

## JUSTICE SCALIA AND THE CRIMINAL LAW\*

*Moderator: Justice David Stras\*\**

*Panelists: Orin Kerr,‡ Rachel Barkow,‡‡ Stephanos Bibas,± Paul J. Larkin, Jr.±±*

JUSTICE DAVID STRAS (MODERATOR): Justice Scalia's criminal law and procedure jurisprudence is fascinating. Justice Scalia didn't always end up where I thought he would end up and, I think, where a lot of people thought he would end up in some of the cases he decided. But I think there is a consistent theme in his jurisprudence in a number of different areas in criminal law. Let me talk a little bit about what we're going to do here. Each panelist is going to have a few minutes to talk about each of the subjects they want to talk about. Then I may ask a question or two of each of the panelists, or open it up to the audience, depending on where the discussion goes. So, without further ado, let's get started.

Our first speaker is Professor Orin Kerr, who is a nationally recognized scholar in criminal procedure and computer crime law. He's also a frequent contributor to *The Volokh Conspiracy*. Among his other accomplishments, he was a trial attorney at the U.S. Department of Justice, as well as a Special Assistant U.S. Attorney in the Eastern District of Virginia. He also clerked for Justice Anthony Kennedy on the United States Supreme Court and is considered a national expert on Fourth Amendment law, and is especially proficient at the intersection of the Fourth Amendment and technology. Without further ado, Professor Kerr.

PROFESSOR ORIN KERR: Thank you so much, Dave, and to the Federalist Society for the invitation. I've been a long-time participant in Federalist Society national conventions and never spoken. I feel like the person who calls into the radio program and says "long-time listener, first-time caller." Hopefully, the call will go OK.

I'm going to talk about Justice Scalia's impact on the Fourth

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Amendment, the prohibition on unreasonable searches and seizures. Justice Scalia had a significant impact on this body of law that has been, in part, overlooked. I want to tease out Justice Scalia's particular vision of the Fourth Amendment and talk about what it did and what it didn't quite do. My view is that he had a significant impact on the doctrine, but that it was also more a matter of form than substance.

I should start by saying that Justice Scalia was not really a fan of the Fourth Amendment. He was interviewed on C-SPAN a few years ago, and he was talking about how Chief Justice Rehnquist would assign opinions and how Chief Justice Rehnquist loved to write Fourth Amendment cases. Justice Scalia said he did not actually like to write Fourth Amendment cases. He said, "I just hate Fourth Amendment cases. It's almost a jury question, you know, whether this variation is an unreasonable search or seizure. It's variation 3,542. Yes, I'll write the opinion, but I don't consider it a plum."<sup>1</sup> Now, that hurts, as someone who spends a lot of time working in the area of Fourth Amendment law. To each his own, I suppose.

But Justice Scalia actually did have a significant impact on the body of law, despite not being a big fan of the Fourth Amendment. He had a vision in which he pursued his two broad themes in his constitutional jurisprudence. One being originalism, pursuing the original public meaning of the Constitution. And the other limiting judicial discretion, rules instead of standards. And, of course, those worked together. If you have to follow the original public meaning, then that will cabin the discretion of judges.

Justice Scalia pursued this in the following way. He looked at Fourth Amendment doctrine as he came to the Court in the 1980s and saw a body of judge-made law that invested judges with a great deal of judicial discretion. A good example of this is the *Katz*<sup>2</sup> reasonable expectation of privacy test, which governs what is a search. In 1998, in *Minnesota v. Carter*, Justice Scalia wrote a concurring opinion condemning the doctrine. He said it's a "self-indulgent test." "[I]t has no plausible foundation in the text of the Fourth Amendment."<sup>3</sup> He wrote that the Fourth Amendment

did not guarantee some generalized "right to privacy" and leave it to this Court to determine which particular manifestations of the value

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1. Interview by Susan Swain with Antonin Scalia, Associate Justice of the United States Supreme Court, in Washington, D.C. (June 19, 2009), available at [http://supremecourt.c-span.org/assets/pdf/A\\_Scalia.pdf](http://supremecourt.c-span.org/assets/pdf/A_Scalia.pdf).

2. *Katz v. United States*, 389 U.S. 347 (1967).

3. *Minnesota v. Carter*, 525 U.S. 83, 97 (1998).

of privacy “society has prepared to recognize as ‘reasonable.’”<sup>4</sup>

If society wants to make that judgment, they should do so with the elected branches, not with the courts. Scalia disagreed with the *Katz* test as infusing too much discretion in judges, and he had a similar view of constitutional reasonableness. Once the Fourth Amendment recognizes conduct as a search or a seizure, the courts have to say what’s reasonable. He objected to the judges-make-up-what’s-reasonable-based-on-their-sense-at-the-time approach that he had seen in some earlier cases.

So, what did he do about it? What’s his vision of the Fourth Amendment? Justice Scalia basically divided the world into the old and the new, and he tried to carve out the old, original Fourth Amendment and distinguish it from the newly developed Fourth Amendment in the following way.

First, consider the test for what is a search. In *United States v. Jones*,<sup>5</sup> Justice Scalia, in a five-justice majority opinion held that the test for what is a search actually has two components. There is, first, what is a reasonable expectation of privacy (the *Katz* test), but there is also a physical intrusion or trespass test. If government conduct is a trespass, it counts as a Fourth Amendment search, regardless of whether there was a violation of a reasonable expectation of privacy.

The idea was to make what had been understood to be the single test, the reasonable expectation of privacy test, into different tests – “old” trespass, “new” reasonable expectation of privacy. This was a curiosity to Fourth Amendment scholars. There were a lot of people who had to rewrite treatises and case books and commercial outlines because everybody had understood the *Katz* test to be the only test in town. Not so after *Jones*. There’s a division between these two different tests, trespass and reasonable expectation of privacy. So, that’s one change which was really driven by Justice Scalia in his majority opinion in *Jones*.

The other change was to alter the test for Fourth Amendment reasonableness. Instead of it being a free-form inquiry – where judges determine, in context, what’s reasonable – you look to see whether it’s an old problem that was answered at common law. This is what Justice Scalia wrote in *Arizona v. Gant*, in his concurring opinion. “To determine what is an ‘unreasonable’ search within the meaning of the Fourth Amendment, we look first to the historical practices the Framers sought to preserve; if those provide inadequate guidance, we apply traditional standards of reasonableness.”<sup>6</sup> That is, judge-made standards. As he put the same point a few years earlier in *Vernonia School District 47J v. Acton*, we look for

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4. *Id.* at 97.

5. *United States v. Jones*, 565 U.S. 400 (2012).

6. *Arizona v. Gant*, 556 U.S. 332, 351 (2009).

a “clear practice either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted.”<sup>7</sup> So, what does that mean? It means, when trying to figure out what searches are constitutionally reasonable, you look to whether there was a common-law answer. There were common-law rules of search and seizure, and if there is a clear answer to that specific practice, you follow the common-law rule. On the other hand, if there is no clear answer, or if it’s a new set of facts (if it’s something, say, involving technology or cars or something which just didn’t exist at common law), then you can apply a more general reasonableness approach.

These are some pretty significant changes. They divide the Fourth Amendment world doctrinally into the old and the new. I think of them as plausibly originalist approaches to the Fourth Amendment. I say “plausibly originalist” because, well, it’s not clear that this was a serious originalist approach. It’s not obvious that trespass was the test or that the original understanding of what is “search” was based on trespass. Rather, we know that the cases that inspired the passage of the Fourth Amendment, *Entick v. Carrington*<sup>8</sup> from 1765, prominently involved civil claims alleging trespass, and so what was a “trespass” was relevant to establish the cause of action. In that context, the common-law search-and-seizure rules were an affirmative defense to the trespass action. It’s not obvious that means that “trespass” is actually the original public understanding of “search.” But it’s at least a plausible, historical way of rooting Fourth Amendment doctrine in some sort of objective test, or at least something that cabins the discretion of judges.

I always wondered what Justice Scalia wanted to do with this bifurcation, this dividing of the doctrine, as he did. There’s always a possibility that maybe he was trying to cut off the trespass parts of *Katz* with the hope being someday that he could kill *Katz*, that he could cut off that newfound part. Because just dividing the doctrine into two, on its own, doesn’t really make an obvious difference. It just determines which doctrinal box you’re going into. Of course, we’ll never know where Justice Scalia was going. And, at least as the cases came down at the time of his death, it’s not obvious that these changes had a big impact in terms of actual outcomes.

As I suggested, dividing the law of searches into trespass searches and reasonable expectation of privacy searches may just be moving doctrinal boxes around. The Court had indicated in a footnote in *Rakas v. Illinois*<sup>9</sup> that if there is a trespass, then there’s going to be a violation of a reasonable expectation of privacy. So you could have just kept it all under

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7. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995).

8. 19 Howell’s State Trials 1029 (CP 1765).

9. 439 U.S. 128 (1978).

the reasonable expectation of privacy rubric without specifically dividing out trespass. It's not obvious that anything is gained in terms of outcomes by dividing it. Although doctrinally, as a matter of black-letter law, it makes a pretty significant difference.

I think you can say more about the impact of the switch to reasonableness in that it can actually cabin the discretion of judges. If judges have to stick to the common-law rule to the extent it's an old practice in a clear common-law answer, that's what the Court should follow. That's pretty different from the law before Justice Scalia joined the Court. For example, in *Payton v. New York*<sup>10</sup> in the early 1980s, the Court rejected the common-law rule for whether a warrant was required to enter a house to arrest someone. The common-law rule is that no warrant was required. The Court said a warrant was required, and it was based on policy grounds – “Well, it doesn't really work to say there's a warrant required” – and it was more of a free-floating reasonableness idea. At least under Justice Scalia's methodology, that would not presumably have been the approach the Court took because there was a clear common-law answer. And it was a set of facts that were clear at common law.

With that said, it's also not obvious that the methodology of looking to common law first is actually going to cabin judges all that much. It's pretty easy to say, “I look at the common law, and I don't see a clear answer,” or “I think this set of facts is a new set of facts.” It's always easy to say, “Well, the world has changed, therefore, the old common-law answer doesn't apply.” We haven't really seen cases where the courts say, “We wish we could go in a different direction, but we're cabined by this framework.”

It's also a little early to say this framework is established in the cases in the sense that, if a court doesn't follow it, they look odd. That framework has been followed recently, for example, in the *Birchfield v. North Dakota*.<sup>11</sup> In an opinion by Justice Alito, the Court said that testing for blood and breath for a DUI arrest is a new set of problems, so we just look to general reasonableness. We haven't seen the cases where there is a real tension there, where the judges or justices divide. But it's possible that Scalia's old/new methodology will cabin the discretion of judges in a significant way.

Certainly, for a body of law that Justice Scalia himself said he didn't like, he had a significant impact beyond his votes in changing the black-letter law. At least on its surface, the law is now saying, “Listen, there's an understanding of what the Fourth Amendment means; it is the original

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10. 445 U.S. 573 (1980).

11. 136 S.Ct. 2160 (2016).

understanding of what the Fourth Amendment means. That is a rock-solid piece of the doctrine; the judges can monkey around with the other parts, but they have to keep that initial part preserved.” I think that’s a pretty significant accomplishment for a justice.

Thank you for listening. I look forward to the rest of the panel.

JUSTICE STRAS (MODERATOR): Thank you, Professor Kerr. Our next panelist is Professor Rachel Barkow, who is the Segal Family Professor of Regulatory Law and Policy and the Faculty Director of the Center on the Administration of Criminal Law at New York University Law School. She’s also a member of the United States Sentencing Commission. She teaches courses in criminal law, administrative law, and constitutional law. She also clerked for Justice Scalia, so she will have unique insights on our topic today, and her scholarship, as her resume would suggest, focuses on criminal law and especially the intersections of administrative law, constitutional law, and, obviously, criminal law. So, without further ado, I will pass it over to Professor Barkow.

PROFESSOR RACHEL BARKOW: Thank you very much, Judge. I’m glad we’re doing a panel on criminal law today in large measure because I think this is one of the areas where you really see Justice Scalia’s commitment to law, regardless of what the outcome is in a particular case. I think you really get a sense of non-ideological voting here, which I think is very commendable in a judge. There are lots of things we could be talking about, and it was hard for me to pick one, but today I want to talk about the ways in which Justice Scalia’s commitment to textualism benefited criminal defendants, and I’m going to focus on two areas. The first is how textualism affected his approach to vagueness challenges, and then, second, how he interpreted the statutes more generally and why a commitment to textualism is more likely – though not always – but more likely going to benefit criminal defense than a statutory approach that looks at a statute’s broader purpose or looks at legislative history.

First, to start with the vagueness cases. For years, Justice Scalia had been lamenting that there were circuit splits and a lot of confusion of a law called the Armed Career Criminal Act, or ACCA, as it is known. Under ACCA, if you are a felon in possession of a firearm, you get a fifteen-year mandatory minimum, and you can get up to a life sentence if you have three prior convictions for serious drug offenses or violent felonies. So, the key to the law is: What are the violent felonies that trigger this mandatory minimum and get you within its scope? The way that the act defines these has a list of some, so those are the enumerated felonies, and then it explains that, even if a felony is not one of the ones that is listed and enumerated, you could still be held, pursuant to ACCA and

qualified for it, as long as the felony is violent, if it involves the use, attempted use, or threatened use of physical force, or (and this is the key part of the statute that drew Justice Scalia's ire) if it "otherwise involves conduct that presents a serious potential risk of physical injury to another."<sup>12</sup>

That last part of the law is known as the residual clause in ACCA, and for years Justice Scalia had been saying, "This is unconstitutionally vague; no one knows what this means." He first mentioned it in a dissent in a 2007 case, *James v. United States*,<sup>13</sup> and at that point he just had Justice Ginsburg and Justice Stevens along for the ride. But if you know Justice Scalia, or you followed him, he was not one to give up easily, so he repeatedly called out problems with this law whenever he had the opportunity. He dissented again in 2011 in a case called *Sykes*, and this time he also got Justice Kagan to join his dissent. She had since joined the Court and agreed with him. Eventually, in 2015, he got seven justices to agree with him. One, it's an interesting, substantive way to look at it, but it also shows that, over time, the justice did get other justices to see his point of view on things, which sometimes gets overlooked, I think.

In *Johnson v. United States*, Justice Scalia noted in his opinion that his statute was, in fact, unconstitutionally vague because the wording of the statute "leaves grave uncertainty" about how much risk it takes for a crime to qualify as a violent felony.<sup>14</sup> In April of this year, after Justice Scalia passed away, the Court ultimately decided that *Johnson*, the decision holding this clause to be constitutionally vague, applies retroactively. And there are thousands of petitions pending in the courts for people seeking to have their sentences reduced as a result.

Now, I think it's safe to say that the people who are getting ACCA relief aren't exactly the preferred constituency of Justice Scalia. The people who get these *Johnson* motions are not people with three prior drug offenses that fall within the fifteen-year mandatory minimum. These people, by definition, have to have a felony that was thought to have been violent, and if you look at Johnson himself, I think you'll see that these are not always the most sympathetic figures. Johnson was a white supremacist who the F.B.I. had been monitoring because they were concerned he was going to commit a terrorist act. In the words of Justice Alito, Johnson "led a life of crime and violence" and had prior convictions for "robbery, attempted robbery, illegal possession of a sawed-off shotgun, and a drug offense."<sup>15</sup> So, it wasn't, I don't think, that Justice Scalia was particularly moved by Mr. Johnson's predicament. He was

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12. 18 U.S.C. § 924(e)(2)(B)(ii).

13. 550 U.S. 192 (2007).

14. *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015).

15. *Id.* at 2574 (Alito, J., concurring).

interested in a broader legal principle. That commitment to the broader legal principle transcended whatever the facts were of the particular case, and he stuck with it. He noted in particular, when he dissented in *Sykes*, what it was that vagueness doctrine is supposed to be about and what concerned him, and I think it's worth paying attention to this because of his commitment. He said,

We face a Congress that puts forth an ever-increasing volume of laws in general, and of criminal laws in particular. It should be no surprise that as the volume increases, so do the number of imprecise laws. And no surprise that our indulgence of imprecisions that violate the Constitution encourages imprecisions that violate the Constitution. Fuzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation is attractive to the Congressman who wants credit for addressing a national problem but does not have the time (or perhaps the votes) to grapple with the nitty-gritty. In the field of criminal law, at least, it is time to call a halt. I do not think it would be a radical step – indeed, I think it would be highly responsible – to limit ACCA to the named violent crimes. Congress can quickly add what it wishes.<sup>16</sup>

I think it's really important. Justice Scalia meant what he said. “Congress, you want a list of felonies? Put them in there. But if you are going to just pass vague laws, the Constitution will not allow you to take somebody's liberty away on that basis, no matter how the particular facts of a case may look, or how unsympathetic that person may be.” It wasn't the first time that Justice Scalia ruled a statute had been void for vagueness. He did the same thing in *Skilling v. United States*, where he found the honest services theory of mail and wire fraud to be void for vagueness. There the majority saved the statute, or tried to save the statute, by interpreting it to say, “Well, it's not just ‘honest services,’ fine, we'll say it's limited to bribes and kickbacks,” but Justice Scalia refused to sign off to that because, in his view, he said a statute could not be saved by “judicial construction that writes in specific criteria that its text does not contain.”<sup>17</sup> And then he concluded his concurrence there with a quote from Justice Waite that it would be “dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large.”<sup>18</sup>

In these vagueness cases, you see Justice Scalia guided by his view that

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16. *Sykes v. United States*, 564 U.S. 1, 35 (2011) (Scalia, J., dissenting).

17. *Skilling v. United States*, 561 U.S. 358, 416 (2010) (Scalia, J., concurring).

18. *United States v. Reese*, 92 U.S. 214, 221 (1875).

the statute has to be clear on its face if you're going to hold somebody criminally responsible for violating its terms, and you can't just have the courts fix things later. It's got to be clearer from the outset. And you'll see this same theme in the second area that I wanted to emphasize, which is his interpretation of criminal statutes, even when there's not a constitutional vagueness issue – just run-of-the-mill “What does the statute mean?” Here, his commitment to textualism meant that he read statutes to reach no further than what they said, and if they weren't clear on his face, his commitment to the rule of lenity meant that they were interpreted in favor of criminal defendants. He explained this in *United States v. Santos*, where he said that the rule of lenity “places the weight of inertia upon the party [the government] that can best introduce Congress to speak more clearly.”<sup>19</sup> He had a very clear framework of how our government is supposed to work when it comes to criminal law. You need to get Congress to specifically say what it is that you cannot do before someone can be criminally punished, and if there is any ambiguity, that goes in favor of the criminal defendant, and if the government doesn't like that outcome, as he pointed out, the government is in the best position to go ask Congress to fix it. It would be much harder for a criminal defendant to do that, had the government won those ties, or in those ambiguous contexts.

Now, justices who use legislative history to interpret statutes often disagreed with Justice Scalia in cases, and they would rule for the government because they thought the legislative history would clear things up. You could look at it, and you could figure out what the broader purpose was. But Justice Scalia always required more of our government before he allowed it to interfere with individual liberty. If you wanted to criminally punish somebody, you had to get clear language passed by both the House and the Senate, and signed by the President. You see this throughout his approach to statutory interpretation, whether it's administrative law or it's criminal law, and I think it's important to note that he was just adamant that this was what liberty required. It has to go through bicameralism and presentment, and the language has to be clear. So, while we have some justices on the Court who I know favor a more active government role, Justice Scalia always demanded more before someone's individual liberty could be taken away, and, in my view, our constitutional order is far greater because of it.

JUSTICE STRAS (MODERATOR): Thank you, Professor Barkow. Our next speaker is Professor Stephanos Bibas, who teaches at the University of Pennsylvania Law School. He studies the powers and incentives that

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19. *United States v. Santos*, 553 U.S. 507, 514 (2008).

shape how prosecutors, defense counsel, defendants, and judges behave in the real world. He also studies the divorce between criminal procedures focused on efficiency and criminal law's interest in healing victims, defendants, and communities. In addition to having served as a clerk for Justice Kennedy, he's the Director of Penn's Supreme Court Clinic, where he and his students have litigated a wide variety of cases, but one notable one is *Padilla v. Kentucky*,<sup>20</sup> which has caused certainly a lot of work for a lot of state courts and other federal courts. It's a big case involving the right to counsel for noncitizen criminal defendants. As a personal note, I would like to thank a colleague of mine who is the head of the Minnesota Sentencing Commission. I had some issues with sentencing, and Professor Bibas was kind enough to help my colleague out. So, as a matter of personal privilege, I just want to extend my thanks and turn it over to him.

PROFESSOR STEPHANOS BIBAS: Thank you, Justice Stras. This is a distinguished panel I'm honored to be included in. In many ways, my comments are going to parallel, or pick up on, those you just heard from my dear friend, Rachel Barkow. I'm going to talk about the Sixth Amendment and try to draw together threads from three different clauses of the Sixth Amendment. There's the Confrontation Clause, where Justice Scalia spearheaded the *Crawford*<sup>21</sup> line of cases, which said that if you want to bring in testimony from a witness, you need that witness physically present in open court to be cross-examined. There's the jury trial guarantee—in the *Apprendi/Blakely* line of cases, he spearheaded recognizing that if a fact raises the maximum statutory or guidelines sentence, it has to be proved to a jury beyond a reasonable doubt. And then there's the Assistance of Counsel Clause, where Justice Scalia has been in dissent in *Padilla*, *Lafler*, and *Frye*.<sup>22</sup> There, the majority extended the reach of the Assistance of Counsel Clause to plea bargaining and guilty pleas, and Justice Scalia has resisted.

First, I'm going to talk about his methodology, then I'm going to talk about the importance of clarity, and then I'll finish up with a discussion about separation of powers. First of all, in terms of methodology, the first point I want to stress is that he had one. It's hard for us to think back, but a certain generation of lawyers can remember back when litigating these cases was an anything-goes endeavor, whatever you can throw in. There were cases in other areas where, if we look at the legislative history and it's unclear, then we turn to the text. There wasn't a clear way in which one approached these cases. There wasn't a clear vocabulary because

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20. 559 U.S. 356 (2010).

21. *Crawford v. Washington*, 541 U.S. 36 (2004).

22. *Missouri v. Frye*, 566 U.S. 134 (2012).

there wasn't a clear point to the judicial exercise. It is very important that Justice Scalia changed the terms of the debate. There is now a vocabulary that the *Crawford* line of cases focuses on. The clause speaks of anyone who is brought to be a witness, or someone who gives testimony in a case. That includes certain people who are trying to become declarants to inculcate somebody, and then it excludes some other things, which may be technically under the rules of hearsay. But the rules of hearsay got confused with what the Confrontation Clause itself governs.

The jury trial guarantee is another place where there was no clear focus. What is an element of a crime that has to be proved to a jury? What is a sentencing factor? Justice Scalia, very importantly, focused on the importance of preserving the jury's role, defining the jury's role, and understanding what the jury's role is in contradistinction to judges and prosecutors. Now these cases are just litigated very differently. Win or lose, one had to grapple with his terms and his engagement with the very specifics of these clauses, as well as their structural role and their historical purpose and context.

I do want to stress that, as Professor Barkow mentioned, this approach and methodology is grounded in law. There is law here. There are tests. One has to be a textualist, and his originalism is a public meaning, objective originalism, grounded in the text. It's not just politics. Now, again, that might seem obvious with the benefit of hindsight, but take a look at the Confrontation Clause. Before *Crawford* in 2004, there was a generation of lawyers who had to learn *Ohio v. Roberts*.<sup>23</sup> From 1980 to 2003 or 2004, you had to argue about whether testimony was hearsay; the Confrontation Clause supposedly has a preference for live testimony; the preference is not absolute; and we can allow things if the hearsay is grounded in a firmly rooted hearsay exception, or bears particularized guarantees of trustworthiness. So, you had a seven-factor, eight-factor, nine-factor balancing test – it was completely unpredictable. The *Crawford* opinion itself catalogued a number of lower-court cases which held, “Well, if the hearsay is very recent, then it sounds like it's an excited utterance and we ought to let in because it wasn't fabricated. If the hearsay is very old, it has longstanding guarantees of authenticity – let's let it in.” There was really no check. “Heads, I win; tails, you lose. We don't want to let this criminal defendant off; we don't want to let that criminal defendant off.” So, the clause came to be kind of meaningless.

The same could be argued about the jury-trial guarantees: How much is too much discretion for the judge at sentencing? The result was wide open sentencing discretion – surely there's something the legislature can't hand off from the jury to the judge. There is a grounding in law, in text,

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23. 448 U.S. 56 (1980).

in roles of actors that Justice Scalia brought, and a rigor that was missing from these debates until his bracing take on them was brought to bear.

By the way, it's also worth noting that, as Professor Barkow mentioned, his methodology created odd bedfellows. It constantly irks me that newspaper reporters want to paint the Supreme Court in a left-versus-right divide, and one of the things to Justice Scalia's great credit is he constrained his own political preferences. He ruled in favor of a lot of people, and he candidly said, "I don't like these people!" Ralph Blakely is someone who kidnapped his wife and confined her in a coffin-like box in the back of his truck. There were a lot of unsympathetic characters. The flag-burning case<sup>24</sup> is another example outside of criminal law where he was very clear about saying, "I don't like this personally, but this is where consistent, principled methodology takes us." That made him very different from some other possibly more results-oriented justices, and it's important to underscoring that judging is about the rule of law, not politics.

My second point is one of clarity. In the Fourth Amendment, the text doesn't necessarily generate formalism when it talks about reasonableness, but in the Sixth Amendment context, textualism brought out certain bright-line rules. I think he certainly liked bright-line rules, but they also served some of these rule-of-law values pretty well. One of his arguments was that it's important to give people fair notice of what's going to be admissible in court, what kinds of penalties a criminal defendant is going to face, and what a defendant is or is not entitled to as a matter of his defense lawyering. And all this would protect against some maximum sentences but not against the possibility of losing out on leniency in the plea bargaining context. I personally view that as one of his less successful arguments because there's a fiction that criminals actually know the prospective punishments when they burglarize. I don't know that many criminal defendants who actually read the statute books.

A better argument for clarity he advanced is that clarity is important to constrain the discretion of those in the system. His writing – his very trenchant and beautifully pointed writing – brought out this point. The best example I can think of is in the *Apprendi* line of cases. There was a case called *McMillan v. Pennsylvania*<sup>25</sup> about thirty years ago. It said, "We think it's good enough for government work if a judge triggers the mandatory minimum sentence, as long as the sentence enhancement doesn't go so far as to allow the 'tail to wag the dog.'" Now, Justice Scalia had great fun with the obvious subjectivity of this test. Because it was very murky, judges could always disagree about whether a particular

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24. *Texas v. Johnson*, 491 U.S. 397 (1989).

25. 477 U.S. 79 (1986).

enhancement went too far, and there was no way to falsify it. It was basically personal preferences. He had a footnote in which he wrote – in *Blakely*, I think – that he was terminating this line of jurisprudence because the “tail wags the dog” rule would

require that the ratio of sentencing-factor add-on to basic criminal sentence be no greater than the ratio of caudal vertebrae to body in the breed of canine with the longest tail. Or perhaps no greater than the average such ratio for all breeds. Or perhaps the median. Regrettably, *Apprendi* has prevented full development of this line of jurisprudence.<sup>26</sup>

He made reading footnotes fun because it’s obvious what the problem is with the “tail wags the dog”: There’s no standard there; there’s no test. I know it when I see it, and surely we can do better in this area.

A third importance of clarity that Professor Barkow alluded to is that Justice Scalia prized liberty over efficiency. There’s a real contrast between Justice Scalia and Justice Breyer in this area. Justice Breyer, in his *Apprendi* dissent, pointed out, “You know, sentencing commissions make a lot of policy sense. They’re the wave of the future. They’re the experts. We ought to learn from them.”<sup>27</sup> I have some sympathy myself for that policy position. Justice Scalia’s concurrence responded that Justice Breyer, in his dissent, has sketched out an admirably fair and efficient approach to criminal justice, but the Framers didn’t embrace that. They took a different tack. Our Constitution “has never been efficient; but it has always been free.”<sup>28</sup> So, there’s a tradeoff. He embraced that tradeoff, and he grasped the nettle; but he saw a broader virtue in embracing this kind of clarity in protecting liberty, and not just pursuing efficiency and experiments that might muddy things.

This brings me to my final point, which is the importance of the separation of powers in protecting juries and protecting liberty. Professor Barkow may be the leading scholar of the separation of powers in criminal procedure. I think the rule of lenity and vagueness are part of that, but another part of that is the way the Sixth Amendment plays out. First of all, he understood that about half of the Bill of Rights is criminal procedure, and it is a set of restrictions on government power. The government’s ability to punish people is an awesome power, and it has to be exercised vigorously to protect us. But it has to be restrained by checks, and these restraints are important to preserving liberty, as he kept underscoring. Secondly, he saw the importance of democracy as a

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26. *Blakely v. Washington*, 542 U.S. 296, 311 n. 13 (2004).

27. See *Apprendi v. New Jersey*, 530 U.S. 466, 555-60 (2000) (Breyer, J., dissenting).

28. *Id.* at 498 (2000) (Scalia, J., concurring).

counterweight to expertise, and the jury is the locus of democracy. Prosecutors – and I’m proud to be a former prosecutor – and judges are nevertheless functionaries of the state, and they have to satisfy a jury unanimously beyond a reasonable doubt that somebody deserves to be thrown in prison, to lose liberty, to have the stigma of a conviction. He powerfully wrote about the importance of juries seeing the witness be cross-examined to satisfy itself – not some judge deciding that hearsay is reliable, but the jury deciding for itself. The Constitution intends a procedure to ensure that the jury makes that determination, not a substantive requirement that the judge decides for himself or herself what is reliable. The Constitution guarantees that the jury authorizes a certain sentence, not that the judge decide what is enough proof. That separation of powers is an important part of our history, I would stress – the history of the colonists trying to check this authority.

Now, I want to offer a note of caution at the end because I think a fair counterargument to Justice Scalia’s approach is that, while it works pretty well and is pretty faithful for problems from the 18<sup>th</sup> century, it might be arguably less workable in problems that are unpredictable and aren’t addressed by the text or the history. So, in the Fourth Amendment area – Professor Kerr has spoken about this – you’re aware there are big recent cases involving the use of GPS tracking to formulate a mosaic of a bunch of data,<sup>29</sup> or cheek swabs to gather DNA,<sup>30</sup> or thermal imaging.<sup>31</sup> It’s at least strained to say that using thermal imaging devices is like watching snow melt in the 18<sup>th</sup> century. But in this area of the Sixth Amendment, I think there are real problems taking a Confrontation Clause that’s designed for live-witness testimony and applying it just hook-line-and-sinker to forensic testimony.<sup>32</sup> I think the Confrontation Clause works pretty well when you’re talking about lay witnesses and obvious incentives to fabricate. But when we’re talking about problems of DNA analysis and chains of custody, et cetera, it’s at least arguable that that might be an extension beyond where the text takes you. We ought to start there, but it’s not clear that it ends the analysis.

The same thing when it comes to modern sentencing schemes. Again, a fair counterargument is insofar as we have historical parallels, it’s good to make sure the jury has some role but doesn’t necessarily preclude a scheme that might have more protections in it than indeterminate sentencing. Probably my biggest qualification in this area pertains to the plea-bargaining cases, the ones in which he was in dissent.<sup>33</sup> Justice Scalia

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29. *United States v. Jones*, 565 U.S. 400 (2012).

30. *Maryland v. King*, 569 U.S. 435 (2013).

31. *Kyllo v. United States*, 533 U.S. 27 (2001).

32. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

33. *Lafler v. Cooper*, 566 U.S. 156, 175 (2012) (Scalia, J., dissenting).

and even Justice Thomas are unwilling to dynamite the plea bargaining edifice. There is a consistent originalist argument that plea bargaining does not fit with the Constitution. Go read Article III, Section 2 of the Constitution. “The trial of all criminal cases shall be by jury.” It looks like that was made to be a non-waivable structural check. If you do that, you have no plea bargaining – and no plea-bargaining problem. If you are going to have plea bargaining and you’re going to make the Sixth Amendment guarantee of counsel meaningful in that world, you can take two approaches. You can take a formalist approach, which is Justice Scalia’s. He said, basically, if you are getting a discount in plea bargaining, you shouldn’t have any rights because it’s just unfettered leniency, and leniency doesn’t threaten these rule-of-law maximum-sentence values. He said, “The Court today embraces the sporting-chance theory of criminal law, in which the State functions like a conscientious casino-operator, giving each player a fair chance to beat the house, that is, to serve less time than the law says he deserves.”<sup>34</sup> From a formalist perspective, maybe. From a functionalist perspective, it’s not like a few people are getting a roulette wheel of leniency. Almost everybody is, and the real world is one in which most people are getting the going rate determined by plea bargaining, and Justice Scalia wasn’t going to take or extend Sixth Amendment protections to a world – nevertheless a post-originalist world – that the Court was willing to allow.

Those quibbles aside, there is no question that Justice Scalia has left a lasting legacy. His vocabulary and his methodology changed the terms of the debate and reinvigorated the Sixth Amendment, and that’s something that everybody has to grapple with. It’s telling that most of the justices on the Court have signed on to some of the unusual left-right coalitions involved here. Justice Ginsburg, Justice Souter, Justice Stevens, now Justice Kagan and Justice Sotomayor have signed on to many of these opinions. So even non-committed originalists see the virtue in a method, in a purpose, in making these clauses mean something, even though they disagree about the details, and even though they sometimes get off the train with him at certain points. So his legacy endures, and it is an important testament to the rule of criminal law as a law of rules and not one of naked politics or discretion.

JUSTICE STRAS (MODERATOR): Thank you, Professor. Our final speaker is Paul Larkin from the Heritage Foundation. He directs the Heritage Foundation’s project to counter abuse of the criminal law, particularly at the federal level, and he is part of the over-criminalization project of Heritage’s Rule of Law Initiative. Before joining Heritage in September

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34. *Id.* at 186 (2012) (Scalia, J., dissenting).

of 2011, he held various positions with the federal government. He was at the U.S. Department of Justice from 1984 to 1993 as an assistant to the solicitor general and an attorney in the Criminal Division on organized crime and racketeering. He has argued twenty-seven cases before the U.S. Supreme Court. He was also a law clerk for the United States Court of Appeals for the District of Columbia Circuit, for Judge Robert Bork. I will turn it over to Mr. Larkin.

MR. PAUL LARKIN: Thank you very much. I appreciate it, and it's an honor to be here. I want to thank the Federalist Society for giving me this opportunity to be on a panel with three very brilliant professors.

A few weeks ago, I was at a conference in Virginia, and the night before, I had dinner with some students and some of the other conference attendees, one of whom was Alan Morrison. I said to Alan that I think a good argument can be made that Justice Scalia was one of the best friends that defendants had when they came before him in his Court. Alan immediately interjected. "No, no, no, no. Look at all of his habeas jurisprudence. Nobody ever got any relief," to which I said, "Alan, those are prisoners; they're not defendants. By this point, they are already guilty, and an entirely different set of rules applies."

As my colleagues have mentioned, history is an important feature for Justice Scalia interpreting the substantive provisions of the Constitution, but it was also an important provision for him in some of the substantive criminal cases that he had. Now, his substantive criminal law jurisprudence was narrow – intentionally so. He took to heart the lesson that the Supreme Court taught years ago when the Marshall Court decided the *Hudson and Goodwin* case,<sup>35</sup> that it is not the province of the federal courts to decide what is and is not a crime; it is the province of Congress to do that. As a result, as Professor Barkow said, he read statutes strictly, not always the way that the Justice Department would have liked. In fact, there are a variety of different cases that may have never gotten his vote if he had been on the Court when those cases were decided – and by that, I'm thinking in particular of the *Turkette*<sup>36</sup> case dealing with the RICO Act.

There are a variety of different decisions he handed down in the substantive criminal law area. Now, federal jurisdiction is pretty narrow in this regard, and every crime will be a statutory crime, so Professor Barkow has talked about how he read statutes. I'm not going to address that part because that's already been covered, but what I want to talk about is his use of the common law.

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35. 11 U.S. 32 (1812).

36. *United States v. Turkette*, 452 U.S. 576 (1981) (ruling that the term "enterprise" includes an association-in-fact organized for criminal purposes).

He relied on the common law very heavily in a variety of different cases. For example, in *Schad v. Arizona*,<sup>37</sup> he wrote a concurring opinion dealing with the issue of whether you could have multiple bases for a conviction, or whether the jury had to be unanimous on only one of them. For example, did the defendant murder the victim, or did the victim die in the course of a felony? That, for him, was a pretty easy one, since what you are getting at really didn't matter much, but he also said that in common law it didn't make a difference which basis the jury convicted on, as long as they were unanimous about the underlying offense, and the common law, for him, was dispositive in that.

In *McCormick v. United States*,<sup>38</sup> rather than get into an esoteric discussion about the relationship between the criminal law and the political process, he relied on the common law and used that as a way of trying to limit the problem that resulted when you tried to apply an old statute that sounded like a common-law statute to contemporary political processes.

In *Montana v. Egelhoff*, he relied heavily on common law in order to address the question of whether drunkenness is a defense to a crime.<sup>39</sup> The common law had rejected it. At the common law, drunkenness was immoral and an offense in and of itself, so the idea that drunkenness could serve as a defense to a crime was alien to Blackstone and the others. For Justice Scalia, that was dispositive. The Constitution didn't require that what had been permitted or commanded throughout history be done entirely differently. So, for him, there was no entitlement to a drunkenness defense, even as to a specific-intent crime.

He followed the same sort of approach in *Smith v. United States*,<sup>40</sup> which dealt with the withdrawal from a conspiracy, and *Sekhar v. United States*,<sup>41</sup> which dealt with the definition, again, of extortion. In fact, to some extent, the best example of what Professor Barkow talked about with his reliance on the statute is his decision in a case called *Brogan v. United States*,<sup>42</sup> which dealt with the so-called "exculpatory no" doctrine that had been developed under false-statement cases. If a suspect said he was innocent to a police officer, the police officer in the prosecution couldn't charge him with lying to a federal official. Justice Scalia absolutely flatly refused to create a new common-law exception to the federal False Statements Act because there was no similar exception in common law, and more importantly, he saw it as not being his

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37. 501 U.S. 624 (1991).

38. 500 U.S. 257 (1991).

39. 518 U.S. 37 (1996).

40. 508 U.S. 223 (1993).

41. 570 U.S. 729 (2013).

42. 522 U.S. 398 (1998).

responsibility to create federal common law in this regard, even when, in this case, it would have helped the defendant.

But there is one case that I want to talk a little bit about where he relied heavily on the common law. My colleague, Professor Bibas, was mildly critical of Justice Scalia for his decisions in some cases, but there was one case that he just got flat wrong. It's a case called *Griffin v. United States*.<sup>43</sup> It dealt with the problem of jury instructions that permitted multiple potential bases for a conviction where you know one of them on appeal is clearly wrong. He relied very heavily on the common law in rejecting Griffin's argument for a unanimous Court. I have to confess, that the indecision in this regard required it be resolved in favor of the defendant with the conviction reversed.

The problem with relying on the common law in this instance is at common law there were no appeals. There were no appeals in federal criminal cases for capital defendants until 1889, and none for defendants generally until 1891, so the common law really doesn't help you very much. In fact, the Supreme Court had addressed this problem under the Constitution in a case called *Stromberg v. California*,<sup>44</sup> where the question was whether a defendant who is possibly convicted of one of several bases that may be unconstitutional is entitled to have his conviction reversed. *Stromberg* and a series of subsequent cases decided that where one of the possible bases of the conviction may violate the Constitution, the conviction can't stand.

He distinguished that case on the ground the error was constitutional in nature. But to me, it really raises the question of why that would make a difference. The problem in cases like *Stromberg* and *Griffin* is uncertainty. You don't know for certain that the jury relied on a permissible ground when it was convicting the defendant. Now, in *Schad*, if all the different bases are permissible, you may not be worried about the jury coming to unanimity on any one of them, but if you know for certain that one or more of them perhaps is invalid, it's odd to say that we're going to presume the jury relied on the one that was valid.

So, common law for Justice Scalia was very helpful because it provided a good starting point on interpreting any statute. He made that clear in a case called *Sekhar v. United States*, where he said, "It is a settled principle of interpretation that, absent other indication, 'Congress intends to incorporate the well-settled meaning of the common-law terms.'"<sup>45</sup> It provided not only a good basis; it provided a very strong one where that was a possible outcome in the case, where you have terms like "extortion" and the like used in statutes that had a common-law meaning. He found

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43. 502 U.S. 46 (1991).

44. 283 U.S. 359 (1931).

45. *Sekhar v. United States*, 570 U.S. 729, 732 (2013).

that to be extraordinarily powerful. It ranked right up there with the text of the statute itself.

He also found that the common law provided an objective, moral judgment that had to be respected. In cases involving – for example, *Montana v. Egelhoff*<sup>46</sup> – the question whether a certain defense was entitled to be raised by a defendant, he looked to the common law to see how England and America had historically treated this defense, rather than engaging in the type of cost/benefit analysis or plus/minus analysis that you see in a lot of other cases. He believed that if the common law had consistently rejected a certain point, it would be unreasonable to conclude that the Constitution somehow required that the Court today eschew hundreds of years of precedent.

But, as I mentioned with respect to *Griffin*, even Homer nodded. Unfortunately, sometimes the common law can be very seductive. The analysis that relies on what has happened over hundreds of years may not always, as Professor Bibas said, be useful today. He relied on it very heavily in whatever case he could because he believed judges should not be making the law themselves – not just simply the substantive law but other law of the type that we heard about in connection with the Fourth Amendment, as well as the Sixth Amendment and elsewhere. For that, he deserves enormous amounts of credit. He actually brought the text of the Constitution and the text of statutes back into play as being the principle issue in these cases.

Judges historically had learned the common-law method – they started it at Harvard – and they moved from one case to another in a sort of color-matching approach. For a variety of cases, he just completely rejected that analysis. Where there was a constitutional provision at issue, that’s what you had to consider. Where there was a statute at issue, that’s what you had to consider. And where the common law provided an answer that may have existed for centuries, that is what you had to consider, too, because, in each of those cases, you are relying on something other than the judge just engaging in a type of balancing that you might see in a tort case but that he thought was impermissible under the Constitution and in the substantive criminal law. Thank you.

JUSTICE STRAS (MODERATOR): Thank you, Mr. Larkin. Because one of the most interesting parts of these panels is the give and take between the various panelists, I thought I would give a very brief period, so that we can get to questions, for panelists to respond to any points made by any of the other panelists. So, in a brief two minutes, do any of you (and it’s certainly not mandatory) want to respond to the points made by your co-

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46. 518 U.S. 37 (1996).

panelists?

PROFESSOR KERR: I'll bite at one issue, in response to Paul. I'm more sympathetic to my colleague Alan Morrison on the issue of whether Justice Scalia was a criminal defendant's best friend. In a lot of ways, he was a swing vote in criminal law cases more than a reliable vote for defendants. Maybe the way of thinking about it – at least how I think about it – is that he was much more of a friend of criminal defendants than you would have expected when he joined the Court. Maybe he's more of a criminal defendant's friend than other Republican nominees or other conservatives.

I think his record is mixed. In the Fourth Amendment area, where Justice Scalia got a lot of attention voting in favor of defendants, part of that was an assumption that Justice Scalia must be on the government's side. So when he voted for the defense, it was kind of a surprising thing. I think of my friends on the liberal side saying, "Wow, I never expected to like Justice Scalia's opinion. But it's great!" So, I think some of that was the surprise aspect that made people remember those decisions more. But I think of him as more someone who in the Fourth Amendment context was very much a swing vote in the last, say, ten years of his career, rather than a defendant's best friend.

PROFESSOR BARKOW: Now I want to weigh in, too, just for a minute to say, OK, maybe not "best friend" but "really good buddy," because I think the way to think about it is the cases where he ruled for the defendant instead of the government, these were big areas. These are the ones that Professor Bibas was talking about that are the most monumental criminal justice decisions, at least in the past two decades, I think, are these Confrontation Clause decisions and the *Apprendi* line of sentencing decisions, which have fundamentally changed the way that criminal justice operates in the United States. So, they weren't just here-and-there issues, and I understand that the Fourth Amendment is a little bit different, but those were really big. Now, it didn't mean you always won before him as a criminal defendant, but I think it's important that he was willing to stand behind his principles and areas, even when it meant watershed change for the way that business-as-usual was operating.

And in statutory cases, I do not think you had a better friend than Justice Scalia if you were a criminal defendant because he was a faithful adherent to the text of the statute, and time after time studies have shown that no one used the rule of lenity more than Justice Scalia.

So, as a statutory matter, I think, absolute best friend; in the other contexts: super good buddy that you wanted along for the ride. And I do think part of that is maybe the unexpected of a more conservative judge,

but he was faithful to constitutional principles in a way that you could anticipate in advance as a litigant arguing cases. You sort of thought, “OK, if I argue this way to Justice Scalia, I have a real chance here. There’s a way in which I can do it.” With some of the other justices, it’s less clear, and I think that goes to the methodological consistency. I’m not saying that’s who you would want over Justice Stevens, but I think there is a way in which he was really true to his principles in ways that were fundamentally important.

JUSTICE STRAS (MODERATOR): All right, I’m going to pop in here because this little debate actually anticipated the question I wanted to ask the panelists. I think that one of the things that’s interesting about Justice Scalia’s jurisprudence is the right/remedy distinction. On rights, I think that Professor Barkow makes a great point, which is that he was open to – and Professor Bibas makes the same point – changing the right, to expanding the right. In the *Crawford* context perhaps; in the Fourth Amendment context as well; *Maryland v. King*,<sup>47</sup> his dissent, in that case, is an excellent example of that. But when it came to the remedy, he seemed to be a little bit more limited in what he would do for a criminal defendant – the exclusionary rule, for example. He was somewhat skeptical of the exclusionary rule, to say the least. With respect to the good-faith exception, he certainly was a proponent of the good-faith exception. When you look to the remedy, he seemed to not necessarily be the friend of criminal defendants, so I wonder how we can address that dichotomy or that almost-tension between the doctrines.

PROFESSOR BIBAS: Let me just add. I think there’s an issue on the remedies (and this goes to the post-originalist problem), which is a bunch of the remedies that worked in the colonial era don’t work anymore. We have created qualified immunities. We’ve taken tort cases away from juries. Tort remedies used to do the work in the Fourth Amendment. They don’t anymore, so it’s a real problem. What are you going to do about a remedy in that situation? Are you going to leave too much exclusion and deterrence? Or are you going to leave it, in essence, unremedied? There doesn’t seem to be a clear or neat answer to that problem.

When it comes to the right, I think it’s easier to latch onto as an originalist, textualist matter what the right is, and he was very faithful to that, and (I agree) maybe not the best friend, but as a textual matter, take the death penalty. I think people over-fixate on the death penalty just because it’s high profile. It’s actually a very small number of cases. You want to compare it to the broad impact on lots of defendants lower down,

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47. 569 U.S. 435 (2013).

but as a textualist matter, the Constitution refers to capital crimes. So he's not the defendant's best friend there because I don't think anyone who is principled about the text or original meaning of the Constitution could be. So, he's faithful to it, but it's unfair to say that that is driven by a hostility to the right; it's just that that's a made-up right, basically. And when it comes to remedies, there's a bigger issue as to what is the second-best thing you're going to inevitably be making up or crafting where you can't stick with the original one.

PROFESSOR KERR: I think the remedy question really is an important one. Trying to fit that into Justice Scalia's views is a little bit tricky. With the exclusionary rule, just focusing on the Fourth Amendment issues, you can say a plausible reading of the history is that that the exclusionary rule was not an understood remedy for Fourth Amendment violations. It's a little bit hard because the Fourth Amendment was so much a response to a specific set of cases. So in trying to figure out what the original public meaning of the Fourth Amendment was, you've got a couple of data points, and then you can construe it in lots of different ways. It's not obvious how you do that. The text of the Fourth Amendment says nothing about what the remedy should be. It's written in the passive voice. "Don't do this. This shall not be done."

A case I've always struggled with, in trying to fit into Justice Scalia's views, is his decision in *Anderson v. Creighton*<sup>48</sup> in 1987, at the end of his first term on the Court. He wrote a very important opinion for the Court saying that qualified immunity applies to Fourth Amendment civil claims. The plaintiffs, in that case, raised an originalist argument. They said there was no qualified immunity at common law. The remedy in a direct suit against an officer who violated the Fourth Amendment was damages for trespass, so that was what the plaintiffs in *Anderson v. Creighton* claimed.

Justice Scalia's response is interesting to read. It's just two sentences: "We have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law."<sup>49</sup> Doing so would entangle ourselves in the "vagaries of English and American common law."<sup>50</sup> He was sort of scoffing at the idea that the common-law rule was the one to follow.

How does that fit with Scalia's views of the right, which was so much based on the idea that you have retain the common law? I've always wondered: Did *Anderson v. Creighton* come out that way because it was only Justice Scalia's first term on the Court? If that had come up after

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48. 483 U.S. 635 (1987).

49. *Id.* at 645.

50. *Id.* at 646.

twenty years or twenty-five years, would he have said, “Listen, the common-law remedy was trespass, no qualified immunity; therefore, that should be the remedy”? Or alternatively, did he take that view because the cause of action in *Anderson v. Creighton* was a Section 1983 action rather than a trespass claim? If somebody had alleged common-law trespass, would there be qualified immunity under a Justice Scalia approach? We don’t know, but I think it’s tricky to fit Scalia’s view of qualified immunity in with his views of Fourth Amendment rights.

PROFESSOR BARKOW: I think that’s a great question – just really quickly. The one area where I think the tension comes, he really didn’t like any area where it was just left up to the judge on their own. I think we haven’t talked as much about the Eighth Amendment, but you could really make a very strong originalist case that Justice Scalia just had the Eighth Amendment wrong and that there’s actually a lot of judging that needs to take place with terms like “cruel and unusual,” and there are lots of great historical articles by Professor Stinneford and others saying, “Sorry, that’s just a tough area where judges have to do that balancing.” Justice Scalia did not like that, and I do think, when you have areas where there’s a tension between the bright-line reigning judges and then one of the other methodologies, those are the tough ones. Did he blink sometimes? I think so. I think the Eighth Amendment is one of them where the idea of just having judges reevaluate whether a sentence goes too far was a scenario that was just too hard to bear. So, as a result, the view was, “Well, no, nothing can be disproportionate, unless it was the kind of sentence that is drawing in court, something that even at the time you couldn’t do; otherwise, anything was OK.” I think that’s harder to justify under his methodologies, and I think where he got there was precisely because this remedy question would be so hard, and the judging would be so hard. I think that’s, for me at least, the area where I look, and I say I don’t agree.

PROFESSOR BIBAS: Picking up on that, in *Lafler* and *Frye*, it’s the same thing. It’s really hard to come up with a remedy for bad counsel and plea bargaining. That is part of what is driving him to say, “There can’t be a right here because the majority’s remedy is so loosey-goosey.”

MR. LARKIN: I think he probably felt over time the difficulty of trying to deal with all of these doctrines that predated him that he had to deal with, such as *Bivens*. I mean, if you look at the text of the Constitution, there’s only one provision that has a remedy – it’s the Takings Clause – and the remedy is you get just compensation. There isn’t a remedy in the Fourth Amendment. Then, the only remedy, I suppose, in the Sixth

Amendment would be just reversing the conviction or making sure that somebody testifies, et cetera. So, he probably would have been very uncomfortable with *Bivens*, but *Bivens* was decided before he got there and then *Harlow*<sup>51</sup> and the other cases create this doctrine of qualified immunity. I mean, I remember him asking me one time, “I’m really uncomfortable with this qualified immunity doctrine,” and I said, “Well, if you want to rule that all executive-branch officials get absolute immunity, we would be happy with that!” I think he just was in the position of trying to figure out: “OK, I can’t completely return the world to where it should be, so I’ll just try not to make things worse.”

JUSTICE STRAS (MODERATOR): One more question, and then we can start lining up here at the microphone. As a state court judge, Professor Bibas pointed out some areas where these questions come up a lot in state court: the Confrontation Clause, the right to a jury trial. I don’t know how many cases I’ve sat on where those constitutional rights have been at issue. Now, Justice Thomas is obviously still on the Court, but Justice Scalia wrote a lot of the opinions in these areas. He really was a big part of how the doctrine in those areas evolved, so as someone who has to apply and does apply these doctrines on a daily or weekly basis, I’m wondering what’s next. Are those doctrines going to be scaled back under a Court without Justice Scalia? Is there anything that we can tell? Is Justice Thomas going to carry on the mantle? Certainly, there have been retirements that have affected this so-called “*Apprendi* Five” and the “*Crawford* Five,” and it’s sort of gone on, but there are a number of justices on the Court who are skeptical of both of those lines of doctrine, so I’m curious, from the panel: What do you see as the future of those areas of the law?

PROFESSOR BIBAS: Hard to know. It’s arguable that the *Apprendi* line had run its course, and that the state sentencing guidelines that were blown up are not going to be limited any further, but that the courts were going to extend that line to indeterminate or unstructured sentencing. In the *Crawford* line of cases, we’ve got this weird situation where Justices Sotomayor and Thomas are swing votes on some of these cases, and there are factual distinctions among them.<sup>52</sup> Does it matter where the lab report was sealed or not? Does it matter whether the assailant had a gun or was using his fists? If you know these areas of doctrine, you know that some of the distinctions among some of the cases are very fine ones, so I don’t think the Court necessarily has to overrule them. But failing to extend

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51. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

52. *Bullcoming v. New Mexico*, 564 U.S. 647 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

them – in possibly analogous but possibly distinguishable cases in the future – is quite possible. But now the President says he wants to appoint justices in the mold of Justice Scalia; who knows what that means? Does it mean originalist and formalist, or tough on crime, or what? A Rehnquist conservative is very different from a Scalia conservative, and we frankly don't know what's coming next.

PROFESSOR BARKOW: I would predict that it will be death by a thousand cuts for most of them, honestly. I don't think that they'll last. The lasting legacy, I think, is the methodological one. I do think that, for the foreseeable future, justices are going to be committed to the text and starting with the text first. I think they're going to look at history in a way that they didn't before he was there, and I think those will be lasting legacies that will take far longer to chip away from. Having said that though, there was a backbone and a set of principles to Justice Scalia that he was happy to be a lone dissenter, and he was happy to just stick to his guns, even when you had very unsympathetic people. It takes a special kind of person to do that, and I would hope that we would see people like that on the Court, but I think if you're just kind of an odds maker, the odds of finding another one quite like Justice Scalia are zero, and then finding that kind of commitment even in the face of really sympathetic government arguments, you're asking a lot of judges when you ask for that. He really was a very special person to be able to see the long view. Now we look back at some of his decisions, and we just think, "Oh gosh, *Morrison v. Olson*<sup>53</sup> – nailed it!" But think about at the time. He was the only guy dissenting, a voice-in-the-wilderness kind of thing, and I do think you need a personality type and a set of core principles and a spine of steel to keep doing that, and it's very hard. Everything we know about social psychology and group dynamics and everything else suggests that that will be very hard to replicate.

PROFESSOR KERR: And building on that, what's so striking about Justice Scalia is not only did he have the methodological commitments, but he stuck to his guns. He would press them at oral argument. A lot of counsel would incorporate that. Some Supreme Court practitioners had too much of a fear of Justice Scalia. This is particularly true with new Supreme Court advocates, where they would say, "I'm so worried about how Justice Scalia is going to respond, I'm basically going to craft the brief in large part in response to him." Well, he's only one vote. But because he was so strong at oral argument, and he was pressing his methodological approaches throughout, he had that outside influence. It's

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53. 487 U.S. 654 (1988).

not clear to me that you will have someone, even someone who has that similar methodology and view of the world, that they'll have that influence. Because they just won't be as strong of a personality.

MR. LARKIN: On the Sixth Amendment, the *Apprendi* line of cases, I think that probably won't change, and I think the reason the Court came down the way it did was that legislatures were gaming the system. *McMillan* was the first case that came along, and once *McMillan* seemed to approve this, it seemed that legislators thought, "Great. Now all these important factors we otherwise would have thought should be treated as elements of an offense are now just sentencing factors, and we'll let the judge do it." So, you could be basically convicted of hitting somebody with your fist and wind up sentenced for murder because of the different add-ons that happened as a result. I think these are very savvy people up there, and they know that if they take their foot off that brake, it's just going to come back, so I don't think that's going to come back.

On the Fourth Amendment, I think, ironically, the Court spent so much time over the last twenty years (his time there, as well as elsewhere) trying to come up with rules that they are eventually going to create so many rules that it is impossible for a police officer to know which of the rules to follow and that someday, if they keep going in this direction, they'll get back just to a general reasonableness test. He didn't seem to like that. I know Orin says he didn't seem to like that, but that was always for me one of the oddities of his jurisprudence. I mean, he hated a general reasonableness judgment, but this was in a provision of the Constitution. He used that precise term, so why have all these rules when it just says "be reasonable." And eventually, we may even wind up getting there.

JUSTICE STRAS (MODERATOR): That's a fair point. All right. Questions – feel free to go to the podium if you have questions. Go ahead.

ATTENDANT: Thank you for this presentation. I'm a former state prosecutor. I certainly can relate to what you were saying about how these issues that come up in the criminal law, particularly when something is reasonable under the totality of the circumstances. Did the police officer have grounds to stop an individual? As you know, it's so fact-based. There are just one or two different facts that could completely change whether or not the stop or search or seizure was, in fact, reasonable. So, I guess my question is: Is there a method or a particular legal doctrine under Justice Scalia's method of interpreting the Constitution and the Bill of Rights? Is there a way in which the totality of the circumstances could have more of a bright-line rule, or is it just completely impossible under his way of interpreting the Constitution? Thank you.

PROFESSOR BIBAS: Well, there are some Fourth Amendment issues, for instance, in *Arizona v. Hicks*<sup>54</sup> – moving the turntable a few inches equals a search. Or look to the curtilage versus open fields distinctions in searches. There are some areas where there was a rule, and the rule came from common law, so you don't have to get to the totality of the circumstances if you have one of those. Those are areas where I think the rule had some sticking power. I'm not sure if you can say *Arizona v. Gant* isn't an originalist decision; it's a formalist decision, and you kind of have a clear rule that comes out. Again, it comes from his idiosyncratic fifth vote, but I leave it to Orin as to whether that has sticking power or not.

PROFESSOR KERR: I don't see the Court as likely to overturn *Gant*. I think Justice Scalia never had an answer to how you get around the fact-specific standards like probable cause or reasonable suspicion or general reasonableness. An example of this is *Scott v. Harris*,<sup>55</sup> a case on excessive force. Excessive force requires the Justices to say whether the use of force was reasonable. Scalia apologetically said we're going to have to "slosh through the fact-bound morass of reasonableness," in the sense of "we have no choice but to do this horrible thing and consider the totality of the circumstances because that's just what we're left with in the nature of the inquiry." I don't think he had a way around that except to cabin the doctrine with rules where rules were available. What is a search comes down to a bright-line rule. "This is a search; this is not a search." But the ultimate question of justifying searches or seizures, they were just going to be context where there was no other way around but a fact-specific inquiry.

MR. LARKIN: I think it would have been fascinating to have Justice Scalia on the Court at the time they decided *Terry v. Ohio*,<sup>56</sup> because I think he would have thought there's no doubt that reaching into somebody's pocket is a search, but I also think he would have thought there's no doubt that stopping somebody to ask questions is not a seizure. I think he would have said seizures are taking someone into custody to charge them with a crime or taking goods for which, say, tax hasn't been paid or something like that. I mean, if you take a look at the opinion in *Terry v. Ohio*, the entire analysis of whether this is a seizure occurs on one page where Earl Warren says, "Well gee, if this isn't a seizure, then police officers can do this for all sorts of reasons we don't like." He paid no attention to the common-law meaning of "seizure" or anything like

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54. 480 U.S. 321 (1987).

55. 550 U.S. 372 (2007).

56. 392 U.S. 1 (1968).

that; it was purely a consequentialist approach. “We don’t like the consequences of not treating this as being governed by the Fourth Amendment, so it is.” I think Justice Scalia would have rebelled at that notion. I think he would have said that the cities, the states, the federal government could all regulate the action of police officers up until the point there is a seizure, and stopping somebody in the street isn’t one. But he clearly, I think, would have said, “What happens after that? You reach into someone’s pockets. That’s definitely a search.” He probably would have been somewhat looking both ways, I think, in a case like that.

PROFESSOR BARKOW: But if you wanted to make him gasp, you just had to mention “totality of the circumstances” as the test. I remember there was one opinion where it was the ol’ T-H-apostrophe, “ol’ totality of the circumstances.”<sup>57</sup> It was like the key of “Now you’re about to do something lawless.” So, I think insofar as you are in that box, that was a troubling box.

JUSTICE STRAS (MODERATOR): Let’s go to the next question.

ATTENDANT: My name is Bill Otis. I’m a part-time law professor at Georgetown. It was an hour into our discussion before Professor Bibas mentioned the death penalty. It seems to me that the portrayal of Justice Scalia as a friend of defendants only when he thought the text of the Constitution required it is somewhat misleading. In fact, the death penalty had no better friend and no more eager proponent on the Supreme Court than Justice Scalia, and I would give as the foremost example is his concurrence in *Kansas v. Marsh*,<sup>58</sup> which I continue to use when I debate the death penalty as the best argument for its textual grounding in the Constitution. And the best argument against the dissenting opinion in *Glossip v. Gross*<sup>59</sup> of Justices Breyer and Ginsburg that the death penalty was unconstitutional, an opinion that I think Justice Scalia said pretty clearly could not possibly be squared with the text of the Constitution. I also dissent from the view that, apart from remedies – and the death penalty can be viewed as a kind of remedy for the worst defendants – in the matter of rights, Justice Scalia turned out to be a friend of defendants. I recall specifically his dissenting opinion in *Dickerson v. United States*<sup>60</sup> in which he exposes the *Miranda*<sup>61</sup> decision, which is probably in the public mind one of the most important – if not the most important –

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57. *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).

58. 548 U.S. 163 (2006).

59. 135 S. Ct. 2726 (2015).

60. 530 U.S. 428 (2000).

61. *Miranda v. Arizona*, 384 U.S. 436 (1966).

decisions in criminal procedure that he exposed *Miranda* as essentially a fabrication of what the Fifth Amendment commands, and pointed out that not only the automatic exclusionary rule in *Miranda* but the warnings themselves are nowhere required or even suggested in the Fifth Amendment. I would ask, in light of these considerations, whether Justice Scalia was indeed the friend of defendants that he had been portrayed so far today.

PROFESSOR BARKOW: I think what I would say is you may be a good friend without ever going beyond your principles for your friends. I have a lot of friends, but I wouldn't violate my core fundamental principles for them. So, at least insofar as I was talking about it, if you had a legal argument that had merit, absolutely, he didn't let what may be a knee-jerk impulse towards the facts of the case or where the sympathies lie. But if you didn't have a legal argument – and the examples you gave really would not be consistent with Justice Scalia's methodologies. As Professor Bibas pointed out, capital punishment is in the text of the Constitution, and the *Miranda* remedy was created by the Court, so in those areas, those aren't the kinds of context where his methodology would ever allow those kinds of things. When I say "friend," to the extent of what is in the bounds of acceptable legal argument, absolutely he would be open minded, and if the Constitution gave you a right as a criminal defendant – even if it hurt the government, made the government's case more difficult – wherein the particular case you didn't want it, it didn't matter – he would stick to his constitutional guns. To me, when I think of a judge and what it means to be "friendly" or not to an argument, I guess what I'm saying is "open-minded," and I think he truly was that. If the Framers gave a robust set of rights in the Sixth Amendment and other contexts, he was all in, and he didn't pull his punches. On the other hand, if there wasn't a textual or historical basis for something, you were out of luck.

PROFESSOR BIBAS: I think I can second both what Professor Barkow said and what Mr. Otis said. He's so quotable, but his dissent in *Dickerson* is brilliant. He criticized *Miranda* as a "milestone of judicial overreaching" and the Court's reaffirmation of it as "the very Cheops' Pyramid (or perhaps the Sphinx would be a better analogue) of judicial arrogance."<sup>62</sup> He was willing to call out when the judges were making things up, but when the Constitution actually took him there, that's where he went. So I think you're both right.

JUSTICE STRAS (MODERATOR): All right, next question.

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62. *Dickerson*, 530 U.S. at 465 (Scalia, J., dissenting).

ATTENDANT: I'm Paul Kamenar, a Washington attorney. I was going to ask about *Dickerson*. I sat second chair with Professor Paul Cassell argued that, and Justice Scalia agreed with us, so since that question has been asked, let me ask a different one. Professor Bibas, you talked about Justice Scalia's Sixth Amendment jurisprudence. How do you think he would have ruled in *Luis v. United States*,<sup>63</sup> where he heard the argument in November but passed away before it was decided? That case held that the pre-seizure of untainted assets of the defendant violated his Sixth Amendment right to counsel. It was a 5-3 decision, so his vote would not have made a difference, but, based on your discussion of his more limited role of the Sixth Amendment, how do you think he would have ruled in the *Luis* case?

PROFESSOR BIBAS: I vaguely remember that in *Caplin & Drysdale*,<sup>64</sup> he was one of the votes in the five-justice majority that said you could freeze a defendant's assets. So I'm not sure that he necessarily, as an original matter absent precedent, would have said that you have a right to appointed counsel as opposed to (as it was written in the 18<sup>th</sup> century) a right to retain your own lawyers. He never rejected the precedent that had established that, but whether he would have extended it to say that you have a right to keep the funds you need to hire your own lawyer, it's dubious that he would have gone the extra step, but I don't know.

JUSTICE STRAS (MODERATOR): All right, we have a couple of minutes left. I'm going to ask the other unanswered, unasked question that I had, which goes to Professor Barkow's presentation, which is one of the things I actually find fascinating about Justice Scalia is, in some of his opinions, he suggests that the rule of lenity may very well be a first resort and not a last resort, and he's made that point at various points in his career. But, of course, the rule of lenity is a pretty heavy finger on the scale of the criminal defendant, and I know that Justice Thomas and other "conservative members of the Court" have often viewed the rule of lenity as a last resort, not as a first resort. My question is: What explains that, and are there any principles lying in the background that set Justice Scalia apart? Certainly, anyone can answer; it's just that particular presentation sort of brought that question about.

PROFESSOR BARKOW: I see it as consistent with some of his administrative law jurisprudence and statutory interpretation there. There

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63. 136 S. Ct. 1083 (2016).

64. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989).

are two steps under *Chevron*,<sup>65</sup> and Justice Scalia almost never got to step two, so he didn't have to defer to an agency because, under step one, he found the statute clear. I think this kind of the mirror image of that where he looks at a criminal statute, and if it's just not clear on its face, then the tie goes to the defendant. I think, for some of the other justices, there is more of a willingness, certainly, for the justices who use legislative history, they're rarely going to get there. For the justices as committed as he was to not using that, they maybe would be a little more likely to get there using structure, other textual clues. But I think for him, it was a venerable canon, it's a common-law tradition like no other, so whenever he would talk about statutory interpretation canons, the rule of lenity was kind of numero uno in terms of what you had in the arsenal both because of its historical pedigree but also as a matter of just thinking in a government. If you rule for the government and you're wrong as a court, what's the criminal defendant going to do? March back to Congress and say, "You got this wrong! Won't you rule in favor of criminal defendants?" We know as an empirical matter that, in fact, Congress is very unlikely to act when defendants lose. In contrast, when the government loses, Congress often does fix the statute. I think as both a historical matter and just an operation of good government matter, there's a way in which you insist on clarity, and you use lenity to make Congress be clear, and I do think he had a lot of those canons. That was basically to force Congress to do a better job, and I think that's another reason for him it was easier to rely on lenity because then it's not that hard for Congress to come back and rule against a criminal defendant in our system. In our system, for the individual, it's just hard to get those kinds of protections, whereas the government has so much sway. I think for all those reasons, it was an easy step for him because I think both as history, as commitment to textualism, and at least what he said in *Sykes* and other decisions is it's just so easy for Congress to make a slap-dash law, but there should be more care that's taken before you take somebody's liberty away.

PROFESSOR KERR: I've always seen his focus on the rule of lenity as really an outgrowth of his focus on separation of powers. Justice Scalia had a strong sense of it: "Listen, there are three branches. They each have their role; they can't get out of their role. The role of the legislature is defining what is a crime. If they didn't define what is a crime, they failed at their job and have to go back and do it again." And the answer of other judges would be: "Well, we can fill it in. We can help them along. The judges can do a little bit of the legislative role." And I think Justice

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65. 467 U.S. 837 (1984).

Scalia's strong rule of lenity principle, I've always understood it to be reflecting this idea that judges shouldn't don't help the other branches. Each branch has individual roles, and we have to stick with those. So, it's that commitment to the separation of powers driving the rule of lenity. And less concern than maybe other justices had about the consequences that might follow from that in terms of this one case, instead focusing on the need for the legislature to do its job.

PROFESSOR BIBAS: And complementary to that, I would stress notice. If you're a textualist reading the statute, you could plausibly consult with an attorney to read this statute, but it's not likely that you're going to be able to understand legislative history in the way that a court in hindsight is eventually going to get it. If you get to it at the last step, after you've rummaged through a bunch of the materials, it's really hard to say you've had clear, fair warning—whereas if you're just looking at the face of the text, it's at least more plausible. Now again, I suggested that was a fiction in part. But it still might be a useful fiction in terms of constraining sources and providing some notice, as well as some constraint on discretion, because the critique of legislative history is if you have too many sources out on the table, the judges or prosecutors pick the sources that they like as opposed to all being on the same page quite literally, the page of the statutory text.

MR. LARKIN: I think it also reflected possibly a separation-of-powers jurisprudence and concerns, but also it was concerns about the role of government in liberty. I think there are a lot of justices that would be willing to adopt, say, overbroad interpretations of the statute, assuming that the government would pick only the really bad actors to prosecute. And I think he saw that as being an improper way for the courts to act, that liberty was important, and unless a statute clearly said you could be deprived of it, the government was not entitled to deprive you of it. They could always go back and change it, but unless and until they did, there was a presumption in favor of liberty rather than reading it the opposite way.