 5.

184. *See, e.g.*, Crawford v. Washington, 541 U.S. 36, 60 (2004) (overturning precedent that narrowly interpreted the scope of the Confrontation Clause); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that mentally disabled defendants cannot be subject to capital punishment); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (recognizing that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt”).

185. *See, e.g.*, Whren v. United States, 517 U.S. 806 (1996).

186. *See, e.g.*, Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1029–30 (2006).

on the Court in a quarter century.<sup>187</sup>

Indeed, the nomination of Merrick Garland is telling. Despite being seen as a fairly reliable liberal vote on most issues, Garland seemed much more conservative in criminal cases—perhaps due to his service as a federal prosecutor.<sup>188</sup> Despite some clucking from the liberal commentariat,<sup>189</sup> President Obama faced no meaningful political pushback on the left.

To be sure, as recounted above, there was some hope for real change on the Court had Hillary Clinton won. The election certainly could have gone differently, in which case the Court would suddenly be poised to do much more for the criminal justice system. Yet in that alternate universe, it would not be courts standing alone, defending individual rights against political actors determined to take those rights away. Instead, the people would have voted for the candidate who had made criminal justice reform part of her platform.<sup>190</sup> Instead, of course, swing-state voters elected the candidate who used tough-on-crime rhetoric not heard on the national stage in decades.

Perhaps all this should be less surprising when we remember the context in which process theory arose. Ely's theory was not solely—or perhaps even primarily—a forward-looking project, mapping a course for courts to take. Instead, his (like some other famous constitutional theories of his era<sup>191</sup>) was at least in part a backward-looking project of *justification*, one that particularly focused on the Warren Court's liberal decisions.<sup>192</sup> As a normative grounding for seemingly anti-democratic decisions, especially as carefully reconstructed by Michael Klarman,<sup>193</sup> Ely's theory has much to offer.

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187. Dara Lind, *There Hasn't been a Criminal Defense Lawyer on the Supreme Court in 25 Years. That's a Problem.*, VOX (Mar. 22, 2017, 10:54 AM), <https://www.vox.com/2016/3/28/11306422/supreme-court-prosecutors-career>.

188. See Savage, *supra* note 65; see also Tom Goldstein, *The Potential Nomination of Merrick Garland*, SCOTUSBLOG (Apr. 26, 2010, 4:30 PM), <http://www.scotusblog.com/2010/04/the-potential-nomination-of-merrick-garland>.

189. See, e.g., Daniel Denvir, *Inside Merrick Garland's Troubling Record*, SALON (Mar. 17, 2016, 9:59 AM), [https://www.salon.com/2016/03/17/inside\\_merrick\\_garlands\\_bleak\\_record\\_why\\_he\\_could\\_take\\_the\\_supreme\\_court\\_right\\_in\\_one\\_very\\_important\\_regard/](https://www.salon.com/2016/03/17/inside_merrick_garlands_bleak_record_why_he_could_take_the_supreme_court_right_in_one_very_important_regard/).

190. See *Criminal Justice Reform*, THE OFFICE OF HILLARY RODHAM CLINTON, <https://www.hillaryclinton.com/issues/criminal-justice-reform/>.

191. See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

192. Ely's dedication of his book to his former boss, Chief Justice Earl Warren, is telling in this regard. See ELY, *supra* note 171, at v ("For Earl Warren. / You don't need many heroes / if you choose carefully.").

193. See Klarman, *supra* note 13.

The idea that courts should step in to solve problems that the political process should, but for some structural reason cannot, answers the famous challenge of the “countermajoritarian difficulty”<sup>194</sup> while also suggesting some outer bounds on the Court’s role.

Yet as a *predictive* account of how courts actually *will* work, or as a prescriptive theory of how courts *should* work, process theory is much less appealing. It is one thing for courts to stand against political winds in isolated instances or for short periods. But to expect that they can and will do so indefinitely is unrealistic. The political process influences judicial selection. And precisely because (definitionally) political-process failures are unlikely to be remedied politically, that process is unlikely to select for judges who follow process theory. As Eric Posner and Adrian Vermeule put it, “judicial behavior cannot be treated as exogenous or a *deus ex machina*—a miraculous intervention from outside the system.”<sup>195</sup> And indeed, history bears out this critique; as Barry Friedman argues, far from being a consistently counter-majoritarian force, the Court has generally hewed “closely to the mainstream of popular judgment about the meaning of the Constitution.”<sup>196</sup> And where the Court does reject mainstream opinion, it is likely to engender significant backlash—such as the vehement response of state legislatures to *Furman*, which likely contributed to the Court stepping away from the brink in *Gregg*.<sup>197</sup>

The objection, to be clear, is not so much about courts’ *ability* to meaningfully regulate the criminal justice system if they wanted to. On this point, Crespo, for example, provides good arguments why courts could do more than the critics alleging “transactional myopia” believe.<sup>198</sup> The concern, instead, goes to courts’ *willingness* to act as meaningful change agents, at least in any long-term, ongoing way. Courts unquestionably could do more. The problem is that they choose not to, and the reasons they do are predictable to the point of being

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194. See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 16–23 (2d ed. 1986).

195. Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1765 (2013).

196. BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* 14 (1st ed. 2009). Whether the Justices are directly influenced by public opinion, or whether “the same forces that influence public opinion . . . influence judges simply because they are members of the public too” remains unclear. Either way, the result is the same. LEE EPSTEIN ET AL., *THE BEHAVIOR OF FEDERAL JUDGES* 88 (2013).

197. See Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 289–90 (2008) (describing “unprecedented speed and vehemence of the legislatures in reenacting their death penalty statutes” post-*Furman*).

198. See Crespo, *supra* note 178, at 2051–54.

essentially inevitable.

This is not to say that courts have no comparative advantages over other institutions. Courts are more politically insulated than legislatures, and so it is not incoherent to think they might do somewhat more to protect defendants than legislatures will, at least on matters where tough-on-crime passions run particularly high.<sup>199</sup> The problem, though, is that they are simply not insulated enough—and can never be insulated enough—to do all that criminal justice reformers would have them do. Perhaps courts have the ability to tackle and solve the biggest problems facing the criminal justice system. But even if they do, they simply are not willing to do so. And even if they were willing today, they would refuse tomorrow. If courts are the only hope, our hopes will be dashed in the end.

But courts need not be the only hope. Here, I submit, criminal procedure has much to learn from public law more generally. For a time, liberal public law scholars, like criminal procedure scholars, saw in the Warren Court the promise of a cure for democratic failure. This period perhaps reached its peak with Frank Michelman's 1969 *Harvard Law Review* Foreword laying out the case for using the Fourteenth Amendment as a doctrinal weapon against poverty.<sup>200</sup> But in the Nixon years and beyond, cases like *Washington v. Davis*<sup>201</sup> made clear that the courts would be much less active than many had hoped.

Public-law scholars have grappled for decades with that reality. Klarman and Gerald Rosenberg have, for example, questioned courts' ability to serve as agents of meaningful social change.<sup>202</sup> Others, like Larry Kramer and Tushnet, have developed theories of popular constitutionalism in which the people themselves have a greater role in shaping and implementing constitutional values.<sup>203</sup> Friedman has

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199. For a compelling argument that legislatures are more likely to protect defendants when the crimes at issue are ones that legislators themselves, or those they know, might be accused of, see Craig S. Lerner, *Legislators as the "American Criminal Class": Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. ILL. L. REV. 599 (2004).

200. See Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

201. 426 U.S. 229 (1976).

202. See MICHAEL KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* (2006); GERALD N. ROSENBERG, *THE HOLLOW HOPE* (2d ed. 2008).

203. See generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES* (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999). Tushnet seems to have had no trouble getting over his objections to judicial review when it seemed like liberals might control the Court. See Tushnet, *supra* note 1.

shown how the Court has been more receptive to public opinion than people typically assume.<sup>204</sup>

The point is not that each of these insights applies straightforwardly to the criminal justice context. Arguments against judicial review, for example, may not readily and directly translate to the criminal sphere, “where judicial engagement is unavoidable.”<sup>205</sup> The point, instead, is that public-law scholars have at least introduced a conceptual vocabulary that those studying the criminal justice system could build on in developing new ways of thinking for a new era.

Skepticism of courts might seem hard to swallow in criminal justice, where it is an article of faith that courts are the only solution to a politics tilted against the interests of criminal defendants and suspects. But this is a lesson that must be learned. If courts cannot be relied upon to save society from democratic failure, the only alternative is to address democratic failure directly. Judge Learned Hand’s famous words come to mind:

[A] society so riven that the spirit of moderation is gone, no court *can* save; that a society where that spirit flourishes, no court *need* save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.<sup>206</sup>

For too long, too many have assumed that courts, and only courts, can defend the spirit of moderation when it comes to criminal justice. But this amounts to merely magical thinking. The best-designed legal arguments are no substitute for the harder work of political organizing and action. If the political system consistently produces bad outcomes, the only real and lasting solution is to work within the political system to change those outcomes. There are no shortcuts.

This is not to say that legal scholars cannot effectuate change. Some scholarship can spur on social movements, drawing attention to problems and providing intellectual support for political efforts. Michelle Alexander’s work has been particularly successful in this regard.<sup>207</sup> But scholars can also generate insights that can ultimately

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204. See FRIEDMAN, *supra* note 196.

205. Crespo, *supra* note 178, at 2060.

206. Learned Hand, *The Contribution of an Independent Judiciary to Civilization*, in THE SPIRIT OF LIBERTY 155, 164 (3d ed., 1960).

207. See JAMES FORMAN JR., LOCKING UP OUR OWN 220 (2017) (describing how Alexander’s

advance reform, even if the causal chain is less direct.

Perhaps the most pressing need is deeper empirical knowledge; it is almost shocking how many things we don't know about the system.<sup>208</sup> For example, despite widespread consensus that mass incarceration is a terrible problem, there's significant disagreement about who's to blame. John Pfaff points the finger at prosecutors rather than legislators,<sup>209</sup> but his findings are hotly contested.<sup>210</sup> Other accounts emphasize race,<sup>211</sup> political economy,<sup>212</sup> and unique aspects of American culture.<sup>213</sup> While answering these questions isn't easy, making some progress would be immensely helpful. One cannot hope to cure an illness without understanding what disease is causing the symptoms.

Other avenues of research have promise as well. Stuntz drew attention to the importance of structure in shaping policy in criminal justice.<sup>214</sup> But more remains to be done. Though prosecutors are almost certainly the most powerful actors in criminal justice, our understanding of their motivations and behavior remains quite limited.<sup>215</sup> And despite consensus that the politics of criminal justice are flawed, not enough has been done to help understand the relationship between structural features of the system and political conditions. Public law scholars have started to systematically examine how formal structural arrangements interact with underlying political conditions and power relationships.<sup>216</sup> Extending that line of inquiry into criminal justice would be worthwhile.

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book "profoundly influenced" D.C. Council's marijuana decriminalization debates). For a somewhat critical take on Alexander's arguments, see James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21 (2012).

208. See Tom Meagher, *13 Important Questions About Criminal Justice We Can't Answer*, THE MARSHALL PROJECT (May 15, 2016, 10:00 PM), <https://www.themarshallproject.org/2016/05/15/13-important-questions-about-criminal-justice-we-can-t-answer#qXdzRN5De>; see also PFAFF, *supra* note 52, at 16–17 (2017).

209. See PFAFF, *supra* note 52.

210. See Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 117 MICH. L. REV. 835 (2018) (questioning Pfaff's findings).

211. See ALEXANDER, *supra* note 54.

212. See, e.g., NICOLA LACEY, *THE PRISONERS' DILEMMA* (2008).

213. See, e.g., JAMES Q. WHITMAN, *HARSH JUSTICE* (2003).

214. See, e.g., STUNTZ, *supra* note 176; Stuntz, *supra* note 121.

215. See Daniel Epps, *Adversarial Asymmetry in the Criminal Process*, 91 N.Y.U. L. REV. 762, 846–51 (2016).

216. See, e.g., Daryl Levinson, *Looking for Power in Public Law*, 130 HARV. L. REV. 31 (2016); Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445 (2016).



That project holds great theoretical interest, but it also offers practical guidance. A deeper understanding of structure, and its relationship with political forces, could provide guidance for how reform could be effective. Though, as the conventional narrative tells us, political winds generally blow against defendants, those winds may be less strong at particular times. During brief windows when reform might be possible, it is critical that reformers know where their efforts might most fruitfully be directed. It would also help to have a better sense of which reform efforts are most likely to be durable in the face of shifting political winds; identifying structural reforms that might counteract political biases against criminal defendants should be a priority. Here, too, public law can help provide inspiration, as scholars have started to ask how reforms can be self-reinforcing through political entrenchment.<sup>217</sup>

Federalism and localism also deserve renewed attention in criminal justice. Recently, a movement led by Heather Gerken has explored how devolving power to lower levels of government might actually serve ends typically associated with “nationalist” values.<sup>218</sup> Such an approach seems especially promising in criminal justice. The dominant paradigm in criminal procedure for the last century has been one in which a national Supreme Court nudged (or shoved) along state and local governments unwilling to do the right thing on their own. But this model may soon seem increasingly outmoded. Indeed, many have noticed that, in the same cycle that elected President Trump, several reform-minded district attorneys also won their races.<sup>219</sup> At least in the medium term, reform appears likelier to come from the state, local, and community level than from the Court. Scholars have already directed efforts at community-level reforms,<sup>220</sup> but likely more can be done.

Many other questions are worth asking; here, I suggest only a few possibilities. There’s no guarantee that asking these questions will solve the criminal justice system’s problems. But it can’t hurt, and it has a better chance of being helpful than holding out hope, despite all

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217. See Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment in Public Law*, 125 YALE L.J. 400 (2015).

218. See, e.g., Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889 (2014).

219. Eli Hager, *Against the Trump Tide*, THE MARSHALL PROJECT (Jan. 25, 2017, 10:00 PM), <https://www.themarshallproject.org/2017/01/25/against-the-trump-tide#.fP5in2rdm>.

220. See, e.g., Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585 (2017).

evidence to the contrary, that courts will come to the rescue.

#### IV. CONCLUSION

The future that looms threatens to be a period of darkness for constitutional criminal procedure; perhaps even an end of one vision of the role of courts. But if nothing else, these circumstances give criminal procedure scholars an overdue opportunity to rethink assumptions about the role of courts and to ask new questions about structure, politics, localism, and power. What comes next need not be an end; it can be a new beginning.

