



# Regaining Perspective: Constitutional Criminal Adjudication in the U.S. Supreme Court

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## Article

# Regaining Perspective: Constitutional Criminal Adjudication in the U.S. Supreme Court

Andrew Manuel Crespo<sup>†</sup>

### INTRODUCTION

A classic is a work that lives on through time, not because it is static and inert, but because it speaks continuously to new generations—always in its own voice, but with resonance and relevance for our current quandaries. Anthony Amsterdam’s *Perspectives on the Fourth Amendment*, much like the constitutional text that it sets out to comprehend and expound, is a classic in precisely this fashion.<sup>1</sup> In this trio of lectures, first delivered in 1974, Amsterdam offers a critique of the Supreme Court’s Fourth Amendment jurisprudence that is both trenchant and unrestrained.<sup>2</sup> Equally noteworthy, however, it is also deeply charitable toward its subject. “My present point is to impress upon you,” Amsterdam writes, just “how remarkable and admirable it is that the Court can ever function reasonably well in the torturous task—performed under torturous conditions—of interpreting . . . the fourth amendment.”<sup>3</sup>

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

2. *See, e.g., id.* at 349 (asserting that “the law of the fourth amendment is not the Supreme Court’s most successful product” and describing as an “understatement[]” prior criticism of the Court’s jurisprudence as “a mess!” (quoting Roger B. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329 (1973))).

3. *Id.* at 355.

In Amsterdam's view, "we observe the Court in the throes of one of its noblest labors" when we set out "to understand [its] difficulties in grappling with" that "brief, vague, general, unilluminating text written [over] two centuries ago."<sup>4</sup> Those difficulties, which Amsterdam termed the Court's "vexations," were in his view largely institutional in nature: the Court, he explained, is in essence a "committee" of ideologically varied and changing members, who render decisions only interstitially over time;<sup>5</sup> they confront in criminal cases unavoidably hard facts that do not easily yield stable legal rules;<sup>6</sup> and the questions they consider invariably arise against an ever-changing sociopolitical backdrop, which implicates the always delicate relationship between the police, the citizenry and crime.<sup>7</sup> These institutional challenges, in Amsterdam's view, "complicate the development of a single, comprehensive fourth amendment theory," and indeed make even a minimally "coherent construction of the fourth amendment exceedingly difficult" to accomplish, if not outright impossible.<sup>8</sup>

In this Article, commemorating the centennial anniversary of the Law Review that published these seminal lectures forty years ago, I take up a renewed assessment of the institutional vexations facing the Supreme Court when it grapples with constitutional criminal law—a field that has grown in importance and salience, for the Court and the country, in the four decades since Amsterdam first offered his *Perspectives*. The vexations,

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4. *Id.* at 353–54.

5. *See id.* at 350 ("[T]he Court is in the unenviable posture of a committee attempting to draft a horse by placing very short lines on a very large drawing-board at irregular intervals during which the membership of the committee constantly changes.").

6. *See id.* at 351–52 ("[C]ritics may postpone their articles, change their topics, take a sabbatical, or otherwise procrastinate till muddy waters clear. The Supreme Court ordinarily must decide the case before it."). Of course, the Supreme Court, with its discretionary docket, has more freedom than most courts to set its own agenda—and indeed more freedom today than when Amsterdam authored his *Perspectives*. *See* Supreme Court Case Selections Act of 1988, Pub. L. No. 100-352, 102 Stat. 662 (codified at 28 U.S.C. §§ 1254, 1257–58, 2104 (2012)).

7. *See* Amsterdam, *supra* note 1, at 386–87 (observing that "subsequent events" following a Fourth Amendment decision often "produce surprises proving the definitions" in the Court's holding "insufficient or embarrassing"); *id.* ("It demands a great deal of the Court to ask that it develop coherent principles for the definition of 'searches' and 'seizures' without knowing what is going to come out of th[e] box [next] in Meridian, Mississippi or New York City . . .").

8. *Id.* at 352 (describing the institutional challenges facing the Court as potentially "insuperable").

too, have grown only more numerous in that span of time. In particular, at least three intervening developments have arisen that, much like Amsterdam's original vexations, serve today to stymie the Supreme Court's ability to engage properly and fairly with its growing Fourth Amendment jurisprudence—and indeed with questions of criminal justice more generally.

The first of these new vexations arises from a notable change in the Court's composition: in the decades since Amsterdam first penned his lectures, the Supreme Court has seen a threefold increase in the number of its Justices with experience working as criminal prosecutors prior to their ascension to the bench. In that same span of time, however, it has also lost what one Justice has called the invaluable perspective of a jurist with the "ear of a counselor,"<sup>9</sup> that is to say, a Justice with direct familiarity of modern-day policing and prosecution, as they are so often experienced by the stopped, the frisked, the arrested and the accused. This shift in the professional background of the Court is significant, given the importance of perceived impartiality for judicial legitimacy as well as the potential impact a judge's life experience can have on his or her perspective—and, in turn, on the institutional perspective of the court on which he or she serves.

More important, however, than changes in the Court's composition are changes in the institutional mechanisms by which it engages with and adjudicates the many significant questions of constitutional criminal law that it decides each Term. A tribunal composed of generalist judges, after all, will never include among its members lawyers with direct and varied experience in each of the myriad legal issues that come before the court for review. Usually, however, generalist judges can draw on at least two institutional features of the judicial process to compensate for any such lack of firsthand knowledge or expertise: First, judges are typically exposed, over time, to a wide array of cases that paint a fair picture of the broader field within which their jurisprudence operates and unfolds. And second, they tend to be assisted by argument from counsel who have comparatively higher expertise in the subject matter *sub judice*, and who can therefore educate them as they move toward the resolution of a given case.

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9. Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1217 (1992).

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When it comes to the Supreme Court's adjudication of constitutional criminal law, however, each of these institutional safeguards—the consideration of a wide ranging set of cases, and the aid of ably skilled counsel—fails in practice to give the Court a balanced perspective of the key criminal justice issues of the day. Indeed, the problem is worse than that: structural imbalances in the manner in which criminal procedure cases make their way to the Supreme Court and in which they are argued once they arrive affirmatively *introduce* systemic biases and disparities into the Court's consideration of these important issues.

These disparities arise from two additional and relatively new institutional vexations facing today's Court. First, while the modern Supreme Court generally benefits from the assistance of an increasingly expert Supreme Court Bar, it is starved of such assistance when it comes to the Supreme Court criminal *defense* bar—which, as I will demonstrate in detail in this Article, is uniquely inexperienced, especially when compared to the attorneys called upon to present a contrasting point of view on behalf of the prosecution. Second, developments in the general nature and practice of plea bargaining have granted government agents dramatically increased power to determine which constitutional issues will see the light of litigation in the first instance—and will thus make their way to the Supreme Court for review. As a result, the targets of constitutional criminal procedure's regulatory mandate—the members of the prosecution team—are increasingly able to mold the pipeline of cases heading to the Court, and thus potentially to dictate the terms of their own constitutional regulation.

The three Parts of this Article that follow examine each of these new institutional vexations in turn. The Article opens, in Part I, with a discussion of changes in the Supreme Court's composition that have substantially amplified the prosecutorial perspective on its bench. The Article then offers, in Part II, its most robust and substantial contribution, providing the most comprehensive analysis to date of the unequal and inadequate nature of criminal defense advocacy before the Court. Finally, the Article closes, in Part III, with an exploration of the potential impact prosecutorial plea bargaining leverage might have on the direction and development of constitutional criminal jurisprudence into the future.

Insofar as each of these Parts analyzes a distinct institutional vexation that has emerged over the past four decades, it

stands on its own. Taken together, however, the Parts operate in tandem to expose a striking modern reality: today, forty years after Amsterdam wrote his *Perspectives*, constitutional criminal adjudication before the U.S. Supreme Court consists largely of arguments by expert prosecutors, offered to former expert prosecutors, about cases potentially channeled to the Court by prosecutors.

The potential this reality holds to warp the Supreme Court's institutional perspective when it adjudicates issues of constitutional criminal law ought to cause concern. In the spirit of Professor Amsterdam, however, the goal of this Article is not simply to identify new vexations, but also to identify potential means by which those vexations might be mitigated or overcome. And taking the *Perspectives* as its cue, the discussion of such potential solutions here treats the Supreme Court as an institution with genuine agency—an institution that can itself take significant steps toward regaining a more balanced institutional perspective when engaging in the important task of constitutional criminal adjudication.

Specifically, with respect to the deficiencies in the Court's criminal defense bar, the Article argues, in Part II, that the Court could substantially shrink the current advocacy gap by establishing—on its own initiative—a standing committee of its Bar composed of defense attorneys expert both in the field and in Supreme Court advocacy, and by empowering that committee to appoint attorneys to argue opposite the State as *amici curiae* in criminal procedure cases—much as the Court currently welcomes the nation's foremost appellate prosecutor, the Solicitor General of the United States, as an *amicus curiae* arguing *against* criminal defendants in many of the criminal cases that the Court considers. As for the potential that plea bargaining holds to skew the issues brought to the Court for review, the Article proposes, in Part III, a possible amendment to existing rules of trial procedure that the Court might pursue in order to safeguard judicial review of important constitutional claims—by deeming such claims preserved for review by default, even in cases resolved by pleas of guilt.<sup>10</sup>

Efforts by the Court along these lines will not eliminate all of the various vexations inherent in constitutional criminal ad-

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10. See *infra* note 180 and accompanying text (discussing potential amendment to procedural rules that could implement presumptive issue preservation through conditional guilty pleas).

judication. They could, however, allow the Court to gain a more balanced institutional perspective than it can currently claim, and could thus assist the Court in its ongoing effort to interpret and enforce the Constitution in criminal cases.

#### I. A LOST PERSPECTIVE: "THE EAR OF A COUNSELOR"

In 1974, when Amsterdam delivered the Holmes Lectures that would become *Perspectives on the Fourth Amendment*, Justice Thurgood Marshall was in the middle of his sixth Term on the Supreme Court. Nineteen years later, to the day, Marshall passed away—having recently stepped down from the high bench after a quarter-century of service.

Remarking upon her departed colleague, Justice Sandra Day O'Connor wrote of the "profound[] influence[]" he had on her, and on the Court more broadly, during his judicial career:

Although all of us come to the Court with our own personal histories and experiences, Justice Marshall brought a special perspective. His was the eye of a lawyer who saw the deepest wounds in the social fabric and used law to help heal them. His was the ear of a counselor who understood the vulnerabilities of the accused and established safeguards for their protection.<sup>11</sup>

The influence of that perspective, Justice O'Connor explained, was not merely atmospheric or ephemeral. Rather, during "oral arguments and [in] conference meetings, in opinions and dissents, Justice Marshall imparted" to his colleagues "his life experiences," including, quite often, his experiences as a criminal defense attorney representing the indigent.<sup>12</sup> And through those experiences, he contextualized for them what "legal briefs often obscure: the impact of legal rules on human lives,"<sup>13</sup> including, here, lives directly affected by the daily administration of the criminal law.

When Justice Marshall retired from the Court, the institution lost that "special perspective,"<sup>14</sup> which it has not since regained: no justice, serving now or since Marshall's retirement, has spent any significant time working as a criminal defense attorney prior to joining the Court.<sup>15</sup> That is not to say, however,

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11. O'Connor, *supra* note 9, at 1217.

12. Indeed, in describing the influence of Marshall "the raconteur," *id.* at 1220, Justice O'Connor writes almost exclusively of experiences he shared from time spent representing criminal defendants. *Id.* at 1217–20.

13. *Id.* at 1218.

14. *Id.* at 1217.

15. See Emily Hughes, *Investigating Gideon's Legacy in the U.S. Courts of*

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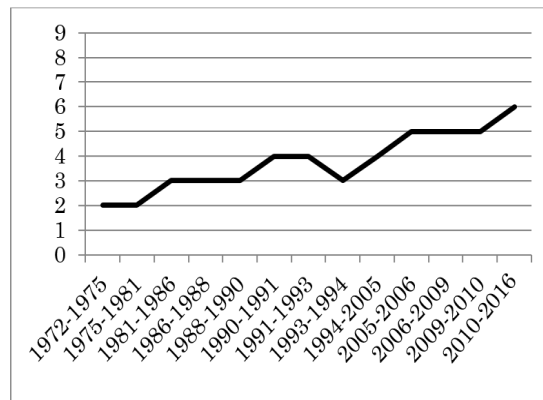
*Appeals*, 122 YALE L.J. 2376, 2382 (2013) (“None of the nine Justices serving on the Supreme Court, now or since the retirement of Justice Marshall, has stood in the well of a courtroom and represented an individual criminal defendant at trial.”); cf. Sanford Levinson, *Constitutional Design*, 128 HARV. L. REV. F. 14, 20–21 (2014) (“I would be stunned if any member of the current Court had ever visited a client in jail or, even more to the point perhaps, negotiated a guilty plea with an overbearing prosecutor.”).

A review of the available Senate Judiciary Committee questionnaires submitted by each of the Justices at the time of his or her nomination demonstrates the current Supreme Court’s dearth of experience when it comes to criminal defense representation—particularly representation of *indigent* defendants, who comprise roughly 80% of all criminal defendants nationwide, see *infra* note 105. Indeed, according to the questionnaires, only three members of the current Supreme Court have ever represented a criminal defendant in any capacity at all, and in each such instance that Justice’s exposure was quite limited. Chief Justice John Roberts, for example, who seems to have the most experience in this regard, once filed a petition for *certiorari* and, separately, an *amicus curiae* brief on behalf of a criminal defendant who, in each instance, was primarily raising an issue of statutory interpretation. See *Petition for Certiorari, Bazain v. United States*, 537 U.S. 1171 (2003) (No. 02-616); *Brief of Dale Lynn Ryan as Amicus Curiae, United States v. Jones*, 529 U.S. 848 (2000) (No. 99-5739). Beyond that, the Chief Justice once filed an *amicus curiae* brief on behalf of the American Psychological Association in a case regarding forced medication of prison inmates, see *Washington v. Harper*, 494 U.S. 210, 213 n.\* (1990); once argued as a Court-appointed *amicus* against the imposition of civil fines on someone who had previously been criminally convicted for related conduct, see *United States v. Halper*, 490 U.S. 435, 436 (1989); and once spent “25 hours assisting in [his law] firm’s representation of an inmate on Florida’s death row.” JOHN GLOVER ROBERTS, JR., U.S. SENATE JUDICIARY COMMITTEE QUESTIONNAIRE 63 (2005) (on file with author). All told, however, criminal matters comprised only about 5% of the cases that the Chief Justice litigated prior to ascending the bench, *id.* at 17, and in most of those he was representing the government on appeal as it sought to preserve a criminal conviction, see *infra* note 19. As for the other two Justices, Elena Kagan worked as an associate for two years at a corporate law firm where she spent some time representing “white-collar criminal defendants.” ELENA KAGAN, U.S. SENATE JUDICIARY COMMITTEE, QUESTIONNAIRE FOR NOMINEE FOR THE SUPREME COURT 71 (2010) (on file with author); *id.* at 194–95 (describing two such cases). And Ruth Bader Ginsburg represented women in two criminal cases, in each instance as they sought relief in the U.S. Supreme Court following criminal convictions rendered by all-male juries. See *Duren v. Missouri*, 439 U.S. 357, 358 (1979) (noting that Ginsburg split the oral argument with her client’s criminal defense attorney); SERENA MAYERI, REASONING FROM RACE 177–81 (2011) (describing *Stubblefield v. Tennessee*, 420 U.S. 903 (1974) (dismissed for want of a substantial federal question)); cf. RUTH BADER GINSBURG, U.S. SENATE JUDICIARY COMMITTEE INITIAL QUESTIONNAIRE (SUPREME COURT) 83 (1993) (on file with author) (reporting that ninety percent of Justice Ginsburg’s litigation experience involved civil cases). Finally, while Justices Clarence Thomas and Samuel Alito do not appear to have represented any criminal defendants in their prior careers as attorneys, each did spend a few months in law school doing such work. See ANDREW PAYTON THOMAS, CLARENCE THOMAS 139–40, 145–47 (2001) (describing “some basic criminal defense work” that Thomas did at the New Haven Legal Assistance Office as well as some limited involvement he



that the contemporary Supreme Court lacks firsthand experience with the modern criminal justice system. Quite to the contrary, today's Court is a substantially *more* experienced tribunal in this respect than the Court that Amsterdam observed in 1974. That is because today's Court comprises three times as many Justices who have previously served as prosecutors in criminal cases:

**NUMBER OF JUSTICES WITH  
PRIOR PROSECUTORIAL EXPERIENCE**



The chart above divides the past four decades into what empirical scholars of the Court call “natural courts,” meaning time periods during which the Court did not experience any personnel changes.<sup>16</sup> Thus, each incremental move forward through time along the horizontal axis represents the departure of one Justice and the arrival of another.

As the chart reveals, only once in the past forty years has a Supreme Court nominee without prior prosecutorial experience replaced a Justice with such experience.<sup>17</sup> By contrast, the oppo-

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had in a capital case while a summer clerk at a law firm); SAMUEL ANTHONY ALITO, JR., U.S. SENATE JUDICIARY COMMITTEE, QUESTIONNAIRE FOR NOMINEE FOR THE SUPREME COURT OF THE UNITED STATES 2 (2005) (on file with author) (reporting three months as an intern with the New Jersey Public Defender during the first summer of law school). Justice Kennedy's questionnaire was not available for review. Justices Breyer and Sotomayor do not appear to have represented criminal defendants in their prior careers as attorneys.

16. See generally HAROLD SPAETH ET AL., SUPREME COURT DATABASE CODEBOOK 40 (2015). The chart concludes with the last fully staffed natural court, composed of Chief Justice Roberts and Justices Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, and Kagan, as well as Justice Antonin Scalia, who passed away a few months before this Article's publication.

17. This occurred when Justice Ruth Bader Ginsburg replaced Justice By-

site personnel change—the appointment of an *additional* former prosecutor to the Court—has occurred five times, thus tripling (to six) the total number of former prosecutors on the Supreme Court today. Among the current Justices, this includes two who began their legal careers as prosecutors before moving on to other forms of government lawyering,<sup>18</sup> two who oversaw and argued prosecutorial appeals to the Supreme Court itself,<sup>19</sup> and

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ron White. For a general discussion of the Justices' antejudicial experience, see Benjamin H. Barton, *An Empirical Study of Supreme Court Justice Pre-Appointment Experience*, 64 FLA. L. REV. 1137 (2012). Professor Barton graciously shared source data that facilitated the empirical analysis underlying the chart in the text. Given the focus of this Article, I have expanded upon Professor Barton's dataset in order to construct a more nuanced account of the Justices' antejudicial prosecutorial experience in particular. Specifically, drawing on biographies of each Justice produced by the Federal Judicial Center, I have created a census of the years that every Supreme Court Justice has spent working in one of the following thirteen positions: (1) District Attorney; (2) Assistant District Attorney; (3) State Attorney General; (4) Assistant State Attorney General; (5) U.S. Attorney; (6) Assistant U.S. Attorney; (7) U.S. Attorney General; (8) Special Assistant to the U.S. Attorney General; (9) Deputy U.S. Attorney General; (10) Assistant U.S. Attorney General for the Criminal Division; (11) U.S. Solicitor General; (12) Assistant to the U.S. Solicitor General; and (13) Special Prosecutor. These of course are not the only prosecutorial posts one could hold; they are, however, the only ones to date that Justices have occupied before joining the bench. The database also captures the years that each Justice may have spent as an attorney for a city or municipal corporation or as an attorney in a component of the U.S. Department of Justice not listed above, although such years are not counted as prosecutorial experience in my analysis (even though some such offices may have incidental or quasi-prosecutorial functions). The dataset is on file with the Harvard Law School Library.

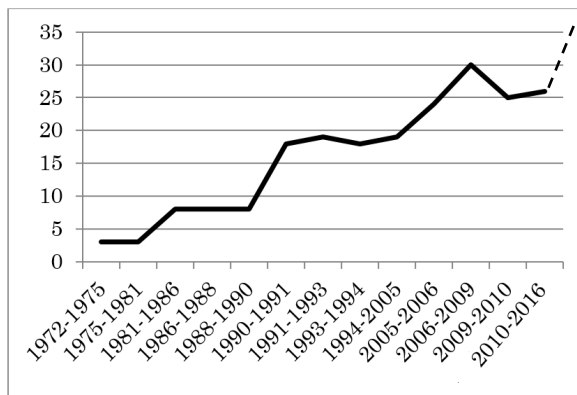
18. See Hughes, *supra* note 15, at 2382 (noting that Justice Thomas began his career "as Assistant Attorney General of Missouri . . . in the criminal appeals division"); CLARENCE THOMAS, U.S. SENATE JUDICIARY COMMITTEE INITIAL QUESTIONNAIRE (SUPREME COURT) 14 (1991) (on file with author) (reporting that when Justice Thomas began working as an Assistant Attorney General his "work consisted almost exclusively of briefing and arguing appeals in criminal cases"); *id.* at 19–28 (listing four such criminal appeals as among the "ten most significant litigated matters" that Justice Thomas "personally handled" over the course of his career as an attorney); see also STEPHEN GERALD BREYER, U.S. SENATE JUDICIARY COMMITTEE INITIAL QUESTIONNAIRE (SUPREME COURT) 61–63 (1994) (on file with author) (reporting that as an "Assistant Special Prosecutor" with the Watergate Special Prosecution Force Justice Breyer was involved in "investigation[s] in criminal matters, the development of cases, and recommendations on whether to prosecute [cases]"); *id.* at 63 (reporting that thirty percent of Justice Breyer's work during his two years in the Department of Justice's Antitrust Division involved criminal matters).

19. Chief Justice Roberts and Justice Kagan each held high leadership positions in the Office of the Solicitor General, the premier appellate prosecutorial office in the nation, see *infra* Part II.B.2. See also ROBERTS, *supra* note 15, at 2 (reporting four years of service as Principal Deputy Solicitor General); KAGAN, *supra* note 15, at 1, 72 (reporting one year of service as Solicitor Gen-

two who worked for many years as trial prosecutors in state or federal court.<sup>20</sup>

Notably, this collection of experiences represents not only a threefold increase in the number of former prosecutors on the Court, but also a ninefold increase in the depth of that experience, with the current Court boasting a collective twenty-six years of antejudicial prosecutorial experience, compared to only three in 1974:

#### AGGREGATE YEARS OF PROSECUTORIAL EXPERIENCE



As this Article goes to press, the Senate is considering President Obama's nomination of Chief Judge Merrick Garland to fill the vacancy recently created by the death of Justice Antonin Scalia.<sup>21</sup> In announcing this nomination, the President emphasized not only Judge Garland's reputation as a jurist but also his "sterling record as a prosecutor" in the Department of Jus-

eral, with a case load "approximately two-thirds civil and one-third criminal"). In this capacity, Roberts and Kagan each personally presented arguments to the Supreme Court urging it to sustain criminal convictions. *See, e.g.*, *Robertson v. United States ex rel. Watson*, 560 U.S. 272, 272 (2010); *Withrow v. Williams*, 507 U.S. 680, 681 (1993); *United States v. Green*, 507 U.S. 545, 545 (1993); *Florida v. Jimeno*, 500 U.S. 248, 249 (1991); *United States v. Kokinda*, 497 U.S. 720, 722 (1990); *cf.* *United States v. Comstock*, 560 U.S. 126, 128 (2010); *Smith v. Doe*, 538 U.S. 84, 88 (2003).

20. *See Biographies of Current Justices of the Supreme Court*, SUPREMECOURT.GOV, <http://www.supremecourt.gov/about/biographies.aspx> (last visited Apr. 4, 2016) (describing the careers of Justice Samuel Alito, who served as an Assistant U.S. Attorney and U.S. Attorney in New Jersey, and of Justice Sonia Sotomayor, who served as an Assistant District Attorney in Manhattan).

21. The prospects of Judge Garland's confirmation are, at present, uncertain. *See, e.g.*, David M. Herszenhorn, *Judge Pays Visit as G.O.P. Digs in Against a Vote*, N.Y. TIMES, Mar. 18, 2016, at A1.

tice, where during his ten years of service he “oversaw some of the most significant prosecutions in the 1990s”<sup>22</sup> and served as the Deputy Assistant Attorney General of the Criminal Division.<sup>23</sup> Should Judge Garland be confirmed to replace Justice Scalia, who was not a prosecutor, he would become the seventh former prosecutor on the current Supreme Court and, as depicted by the dashed line in the chart above, would increase the Justices’ aggregate prosecutorial experience to thirty-six years—a high-water mark in the four decades since Amsterdam wrote his *Perspectives*. But even without Judge Garland’s confirmation, those forty years have already borne witness to a dramatic expansion in the number of Supreme Court Justices who come to the Court with prior experience seeking to obtain or preserve criminal convictions—an expansion accompanied by the disappearance, following Justice Marshall’s departure, of even a single justice with any depth of experience providing to “the accused . . . the assistance of counsel for his defense.”<sup>24</sup>

This sharp tilt in the Court’s composition is potentially significant, in at least two respects. The first concerns public perception. As one member of the current Court has observed, “public acceptance” of the Supreme Court’s legitimacy “is not automatic,” but rather depends on “the public’s trust” in the basic fairness of the institution.<sup>25</sup> This observation echoes a rich body of procedural justice literature, which indicates that the public’s acceptance of judicial legitimacy and authority depends upon whether the people “respect the court as an institution

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22. President Barack Obama, Remarks by the President Announcing Judge Merrick Garland as his Nominee to the Supreme Court (Mar. 16, 2016), <https://perma.cc/7Q5M-R24R>.

23. See Jerry Markon & Amy Goldstein, *The Next Supreme Court Justice?*, WASH. POST, Mar. 8, 2016, at A9 (“A longtime Justice Department official, Garland served as an assistant U.S. attorney for the District of Columbia from 1989 to 1992 and deputy assistant attorney general in the criminal division from 1993 to 1994. From 1994 to 1997, he was principal associate deputy attorney general, supervising major cases such as the prosecutions of Oklahoma City bombers Timothy McVeigh and Terry Nichols and Unabomber Ted Kaczynski.”). Judge Garland’s depth of prosecutorial experience, which would be exceeded on the current Court only by Justice Alito, has “prompted some liberals to respond tepidly” to his nomination. Charlie Savage, *In Criminal Rulings, Garland Has Usually Sided With Law Enforcement*, N.Y. TIMES, Mar. 23, 2016, at A13 (reporting that “[i]n close cases involving criminal law, [Judge Garland] has been far more likely to side with the police and prosecutors over people accused of crimes”).

24. U.S. CONST. amend. VI.

25. STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW* xiii (2010).

that is generally *impartial*, just, and competent.”<sup>26</sup> In that assessment, “the identity of the decision-maker” can, understandably, have “an important influence.”<sup>27</sup>

Within this conceptual frame, a Court whose membership skews sharply (and monolithically) toward prior prosecutorial experience could well face a looming problem of institutional legitimacy. For in the forty years since Amsterdam wrote his *Perspectives*, the Supreme Court has increasingly “shifted its focus” to questions of constitutional criminal law.<sup>28</sup> Indeed, as Ryan Owens and David Simon observe, constitutional criminal procedure cases constitute the *only* area of law that has consistently and steadily grown as a proportion of the Supreme Court’s docket over the past four decades.<sup>29</sup> During those same forty years, the country has seen an unprecedented explosion in its prison population—accompanied by starkly unequal racial dis-

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26. Tom R. Tyler & Kenneth Rasinski, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, 25 LAW & SOC’Y REV. 621, 622 (1991) (emphasis added) (quoting Walter F. Murphy & Joseph Tanenhaus, *Public Opinion and the United States Supreme Court: A Preliminary Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, in FRONTIERS IN JUDICIAL RESEARCH 273 (Joel B. Grossman & Joseph Tanenhaus eds., 1969)).

27. Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1043 (2003); see also Tom R. Tyler, *Multiculturalism and the Willingness of Citizens To Defer to Law and to Legal Authorities*, 25 LAW & SOC. INQUIRY 983, 983 (2000) (observing that “people’s willingness to accept policies” increases “when they identify with the . . . authorities . . . and view them as representing a group of which they are members,” and decreases “when they identify more strongly with subgroups than with society and/or view the authorities as representatives of a group to which they do not belong”); Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 411 (2000) (“Courts achieve structural impartiality when judicial decision-making includes a cross-section of perspectives and values from the community.”).

28. Ryan J. Owens & David A. Simon, *Explaining the Supreme Court’s Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1232–33 (2012).

29. *Id.* at 1232, 1233 fig.3 (suggesting that constitutional criminal law is an area in which the contemporary Supreme Court “feels most at home”); cf. *id.* at 1232 (“In 1966, when the Court decided *Miranda v. Arizona*, criminal procedure cases represented 17 percent of the Court’s docket. When the Court [re]affirmed *Miranda* [thirty-four years later] in *Dickerson v. United States*, criminal procedure cases represented 35 percent of the Court’s docket.”). According to one Justice, the upward trend in the Court’s focus on constitutional criminal law is likely only to continue, with this area of the Court’s docket representing “a growth industry for the court . . . over the next 10 or 20 years.” Alison Frankel, *From Aspen: Justice Kagan Calls Surveillance Cases “Growth Industry,”* REUTERS (July 1, 2013), <http://perma.cc/4DGG-UYUU>.

parities—that would have been simply unimaginable forty years ago.<sup>30</sup> Moreover, for the first time in a generation, that status quo is not only widely and almost universally condemned, but is also increasingly the target of a broad and diverse “movement toward reform” that has captured the center of the national political discourse.<sup>31</sup> Under circumstances such as these, it is entirely possible that—from a procedural justice perspective—the public might not only see the Supreme Court as having played a significant role in the formulation of a deeply flawed national criminal justice policy, but also as lacking the range of experience necessary to serve as a fair and impartial adjudicator in the national debate to address these issues going forward.

Beyond perceptions of legitimacy, however, there is a second concern arising from the current Court’s composition, a concern that goes directly to substance: it is possible that a Supreme Court skewed sharply toward members with prior prosecutorial experience—and lacking a single jurist with countervailing experience representing the accused—might *act* differently when engaging with and resolving important questions of constitutional criminal law. The suggestion that antejudicial experience bears on one’s judicial outlook or perspective seems at some level obvious and intuitive. The claim is not that judges are crude ideological partisans, inflexibly adher-

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30. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 8 (2010) (“In 1972, fewer than 350,000 people were being held in prisons and jails nationwide, compared with more than 2 million people today. The rate of incarceration in 1972 was at a level so low that it no longer seems in the realm of possibility . . .”).

31. *Developments in the Law—Policing*, 128 HARV. L. REV. 1707, 1713 (2015) (describing how “a number of significant deaths” of civilians at the hands of police officers has prompted “a national conversation about policing” that aims “to catalyze a movement toward reform”); see, e.g., *SOLUTIONS: AMERICAN LEADERS SPEAK OUT ON CRIMINAL JUSTICE* (Inimai Chettiar & Michael Waldeman eds., 2015) (collecting essays from leading politicians, including presidential candidates from both parties, criticizing current criminal justice policy); *id.* at v (describing, in a foreword by former President Bill Clinton, “an emerging bipartisan consensus [on] the need to do better” on criminal justice issues); Marco Rubio, *A Step Toward Freedom: Reduce the Number of Crimes*, in *SOLUTIONS*, *supra*, at 93, 95 (“There is an emerging consensus that the time for criminal justice reform has come.”); Peter Baker, *16 Rivals Unite in Push To Alter Justice System*, N.Y. TIMES, Apr. 28, 2015, at A1; cf. TODD R. CLEAR & NATASHA A. FROST, *THE PUNISHMENT IMPERATIVE: THE RISE AND FAILURE OF MASS INCARCERATION IN AMERICA* 4 (2013) (“In just the past couple of years, it seems we have reached a turning point in discourse around mass incarceration . . .”).

ing to their antejudicial personae or parroting as judges the interests of those whom they previously represented or worked with as attorneys. Justices' votes are not mere reductive functions of their prior careers, nor are the Justices themselves simple or unidimensional in their philosophies or outlooks.<sup>32</sup>

They are, however, human—and do not cease being so “merely by putting on a black robe and taking the oath of office.”<sup>33</sup> Moreover, as Kenneth Culp Davis rightly observes, a judge, like any other person, “is probably *unable* to consider a problem—whether of fact, law, policy, judgment, or discretion—without using his past experience.”<sup>34</sup> Multiple members of the Supreme Court forthrightly acknowledge as much.<sup>35</sup> And ample scholarship supports the basic intuition.<sup>36</sup> This includes consid-

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32. Justice Marshall, for example, voted—often over dissents—to uphold multiple criminal convictions during his time on the Supreme Court. *See, e.g.*, *Moskal v. United States*, 498 U.S. 103 (1990) (Marshall, J.) (rejecting, over three dissenting votes, defendant's contention that the rule of lenity required the reversal of his conviction for fraudulently selling used cars); *Powell v. Texas*, 392 U.S. 514 (1968) (Marshall, J.) (plurality opinion) (rejecting, over four dissenting votes, a defendant's contention that “a person in the ‘condition’ of being a chronic alcoholic cannot be criminally punished as a constitutional matter for being drunk in public”). More generally, the Warren Court that kicked off the criminal procedure revolution contained a greater number of former prosecutors and more aggregate years of prosecutorial experience than the ensuing Burger and Rehnquist Courts that rolled back many of the Warren Court's precedents. And on today's bench, the two Justices with the most significant prior experience as prosecutors are also the two Justices who are the *least* likely to agree on any given issue, whether of criminal law or otherwise. *See The Supreme Court 2013 Term—The Statistics*, 128 HARV. L. REV. 401, 404 tbl.I(B2) (2014) (reporting that Justices Alito and Sotomayor agree in only 14% of divided cases, the lowest concordance rate among any two-Justice pair).

33. *In re J.P. Linahan*, 138 F.2d 650, 652–53 (2d Cir. 1943) (arguing that “[m]uch harm is done by [such a] myth”).

34. Kenneth Culp Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 948–49 (1955) (emphasis added).

35. *See, e.g.*, Justice Ruth Bader Ginsburg, Remarks by President Clinton and Justice Ruth Bader Ginsburg at Swearing-In Ceremony (Aug. 10, 1993), in U.S. NEWSWIRE, Aug. 10, 1993 (“A system of justice will be the richer for diversity of background and experience. It will be the poorer in terms of appreciating what is at stake and the impact of its judgments if all of its members are cast from the same mold.”); *cf.* 155 CONG. REC. S8792 (daily ed. Aug. 5, 2009) (statement of Sen. Gillibrand) (recounting statements in this vein by then-nominees Antonin Scalia, Clarence Thomas, and Samuel Alito and stating that “[c]learly, the life lessons and experiences of Justices inform their decisions as has been noted during the confirmation process time and time again”).

36. *See, e.g.*, Lee Epstein et al., *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CALIF. L. REV. 903, 961 app. (2003) (collecting over twenty studies exploring links between the prior occupations of judges and judicial decision making).

erable scholarship suggesting “that certain occupational experiences,” including prior service “as a prosecutor,” have a demonstrable effect on Supreme Court decision making.<sup>37</sup>

Such decision making, of course, consists of far more than the mere casting of votes. Supreme Court Justices impact their institution, and in turn the law, in myriad subtle and nuanced ways—ranging from the cases they decide to pursue for review,<sup>38</sup> to the issues they highlight for further attention from the bar,<sup>39</sup> to—most significantly—the ways in which they frame the questions before them and craft legal doctrines in response.<sup>40</sup> Within these various interstices of the judicial process, ample opportunities arise for what Davis calls the “multifarious

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37. Barton, *supra* note 17, at 1142–43 (citing Richard E. Johnston, *Supreme Court Voting Behavior: A Comparison of the Warren and Burger Courts*, in *CASES IN AMERICAN POLITICS* 84 (Robert L. Peabody ed., 1976) (demonstrating that Justices with prosecutorial experience were more pro-prosecution in civil rights cases); C. Neal Tate, *Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946–1978*, 75 *AM. POL. SCI. REV.* 355, 359–63 (1981) (showing that Justices without prosecutorial experience favored civil liberties claims); Stuart S. Nagel, *Judicial Backgrounds and Criminal Cases*, 53 *J. CRIM. L. CRIMINOLOGY & POLICE SCI.* 333, 335–36 (1962) (finding a statistical relationship between judges who were former prosecutors and their propensity to decide against criminal defendants)). *But see* Rob Robinson, *Does Prosecutorial Experience “Balance Out” a Judge’s Liberal Tendencies?*, 32 *JUST. SYS. J.* 143, 143 (2011). Given the small number of judges with antejudicial experience as criminal defense attorneys, research on the impact of such experience is sparser. *See* Hughes, *supra* note 15, at 2381, 2389 (calling for more research in this vein, and noting that while 38% of federal judges previously served as prosecutors, “almost [none] . . . were . . . public defenders”). *But cf.* Epstein et al., *supra* note 36, at 956 (reporting that “prior experience as a criminal defense lawyer was significant . . . as an explanatory variable for [a judge’s approach to sentencing]”).

38. *Cf.* Kevin H. Smith, *Justice For All?: The Supreme Court’s Denial of Pro Se Petitions for Certiorari*, 63 *ALB. L. REV.* 381, 391 n.38 (1999) (citing “numerous empirical studies which indicate that” judicial ideologies affect “the likelihood that certiorari will be granted” in a given case).

39. *See, e.g.*, Davis v. Ayala, 135 S. Ct. 2187, 2208 (2015) (Kennedy, J., concurring).

40. *See, e.g.*, Richard J. Lazarus, *Back to “Business” at the Supreme Court: The “Administrative Side” of Chief Justice Roberts*, 129 *HARV. L. REV. F.* 33, 39 (2015) (observing that, even among Justices who vote the same way on a given case, the question of “[w]hich of the nine Justices drafts the opinion of the Court . . . can determine the substance of the Court’s ruling and its precedential impact”); *see also* Abe Fortas, *Chief Justice Warren: The Enigma of Leadership*, 84 *YALE L.J.* 405, 405 (1975) (“If the Chief Justice assigns the writing of the opinion of the Court to Mr. Justice A, a statement of profound consequence may emerge. If he assigns it to Mr. Justice B, the opinion of the Court may be of limited consequence.”).



ingredients” of judgment—including antejudicial experience—to inform the “wisdom we seek in judges.”<sup>41</sup> And on the Supreme Court, that wisdom is not generated in isolation. Rather, the Justices, as members of a fundamentally deliberative body, inform each other’s perspectives, such that, in Justice O’Connor’s words, the views of one could, “by and by, perhaps change the way” the others see “the world,”<sup>42</sup> and thus the law that they collectively shape—an insight also supported by the empirical literature.<sup>43</sup>

For all of these reasons, one might fairly hope to see brought to the conference table at the Court a broad and diverse range of experiences when it comes to issues of vital importance to the nation—including issues pertaining to criminal justice. When Professor Amsterdam took stock of the Court’s engagement with those issues in 1974, whatever other institutional vexations the Court may have faced, it at least enjoyed what Sherrilyn Ifill calls “the most important benefit of judicial diversity”<sup>44</sup> in this respect: it had a member who, drawing on experience “that none of [his colleagues] could claim to match,”<sup>45</sup> was able to “introduce traditionally excluded perspectives and values into [the Court’s] judicial decision-making” process.<sup>46</sup>

In the criminal justice debate unfolding today, by contrast, the Justices have an impressive depth (twenty-six years) of collective experience working in the criminal justice system. But their experiences are all of a piece: years spent advocating “with earnestness and vigor”<sup>47</sup> on behalf of the interests of law enforcement, in the always challenging struggle to contain and combat crime. Such experience is undeniably valuable, as is the

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41. Davis, *supra* note 34, at 949.

42. O’Connor, *supra* note 9, at 1217–18, 1220; *see also* Byron R. White, *A Tribute to Justice Thurgood Marshall*, 44 STAN. L. REV. 1215, 1216 (1992) (“[Justice Marshall] could tell us the way it was, and he did so convincingly . . . He . . . would tell us things that we knew but would rather forget; and he told us much that we did not know due to the limitations of our own experience.”).

43. *Cf.* Christina L. Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 406 (2010) (finding that “the likelihood of a male judge ruling in favor of the plaintiff [in a sex discrimination suit] increases by 12% to 14% when a female [judge] sits on the [same] panel”); *see also id.* (suggesting that these “results may provide empirical fodder for a class of normative claims supportive of [greater experiential] diversity on the bench”).

44. Ifill, *supra* note 27, at 409–10.

45. White, *supra* note 42.

46. Ifill, *supra* note 27, at 410.

47. *Berger v. United States*, 295 U.S. 78, 88 (1935).

prior public service from which it arises.<sup>48</sup> But still, it wholly omits an equally important, often countervailing, and traditionally excluded perspective: the perspective of those who, in Amsterdam's words, have repeatedly "seen policemen from the nightstick end."<sup>49</sup> In terms of both substance and perception, this omission constitutes a potentially troubling new vexation for the Court.

A question then arises: are there ways the Supreme Court might attempt to compensate for any ill effects that could be associated with this marked imbalance in the experiential background of its members? The Justices themselves, of course, have little control over who is nominated to join or replace them.<sup>50</sup> They are not, however, powerless when it comes to seeking out a more balanced institutional perspective of the criminal justice system than their own prior experiences might otherwise provide. In the remainder of this Article, I discuss two efforts in this vein that the Court might undertake: first, the Court could ensure that it and the criminal defendants whose cases it considers are ably assisted by expert appellate defense counsel, who might help broaden the Court's institutional perspective; and second, the Court could explore steps to ensure that the pipeline of cases it considers for review presents a full picture of the realities of modern policing and prosecution.

## II. REGAINING PERSPECTIVE: A BALANCED BAR

### A. THE IMPORTANCE OF ADVOCACY

"These lawyers—the reason to listen to them is that they presumably know more about the subject than you do."<sup>51</sup> So said

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48. It bears emphasis that a criticism of the Court as compositionally skewed toward prior prosecutorial experience is not a criticism of prosecutors, nor of the particular Justices who have served in such a role. Quite to the contrary, an appeal to diversity in antejudicial experience recognizes the inherent *value* of such experiences—particularly when they interact with varied and perhaps countervailing experiences concerning similar issues. *Cf.* Akhil Reed Amar, *Clones on the Court*, ATLANTIC (Apr. 2015), <https://perma.cc/GYJ8-VDFW> ("Think of it as simple portfolio diversification: The Court works best when its justices can bring different perspectives to bear on difficult legal issues.").

49. Amsterdam, *supra* note 1, at 409.

50. The experiential makeup of the federal bench, including the Supreme Court, is primarily a function of presidential selection preferences, as constrained by senatorial consent.

51. Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6,

former Justice Antonin Scalia when asked about the impact attorneys had on him in cases argued to the Supreme Court. The observation reflects a basic truism of American-style adversarial litigation: advocacy matters.<sup>52</sup> More particularly, advocacy matters in ways that closely track—and that could perhaps correct for—the potential problems identified above regarding the Supreme Court’s compositional tilt in favor of prosecutorial experience.

Consider first the procedural justice perspective. As multiple scholars in this field observe, people tend to view the legal system more fairly when they feel their interests are represented adequately in the process—when they feel they have a voice that represents them well.<sup>53</sup> Of course, in the context of appellate litigation, such voice is expressed almost exclusively through the lawyer arguing the case,<sup>54</sup> such that one’s perception of the fairness of appellate adjudication in criminal cases may in large part be a function of how well one’s interests are represented in such cases—by an attorney.<sup>55</sup> Conceivably, then,

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2013), <http://nymag.com/news/features/antonin-scalia-2013-10>.

52. See, e.g., Jeffrey L. Fisher, *A Clinic’s Place in the Supreme Court Bar*, 65 STAN. L. REV. 137, 139 (2013) (calling the observation “common wisdom”). But cf. Transcript of Oral Argument at 30–31, *Perdue v. Kenny A.*, 559 U.S. 542 (2010) (No. 08-970) (comment of Chief Justice Roberts) (suggesting that “[t]he results that are obtained” in litigation “are presumably the results that are dictated or commanded] or required under the law. . . . and not different results because you have different lawyers”).

53. See Tom R. Tyler & Justin Sevier, *How Do the Courts Create Popular Legitimacy?: The Role of Establishing the Truth, Punishing Justly, and/or Acting Through Just Procedures*, 77 ALB. L. REV. 1095, 1106 (2014); see also Nourit Zimmerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L.J. 473, 474, 486–87 (2010) (“Having access to representation by an attorney is considered a central means to increase individuals’ access to justice [and] to legal institutions or to legal solutions to their problems.”); *id.* at 490 (observing that “the litigation experience is often generally a more satisfying experience when people are represented by a lawyer” in part because attorney representation can allow parties “to present their arguments in a compelling way and thereby influence the judge to make a favorable decision” (citing JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* 117–24 (1975))).

54. Criminal defendants have no right to represent themselves personally on appeal. See *Martinez v. Court of Appeal*, 528 U.S. 152 (2000). And while the Supreme Court on extremely “rare occasion . . . has permitted parties to argue pro se,” it more frequently denies criminal defendants’ sporadic requests to do so. EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 754 (9th ed. 2007).

55. For a more comprehensive and nuanced assessment of the interaction between procedural justice and representation by counsel, see generally Zimmerman & Tyler, *supra* note 53.

the consistent participation of high-quality defense counsel in such cases could help offset potential legitimacy or perception concerns raised by a Court's otherwise skewed prosecutorial composition.

As for substantive outcomes, the impact of lawyering is perhaps even more well-established and pronounced: “[b]etter lawyers often get better results for their clients.”<sup>56</sup> This is demonstrably true in the criminal justice system, where attorney ability has been shown to directly affect defendants’ ultimate likelihood of incarceration.<sup>57</sup> And so too, the quality of counsel has been shown “to matter in the Supreme Court as well.”<sup>58</sup> Indeed, multiple scholarly studies confirm that, all else being equal, the skill level of the attorney who argues a case to the Supreme Court has a statistically significant impact on his or her client’s chances of success, often increasing those odds substantially.<sup>59</sup> Moreover, expert advocates “not only win more often, but” also “influence the content of the opinions themselves, including the words used and the [scope] of the ruling.”<sup>60</sup>

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56. Fisher, *supra* note 52.

57. See David S. Abrams & Albert H. Yoon, *The Luck of the Draw: Using Random Case Assignment to Investigate Attorney Ability*, 74 U. CHI. L. REV. 1145, 1150 (2007) (finding that criminal defendants assigned attorneys in the ninetieth percentile of ability are incarcerated at a rate fourteen percentage points lower than those appointed counsel in the tenth percentile of ability); see also Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 335–36 & tbl.10, 343–44 (2011).

58. Fisher, *supra* note 52, at 140; see also Neal Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2110, 2154 (2015) (“Lawyers have a profound impact on what the Court actually does with a case. They frame the questions for the Court . . . and do the bulk of the legal and other research informing a case . . . .”); Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1563 (2008) (“Better, more effective advocates influence the development of the law and there is generally no court where such advocacy can wield more far-reaching influence than the Supreme Court.”).

59. Fisher, *supra* note 52, at 151–62 (reporting empirical findings suggesting a success “bump” of between 17.8% and 19.2% for traditionally marginalized clients who are represented by expert Supreme Court counsel); see also Matthew Reid Krell, *Raising the Bar: Elite Advocacy in Supreme Court Public Interest Litigation*, 34 J. LEGAL PROF. 275 (2009); Timothy R. Johnson et al., *Oral Advocacy Before the United States Supreme Court: Does It Affect the Justices’ Decisions?*, 85 WASH. U. L. REV. 457, 487 (2007); Kevin T. McGuire, *Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success*, 57 J. POL. 187, 187 (1995).

60. Lazarus, *supra* note 58, at 1522 (observing that “it is the words that the Court uses throughout its opinion, rather than whether the opinion nominally ends with an ‘affirmed’ or ‘reversed,’ that tend to have the most signifi-

Notably, in explaining why attorney skill appears to matter to the Justices, Jeffrey Fisher, who has authored the most recent comprehensive account on the subject, suggests that the Justices “respond . . . to exceptional advocacy” precisely because, as individual people, they each “have different life experiences and bodies of knowledge” from which to draw, while also facing “resource and time constraints on their acquisition of new information.”<sup>61</sup> Advocacy matters, in other words, because it helps counterbalance deficits of firsthand antejudicial experience on the bench. Through nuanced advocacy, highly skilled lawyers expose the Justices to the relevant social contexts of the case and frame its key issues in a light that incorporates the perspective of their clients—a perspective the Justices might in some cases otherwise struggle to identify or appreciate. When an expert attorney is able to provide the Justices with this “deep understanding of how the law at issue works on the ground” and impacts people like his or her client, the Court often welcomes and “embraces such expertise.”<sup>62</sup> And in so doing, it at least partially corrects—in terms of both substance and perception—for gaps in the Justices’ own prior experiences that might otherwise impede a balanced engagement with the merits of the case.

The capacity of lawyers to broaden the Court’s institutional perspective thus offers at least an opportunity to improve the Court’s process of constitutional criminal adjudication. And indeed, the Justices themselves openly acknowledge and celebrate the growing impact of the newly emerging “elite Supreme Court Bar,” which, as Richard Lazarus explains in his seminal account, “is quietly transforming the Court and the nation’s laws” through its growing “domination of Supreme Court advocacy.”<sup>63</sup> The emergence of this elite group of lawyers is itself an important new institutional development that has transpired in the forty years since Amsterdam penned his *Perspectives*. In 1974, there simply was no elite Supreme Court Bar to speak of,

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cant impact”).

61. Fisher, *supra* note 52, at 140.

62. *Id.* at 175.

63. Lazarus, *supra* note 58, at 1490; see Joan Biskupic et al., *The Echo Chamber: A Small Group of Lawyers and Its Outsized Influence at the U.S. Supreme Court*, REUTERS (Dec. 8, 2014) <https://perma.cc/39KU-68SC> (reporting that “exclusive interviews with eight of the nine sitting justices indicate that most embrace the specialty Supreme Court bar,” which the justices say “helps the court and . . . best serves the interests of justice”).

and thus no opportunity for the Court to benefit from the institutional advantages such a group might offer.<sup>64</sup> Today, by contrast, as the dominance of this group of expert lawyers has steadily grown, the Court has naturally come to rely on them as an integral component of the adjudicatory process.<sup>65</sup>

#### B. THE SUPREME COURT CRIMINAL DEFENSE BAR

There is, however, one major problem. While expert advocacy in theory has the potential to improve the Supreme Court's process of constitutional criminal adjudication, in practice it has precisely the opposite effect, exacerbating instead of ameliorating the institutional imbalances already extant in the Court's lopsided composition. This occurs because the *distribution* of expert lawyering in criminal cases argued to the Supreme Court is exceedingly lopsided as well, substantially favoring the interests of the prosecution over those of the defense. Indeed, the imbalance is pronounced enough to have caught the attention of one close observer, Justice Elena Kagan, who remarked on the fiftieth anniversary of *Gideon v. Wainwright*<sup>66</sup> that, "case in and case out," the litigants who are "not getting great representation at the Supreme Court are criminal defendants."<sup>67</sup>

Notwithstanding Justice Kagan's repeated efforts to highlight this issue,<sup>68</sup> the disparity in the quality of Supreme Court criminal advocacy has received only modest scholarly or popular attention to date.<sup>69</sup> A focused study, however, reveals that the problem is both stark and troubling.

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64. See Lazarus, *supra* note 58, at 1519–20.

65. See Katyal & Schmidt, *supra* note 58, at 2154; Lazarus, *supra* note 58, at 1522 ("[P]reliminary indications are that the Bar is having a significant, long-term substantive impact.").

66. 372 U.S. 335 (1963) (guaranteeing a right of appointed counsel to indigent defendants in state courts).

67. Justice Kagan, Address at Department of Justice Panel, 50 Years Later: The Legacy of *Gideon v. Wainwright*, PT2 (Oct. 21, 2014), <https://www.youtube.com/watch?v=mfX31VVILtk>.

68. Justice Kagan has referred to the issue as her "hobby horse," *id.*, and has raised it in multiple public addresses. See, e.g., Kevin LaCroix, *Justice Kagan at the University of Michigan Law School*, D&O DIARY (Sept. 10, 2012), <https://perma.cc/5NGB-9YTW> (describing the Justice's remarks concerning a "particular[] area of weakness 'on the criminal defense side'" of the Supreme Court Bar); Janet Roberts et al., *In Ever-Clubbier Bar, 8 Men Emerge as Supreme Court Confidants*, REUTERS (Dec. 8, 2014), <https://perma.cc/VV4T-URK2> ("It is as if [criminal defendants] are arguing with one hand tied behind their back," Kagan said.).

69. Professor Lazarus notes the disparity, see Lazarus, *supra* note 58, at

To capture the basic empirics of the situation, I have constructed an original database that offers the most comprehensive information to date on the expertise of the Supreme Court Bar. Following a trend in scholarship on the topic, I treat oral argument experience as a useful and salient proxy for Supreme Court expertise more generally.<sup>70</sup> Accordingly, the database compiles every oral argument presented to the Justices during the ten-year history of the Roberts Court, whether by an attorney representing the petitioner, the respondent, or an *amicus curiae*. All told, the dataset contains 1,885 discrete entries, each representing a single attorney-argument.<sup>71</sup> For each argument, the dataset codes the argument date, whether the case was criminal or civil in nature,<sup>72</sup> the specific issue presented, the name of the arguing attorney, the party that he or she either represented or supported as *amicus curiae*, and (in criminal cases) that party's status as a criminal defendant or a prosecuting entity.<sup>73</sup>

Analyzing these data, I have calculated for each argument the total number of times that the corresponding attorney previously presented an argument to the Justices during the Roberts Court's first decade—thus creating a running tally of arguments for each attorney over the course of those ten years.

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1560–61, but focuses primarily on the Supreme Court Bar's separate tendency to favor corporate interests. *See id.* at 1520–54. Professor Fisher also discusses the tendency of marginalized litigants—including immigrants, criminal defendants, and civil-rights plaintiffs—to have less access to expert Supreme Court representation, although his focus is on measuring the success rates of specialized clinics that represent such interests in a subset of cases. *See Fisher, supra* note 52.

70. *See Fisher, supra* note 52, at 149–50; Lazarus, *supra* note 58, at 1502.

71. An electronic version of this database is on file with the Harvard Law School Library. Rebuttal arguments are not counted separately.

72. Criminal case here includes direct appeals from a judgment of conviction as well as collateral attacks on such judgments, including challenges to a criminal defendant's length of incarceration. It omits, however, civil-rights suits—including prison-condition suits, excessive-force suits, and method-of-execution suits—even though such litigation often implicates constitutional criminal law principles and doctrines.

73. Argument date, attorney name, and party affiliation were obtained from the cover-page of the oral argument transcript for each case via an automated macro and then manually checked for accuracy. The characterization of a case as criminal or civil as well as the coding of a party's status as a criminal defendant or as a prosecuting entity were conducted manually. Codes for the issues presented in each case were imported from the Supreme Court Database. *See* Harold J. Spaeth et al., *Version 2015 Release 01*, SUPREME COURT DATABASE, <http://supremecourtdatabase.org> (last visited Apr. 4, 2016).

Additionally, for any attorney who has argued more than five cases over the past fifteen years—a threshold for individual expertise conventionally used in the literature—I have separately calculated a running-argument tally that reflects the attorney’s cumulative career arguments, as of the date of any given argument during the decade.<sup>74</sup>

These running tallies allow for a more thorough and more nuanced assessment of individual attorney “expertise” than has previously been possible in the literature on the Supreme Court Bar,<sup>75</sup> and thus also offer a far richer empirical assessment of the Supreme Court criminal defense bar than has previously been possible or attempted.<sup>76</sup> In broad strokes, two salient observations emerge from an analysis of the data: First, notwithstanding the emergence of a now genuinely expert Supreme Court Bar, criminal defendants are almost never represented by expert counsel in arguments before the Supreme Court, and thus are routinely forced to stand on shaky footing before Justices who have increasingly come to rely on and expect expert advocacy. Second, and relatedly, those same criminal defend-

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74. To calculate this, I combined my dataset with the survey of career argument totals conducted by Kedar S. Bhatia, *Top Supreme Court Advocates of the Twenty-First Century*, 2 J. LEGAL METRICS 561, 568–72 (2013) (tallying career argument totals for attorneys with more than five arguments between OT 2000 and OT 2011). This method of calculation introduces two artifacts into the dataset: First, the dataset will unfortunately fail to capture as experts those attorneys with five or more career arguments but fewer than five arguments since OT 2000, as these attorneys are not included in Bhatia’s analysis. Second, because career totals are available only for experts captured by Bhatia, it is possible that the combined use of the two running totals might under-report the comparative experience of some attorneys, including some non-experts. Specifically, any attorney who is not included in Bhatia’s list is treated in the dataset as having *zero* arguments prior to OT 2005, when my tally begins, because his or her pre-2005 arguments are simply not visible to the data. I do not suspect that these artifacts significantly alter the analysis that follows.

75. Prior studies have generally defined an “expert” as any attorney who has presented five or more arguments to the Court, treating expertise as a static and binary variable. See Fisher, *supra* note 52, at 149–50; Lazarus, *supra* note 58, at 1502. However, because this database calculates the number of prior arguments for each attorney as a running tally, it allows for a substantially more nuanced relative comparison of attorney expertise. This database is also the first to divide arguments by subject-matter, thus permitting robust investigation into “where” Supreme Court experts appear on the Supreme Court’s docket. Finally, this database is the most comprehensive to date in terms of its scope, capturing and coding a full decade of Supreme Court arguments.

76. The only other related effort is William C. Kinder, Note, *Putting Justice Kagan’s “Hobbyhorse” Through Its Paces: An Examination of the Criminal Defense Advocacy Gap at the U.S. Supreme Court*, 103 GEO. L.J. 227 (2014), a student note presenting an admirable initial exploration.

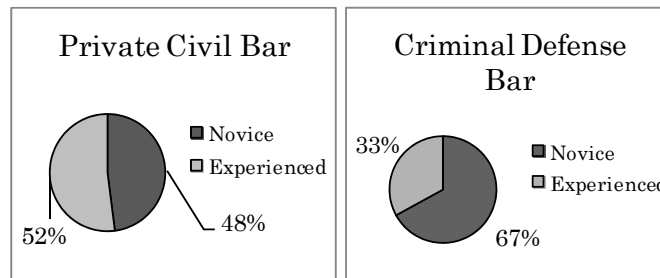


ants are consistently—and dramatically—outmatched within their own cases by the expertise of the prosecutors who oppose them. Let us consider each of these points in turn.

### 1. The Inexpert Supreme Court Criminal Defense Bar

The data I have assembled strongly confirm Justice Kagan’s anecdotal account: Supreme Court advocates representing criminal defendants are indeed markedly less experienced and less expert than the private attorneys arguing on the non-criminal side of the Supreme Court Bar.<sup>77</sup> Consider first simply the proportion of each side of the bar that is composed of what I will call Supreme Court novices, i.e., attorneys who presented only one argument to the Court over the span of the decade and who were not already established experts when the decade began.<sup>78</sup> Among arguments on behalf of criminal defendants, fully two-thirds (67%) were presented by such novices ( $n=223$ ).<sup>79</sup> On the civil side of the Bar, by contrast, novices constitute a minority of arguing attorneys, presenting only 48% of arguments, compared with 52% for attorneys with prior argument experience ( $n=852$ ).

#### PROPORTION OF SUPREME COURT NOVICES PRESENTING ARGUMENT IN THE CIVIL AND CRIMINAL DEFENSE BARS



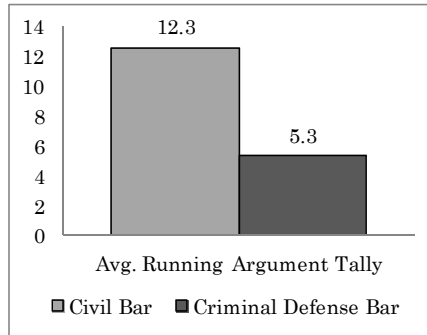
77. The civil side of the Supreme Court Bar of course encompasses cases spanning a wide range of subject-matter areas. Reference in the text to the “civil side” of the bar is thus not meant to suggest that such cases are indistinguishable or monolithic; rather, the phrase serves simply to denote “non-criminal” cases, as a means of demonstrating disparities between the Supreme Court “Criminal Defense Bar” and the Supreme Court Bar more generally.

78. It seems likely that a great many of the attorneys meeting this definition will in fact be presenting their one and only career argument to the Court. However, due to the data limitations described *supra* note 74, I cannot state with certainty that a Supreme Court Novice has *never* argued a prior case to the Court, as pre-2005 arguments by non-experts are beyond the visibility of the dataset’s horizon.

79. This tally excludes nine attorney-arguments presented by established experts (as defined *supra* note 74) who were simply presenting their first oral argument during the timespan covered by the Roberts Court.

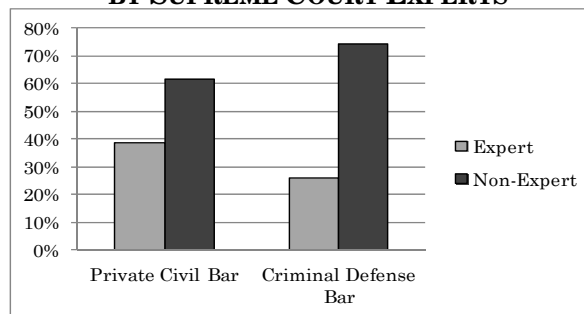
As for the magnitude of attorney experience across the two segments of the Bar, here too criminal defendants lag well behind parties in non-criminal cases: when a private attorney stands at the Court's lectern on behalf of a client in a non-criminal case, his or her running argument tally reflects, on average, 12.3 prior Supreme Court arguments.<sup>80</sup> The average experience for criminal defense attorneys, by contrast, is less than *half* so high, with an average tally of only 5.3 prior arguments.

**AVERAGE PRIOR ARGUMENT EXPERIENCE OF SUPREME COURT ADVOCATES IN CIVIL AND CRIMINAL DEFENSE BARS**



Notably, this disparity in experience scores is driven almost exclusively by the impact of established Supreme Court experts. Indeed, excluding expert attorneys, the average prior argument scores for the civil and criminal defense bars in any given case plummet, to 0.34 and 0.21 respectively. It will come as no surprise then that, as between the criminal defense and private civil segments of the Supreme Court bar, there is an appreciable disparity in where Supreme Court experts focus their attention.

**PERCENTAGE OF SUPREME COURT ARGUMENTS CONDUCTED BY SUPREME COURT EXPERTS**



80. *Cf. supra* note 74 (detailing running-tally methodology).

Percentage-wise, the expert Supreme Court Bar represents criminal defendants in only 24.7% of arguments offered on behalf such litigants ( $n=223$ ), compared to an expert appearance rate of 38.6% in civil arguments made by private attorneys ( $n=852$ )—a rate that increases to 49.6% when government attorneys arguing civil cases are included ( $n=1,365$ ), meaning that half of all civil arguments presented to the Court come from expert advocates.

Notably, the comparatively low percentage of cases in which a Supreme Court expert represents a criminal defendant roughly tracks the percentage of individual members of the expert Supreme Court Bar who take on criminal defendants' appeals at all: of the currently eighty-six expert Supreme Court advocates, only twenty-two (26%) have represented a criminal defendant before the Court in the past decade. It is worth observing, however, that even among those Supreme Court experts who do occasionally argue cases on behalf of criminal defendants, few do so regularly—and few are in fact experts in criminal law as a substantive subject-matter area in its own right. On the contrary, of the twenty-two Supreme Court experts who have represented criminal defendants before the Roberts Court, only seven have done so in half or more of the cases constituting their Supreme Court practice. And of those seven, only *one*—Jeffrey Fisher of the Stanford Law School Supreme Court Clinic—has argued more than two or three criminal cases over the past decade:

**APPEARANCES OF EXPERT SUPREME COURT ADVOCATES ON  
BEHALF OF CRIMINAL DEFENDANTS**

Supreme Court Expert	Criminal Defense Arguments (2005-2015)	Total Arguments (2005-2015)	Criminal Defense Arguments as % of Total
Jeffrey L. Fisher	18	25	72%
Thomas C. Goldstein	4	21	19%
Paul D. Clement	3	50	6%
Bryan A. Stevenson	3	3	100%
David A. Moran	3	3	100%
Mark T. Stancil	3	5	60%
Charles A. Rothfeld	3	11	27%
Kevin K. Russell	3	11	27%
Kannon K. Shanmugam	3	16	19%
Seth P. Waxman	3	28	11%

Donald B. Verrilli, Jr.	3	35	9%
John P. Elwood	2	4	50%
Pamela S. Karlan	2	4	50%
Andrew J. Pincus	2	11	18%
Patricia A. Millett	2	13	15%
Sri Srinivasan	2	19	11%
Neal Kumar Katyal	2	24	8%
Donald B. Ayer	1	2	50%
Miguel A. Estrada	1	5	20%
Robert A. Long, Jr.	1	6	17%
Gregory G. Garre	1	27	4%
Carter G. Phillips	1	35	3%

Indeed, based on the data presented above, it seems safe to say that Professor Fisher *is* the expert Supreme Court criminal defense bar—if only one person a Bar could make.<sup>81</sup> Beyond Professor Fisher, criminal defendants are represented at the Court on rare occasions by Supreme Court experts who either dabble in criminal defense work from time to time or who make only infrequent appearances before the Justices.<sup>82</sup> However, far more often—indeed, 75% of the time—such defendants are not represented by an attorney with Supreme Court expertise at all. Rather, in the vast majority of *those* cases (89%) the defendant’s

81. Cf. Biskupic et al., *supra* note 63 (observing that clinics like Professor Fisher’s at Stanford “are tiny—staffed by two professors and a rotating cast of [law] students,” and quoting Professor Fisher as saying, “[w]e can only do so much”).

82. It may be the case that Supreme Court advocates often lack subject-matter expertise in a particular area of substantive law, beyond appellate advocacy. *But see* Fisher, *supra* note 52, at 174–75 (“[S]ome [Supreme Court] specialists are successful in the Court in part because they are experts in particular areas of law . . . . When such lawyers combine expertise concerning the Court with expertise in a certain field, they are able not only to craft legal arguments and strategies that appeal to the Court as generalists, but they are able to back them up with reputations for a deep understanding of how the law at issue works on the ground.”); Lazarus, *supra* note 58, at 1532 (observing that the expert Supreme Court Bar tends to develop subject-matter expertise in legal issues of particular interest to large corporate clients). Still, the absence of subject-matter expertise among the Supreme Court Criminal Defense Bar in particular is noteworthy—both in its own right and also because in the rare instances when a Supreme Court expert takes on a criminal defendant’s case, that expert will often lack assistance from *any* bona fide criminal-law expert immersed in the case, given the more general endemic failings of criminal defense representation throughout the justice system. *See infra* Part II.C (discussing the indigent defense crisis).

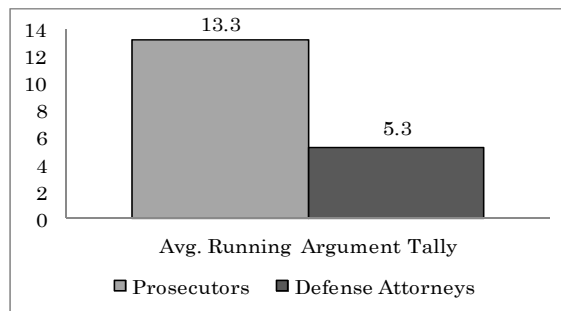
attorney is a Supreme Court novice—and not infrequently one whose lack of experience shows all too clearly.<sup>83</sup>

In short, in the decades since Amsterdam wrote his *Perspectives*, a “new elite Supreme Court bar” has indeed “emerged,”<sup>84</sup> and in so doing has redefined—including, most notably, for the Justices themselves—the meaning of persuasive Supreme Court advocacy. That expert bar, however, simply does not exist in any meaningful way for the people about whom Amsterdam was writing.

## 2. The Outmatched Supreme Court Criminal Defense Bar

Criminal defendants, however, are not only less well represented at the Court relative to private parties in civil litigation. They are also substantially outmatched when compared to the attorneys who oppose them before the Court—attorneys representing the interests of the prosecution. Indeed, the experience score disparity here is even more pronounced than the disparity between the civil and criminal defense bars: when a prosecutor stands at the Court’s lectern in a criminal case, he or she will on average have done so 13.3 times before, while (as noted above) the opposing defense attorney will boast on average just over five prior arguments.

### AVERAGE NUMBER OF PRIOR ARGUMENTS FOR PROSECUTORS AND DEFENSE ATTORNEYS BEFORE THE SUPREME COURT



Interestingly, contrary to widely held assumptions, this disparity does not arise from a mismatch in experience between criminal defense attorneys and the attorneys opposing them

83. Accounts of painfully inept Supreme Court arguments tendered by novice criminal defense attorneys are not hard to find. *See, e.g.*, Tony Mauro, *A Week To Forget: High Court Endures String of Desultory Arguments*, *LEGAL TIMES*, Nov. 15, 1999, at 1; *see also* Kinder, *supra* note 76, at 254–55.

84. *See* Lazarus, *supra* note 58, at 1490.

from state prosecutorial offices.<sup>85</sup> Rather, the data show that state prosecutors have on average less Supreme Court experience than their defense attorney counterparts: state prosecutors are Supreme Court novices in 73% of cases (compared to 67% for defense attorneys), have an average prior argument score of only 1.42 (compared to 5.3 for defense attorneys), and have argued five or more times in only 9.6% of cases (compared to 24.7% for defense attorneys). Notably, these numbers may not completely capture the reality of state prosecutors' true expertise, given that many contemporary state prosecutorial offices are actively—and successfully—taking steps to improve their “expertise in advocacy before the U.S. Supreme Court,” and thus may be hitting above their weight.<sup>86</sup> However, in terms of current raw numbers, state prosecutors do not in any way account for the marked experience gap between prosecutors and defense attorneys that is otherwise clearly apparent in the Court's criminal docket.

That sharp disparity, rather, arises from one simple fact: the single most expert appellate prosecutorial office in the United States—the Office of the U.S. Solicitor General—presents oral argument as either a party or as an *amicus curiae* in a substantial majority (72%) of criminal cases that the Court considers. And when it does so, it virtually always argues in opposition to the criminal defendant—an unsurprising fact given that the office is itself a prosecutorial office,<sup>87</sup> but a dramatic one all the same.

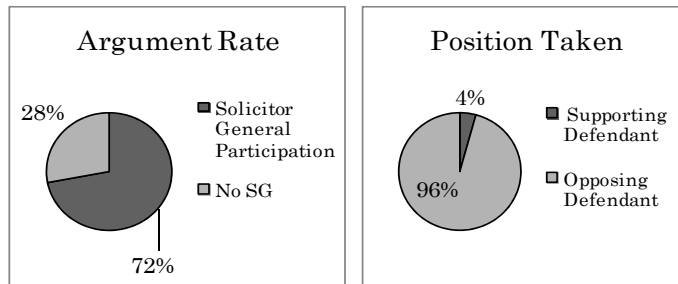
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85. *Cf.* Lazarus, *supra* note 58, at 1502.

86. *See id.* at 1501 (noting that “several states have created or rejuvenated the position of State Solicitors General” in order to gain “expertise in advocacy before the U.S. Supreme Court” and have “recruited . . . highly credentialed attorneys, often former clerks to U.S. Supreme Court Justices, to work within or run those Offices”); *cf.* Kagan, *supra* note 67 (“[N]ow most states have solicitors generals offices which have really exceptional, skilled, experienced appellate counsel. States [also] sometimes hire private attorneys [and] the NAG, National Association for Attorneys General, provides extraordinary backup for them . . .”).

87. *See* Michael R. Dreeben, Deputy U.S. Solicitor General, Presentation at Duke Law School: Challenges and Rewards of Representing the Government in the Supreme Court (Nov. 1, 2010), <https://www.youtube.com/watch?v=EmeHI4TryIw> (“I had a very . . . inaccurate view of what the Solicitor General's Office was when I went to apply to it . . . I pictured it in an office off by itself . . . separate from anybody else's influence. That all turns out to be rather incorrect. The Solicitor General's office is in the Justice Department . . . and as a matter of institutional reality the Solicitor General's boss is the Attorney General . . . and no Solicitor General ever forgets that.”); *see also* Kagan, *supra* note 67 (describing the Attorney General as “a prosecutor” who “head[s] up a De-

**THE SOLICITOR GENERAL'S PARTICIPATION IN  
CRIMINAL CASES BEFORE THE SUPREME COURT**



The influence that the Solicitor General wields before the Court cannot be overstated. For starters, the office's client—the United States of America—is inherently *sui generis*.<sup>88</sup> But beyond that, the Office also has a wholly unique, decades-long history with the Court as an institution, and has accordingly worked “hard to gain the Court's trust and to earn a reputation for integrity in a way that only [such] a repeat player has an opportunity to do.”<sup>89</sup> Additionally, “the attorneys of the Solicitor General's Office, unlike many of their opposing counsel,” gain a level of “sheer expertise” with respect to “the Justices and their precedent, including their latest concerns and the inevitable cross-currents between otherwise seemingly unrelated cases,” which are “largely invisible to those who focus on just one case at a time.”<sup>90</sup> The Court, in turn, recognizes and appreciates not only the high quality of the Office's advocacy but also the “judgment exercised by the Solicitor General in deciding” which arguments to press, all of which “naturally enhances” the credibility of those positions when they are presented.<sup>91</sup>

Moreover, beyond the Office's expertise with the Court as an institution, the Solicitor General's Office also has the opportunity to develop substantial subject-matter expertise in areas of law that it routinely litigates—including criminal law. Indeed, one of the Office's four Deputy Solicitors General, known informally as the “criminal deputy,” is dedicated exclusively to

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partment of prosecutors”). See generally Bruce A. Green, *Gideon's Amici: Why Do Prosecutors So Rarely Defend the Rights of the Accused?*, 122 *YALE L.J.* 2336 (2013).

88. See Lazarus, *supra* note 58, at 1493.

89. *Id.*

90. *Id.* at 1496–97.

91. *Id.*

criminal cases,<sup>92</sup> which allows him to become the office's "premier criminal procedure lawyer,"<sup>93</sup> if not the premier criminal procedure lawyer in the country. The current occupant of that post, Deputy Solicitor General Michael Dreeben, has worked in the Solicitor General's office for twenty-seven years, twenty-one of which he has served as the criminal deputy.<sup>94</sup> Over the course of those three decades, he has become the second most experienced Supreme Court advocate *in the nation*, with 95 total career arguments to his name (and counting).<sup>95</sup> Term in and Term out, Mr. Dreeben brings that substantial expertise to bear before the Justices, personally conducting one out of every five criminal arguments presented by the Office (22%) while also overseeing the work of his more junior colleagues when they present criminal arguments to the Justices in his stead.

Given the Solicitor General's Office's tremendous wealth of subject-matter expertise, institutional experience, and cachet with the Court, it is little surprise that the Office enjoys outsized success compared to other litigants, reportedly winning 75% of cases in which it is the petitioner and 52% of cases in which it is the respondent—compared to average success rates of 61% and 35% for petitioners and respondents more generally.<sup>96</sup> Moreover, the Solicitor General also enjoys outsized success not only when appearing as a party of record, but also when presenting argument as an *amicus curiae*. Indeed, according to Professor Lazarus, if the Solicitor General weighs in on behalf of a petitioner, the petitioner's "chances of winning increase by an average of 17%."<sup>97</sup> Conversely, the petitioner's chances of winning "decrease by an average of approximately 26% if the

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92. Cf. Fisher, *supra* note 52, at 174–75 ("The Solicitor General's office generally classifies its deputies according to areas of substantive expertise.")

93. Yale Kamisar, *Postscript: Another Look at Patane and Seibert, the 2004 Miranda "Poisoned Fruit" Cases*, 2 OHIO ST. J. CRIM. L. 97, 102 n.9 (2004). The criminal deputy's subject-matter expertise arises not only from his extensive experience with criminal cases on the Supreme Court's docket, but also from his considerable responsibilities overseeing and coordinating the federal government's criminal litigation in the lower courts of appeals as well. See generally Dreeben, *supra* note 87.

94. See *Interview with Deputy Solicitor General Michael R. Dreeben*, 44 U.S. ATTY BULL. 5 (1996), <https://perma.cc/4TVE-EYZ5>.

95. Cf. Bhatia, *supra* note 74, at 570.

96. Lazarus, *supra* note 58, at 1494–95.

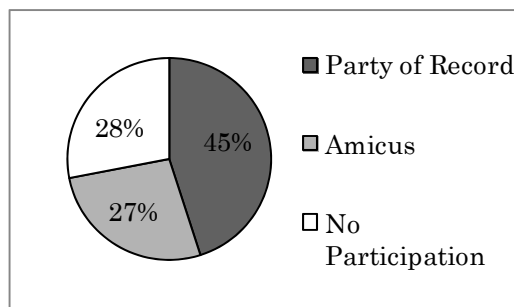
97. *Id.*



Solicitor General instead files an amicus brief in support of [the] respondent.”<sup>98</sup>

This last feature of the Solicitor General’s activity before the Court—the Office’s role as an *amicus curiae*—substantially amplifies the disparity between prosecutors and defense attorneys in criminal cases on the Court’s docket. For while roughly 55% of the Court’s criminal cases arise from state courts—where, as mentioned, the prosecution is typically represented by a state prosecutorial bar with less expertise than the (also inexperienced) criminal defense bar—the Solicitor General’s Office not only appears as a party of record in the other 45% of the docket, but also assists the inexperienced state prosecutors as *amicus curiae* in roughly half of the arguments presented by those attorneys as well—thus increasing by more than half the number of cases in which the Solicitor General presents arguments to the Court in criminal cases.

#### SOLICITOR GENERAL’S PARTICIPATION IN CRIMINAL CASES

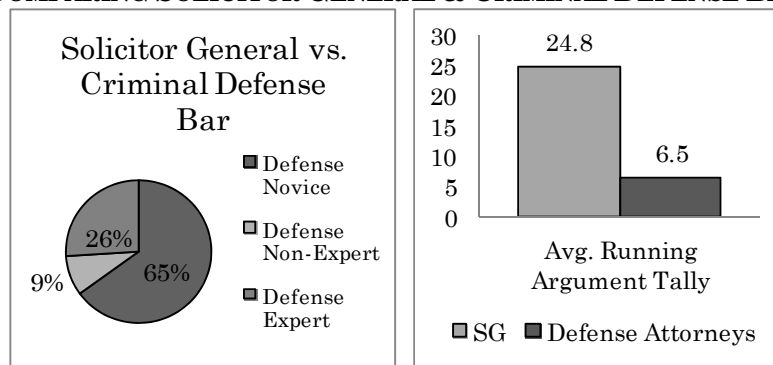


The regular appearance of the Solicitor General’s Office alongside state prosecutors more than offsets any modest relative advantage in Supreme Court experience that the criminal defense bar might otherwise enjoy over its prosecutorial adversaries. Indeed, once the Solicitor General’s *amicus* arguments

98. *Id.*; see also Fisher, *supra* note 52, at 160 (“Support from the United States [is] a factor well known to affect a party’s odds of success . . . .” (citing REBECCA MAE SALOKAR, *THE SOLICITOR GENERAL: THE POLITICS OF LAW* 145–50 (1992))). In some of these cases, the Solicitor General is directly responsible for victory, as is evident when the Court bases its decision on an argument advanced only by the Solicitor General’s Office, and perhaps even forfeited by the party whom the Office is supporting. See, for example, *Salinas v. Texas*, where a plurality of the Court found “it unnecessary to reach” the arguments advanced by the respondent state prosecutor, opting instead to base its holding on an alternative ground pressed for the first time by the Solicitor General’s Office as *amicus curiae* before the Court. 133 S. Ct. 2174, 2179 (2013).

are accounted for, the imbalance in expertise between Supreme Court prosecutors and defense attorneys becomes quite dramatic: in 74% of criminal cases argued by the Solicitor General's Office, the Office argues against a criminal defendant whose counsel lacks a record of Supreme Court expertise. Indeed, in 65% of criminal cases argued by the Office, it faces off against a Supreme Court *novice*. On average, the experience-score differential favors the Solicitor General by a factor of more than three to one.

#### COMPARING SOLICITOR GENERAL & CRIMINAL DEFENSE BAR



And given reports that the state prosecutors themselves are well on their way to becoming Supreme Court experts in their own right,<sup>99</sup> this sharp disparity in the skill and expertise of attorneys arguing criminal cases before the Court is certain only to increase into the future.<sup>100</sup>

#### C. RESTORING BALANCE TO THE BAR

As the foregoing makes clear, constitutional criminal adjudication in the U.S. Supreme Court suffers from sharp and undeniable disparities in the quality of advocacy available to criminal defendants. This inequality should cause concern not just for criminal defendants but for the public more generally, given

99. See Lazarus, *supra* note 58, at 1501.

100. It bears observation that, while I have focused here on the expertise gap at the merits stage, the gap is assuredly even more pronounced at the certiorari stage, where criminal defendants are represented by experts even less frequently, and where the influence of expert advocates is likely even more pronounced. See *id.* at 1490. Thus, both the substantive outcomes of the Court's decisions and the agenda-setting aspect of its docket are impacted by the Court's criminal defense advocacy gap.

that essential questions of not only criminal justice law and policy but also civil rights, civil liberties, governmental power and surveillance are often at stake in these important cases.<sup>101</sup> When those issues arise, it is the criminal defense attorney who is routinely called upon to present the civil libertarian perspective.<sup>102</sup> However, given the current state of affairs, that essential perspective is consistently struggling for the Justices' attention and consideration with at least "one hand tied behind [its] back."<sup>103</sup>

On the rare occasions that this dynamic is recognized and commented upon, there is often a common tilt at a solution: either the national criminal defense bar or the elite Supreme Court Bar should *do something* to improve the quality of criminal defendants' representation before the Court.<sup>104</sup> That suggestion, however, is considerably easier said than done, for a number of reasons. For one, the "criminal defense bar" is more a myth than a reality. As we have seen, at the Supreme Court level, it simply does not exist. But even looking out more broadly, criminal defense—particularly indigent criminal defense, which accounts for roughly 80% of all criminal cases nation-

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101. In Professor Amsterdam's words, Fourth Amendment jurisprudence seeks to craft "restrictions upon . . . law enforcement" that balance "society's capacity to deal with . . . the fact and the fear of crime" against the potential "destruction of liberty" that can arise from the "relaxation of [constitutional] safeguards." Amsterdam, *supra* note 1, at 353–54.

102. See Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247 (1988).

103. Biskupic et al., *supra* note 63 (quoting Justice Kagan); see also *United States v. Jones*, 132 S. Ct. 945 (2012) (raising fundamental questions of government surveillance authority under the Fourth Amendment); Kashmir Hill, *Supreme Court Justices Concerned About Pervasive, Technology-Enabled Government Surveillance*, FORBES (Nov. 8, 2011), <https://perma.cc/7S9Z-AZB7> ("When Jones's lawyer came up to argue, it was a little like watching 9 cats play with an injured mouse that they felt pity for. [The] criminal defense attorney[,] who has never argued before the Supreme Court before, . . . refused to indulge the Supreme Court's questions about the pervasiveness of the [government surveillance] . . . Justice Scalia [eventually] jumped in to help him out . . .").

104. See, e.g., Kagan, *supra* note 67 (urging "people in the defense bar to be thinking about this and to be thinking of how to get . . . those cases into the hands of the absolute best supreme court advocates"); Lazarus, *supra* note 58, at 1562 ("The Supreme Court Bar can itself take the initiative to create mechanisms to ensure a fairer distribution of the Bar's expertise . . . especially in areas such as criminal defense, where the existing gap is especially troublesome.").

wide<sup>105</sup>—is practiced by a wide array of lawyers across the country, with varying levels of skill, coordination, or even shared commitment to the central mission of criminal defense advocacy. To be sure, within that large set of attorneys there are multiple offices and agencies that provide exceptional, client-centered representation, usually located in one of a few large cities, although there are early signs of improvement elsewhere.<sup>106</sup> And that core group of attorneys has in fact made some early efforts to improve the quality of Supreme Court criminal defense advocacy.<sup>107</sup>

It remains the case, however, that a substantial number of public defender offices are woefully under-resourced, fail to provide basic levels of effective representation, and suffer from low and stagnated morale,<sup>108</sup> all of which can sometimes cultivate a professional ethos far removed from the zealous and committed advocate one would imagine inhabiting a “criminal defense bar” worthy of the name. Moreover, public defenders do not even represent many of the criminal defendants in the country. Rather, a substantial portion of criminal defendants are repre-

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105. See, e.g., Thomas H. Cohen, *Who Is Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes*, 25 CRIM. J. POL'Y REV. 30, 35 (2014) (reporting that in 40 of the 75 most populous counties in the country, indigent representation accounts for 80% of criminal cases); see also SANFORD KADISH ET AL., CRIMINAL LAW & ITS PROCESSES 4 (2012).

106. See, e.g., GIDEON'S PROMISE, <http://www.gideonspromise.org> (last visited Apr. 4, 2016).

107. For example, the Defenders Supreme Court Resource & Assistance Panel (DSCRAP) “is a panel of federal defenders assisting other defenders and court-appointed counsel engaged in Supreme Court litigation” with a “goal to perfect written and oral advocacy before the Court.” DEFS SUP. CT. RESOURCE & ASSISTANCE PANEL, <http://www.dscrap.blogspot.com> (last visited Apr. 4, 2016); see also *Supreme Court Advocacy Program*, DEFENDER SERVS. OFF. TRAINING DIVISION, <http://www.fd.org/navigation/supreme-court-advocacy-program> (last visited Apr. 4, 2016).

108. See DONALD J. FAROLE & LYNN LANGTON, BUREAU OF JUSTICE STATISTICS, COUNTY-BASED AND LOCAL PUBLIC DEFENDER OFFICES, 2007 1 (2010) (reporting that roughly “three-quarters (73%) of county-based public defender offices exceeded the maximum recommended limit of cases received per attorney in 2007” and that “40% of all county-based public defender offices had no investigators on staff”); Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 852 (2004) (reporting a local study finding that “under-funding of indigent defense . . . resulted in inadequate attorney performance and poor morale among public defenders”); Andy Court, *Is There a Crisis?*, AM. LAW., Jan./Feb. 1993, at 46, 47 (describing extensive survey of indigent defense that revealed widespread underfunding, morale problems, and frequent incompetence).

sented by “assigned counsel,” i.e., solo practitioners or small-firm attorneys appointed either case-by-case or pursuant to much maligned jurisdiction-wide service contracts.<sup>109</sup> While there are certainly some excellent attorneys in that large cohort, the group as a whole is not only atomized and isolated but has also frequently “been disparaged for” comprising “attorneys with inadequate skills and qualifications to represent indigent defendants,” and has in fact been shown on average to obtain the worst results for such clients.<sup>110</sup>

The upshot, then, is a widespread national crisis of indigent defense that has been recognized at the highest levels of government,<sup>111</sup> a situation in which zealous, effective, client-centered advocacy is far from the norm, and all too often not even the aspiration for many attorneys assigned to represent criminal defendants. The “criminal defense bar” is thus hardly a robust institution ready or able to pull itself up by the bootstraps in arguments before the Supreme Court. Indeed, quite to the contrary, conventional wisdom holds that when it comes to advocacy before the Court, it is often the criminal defendants’ own attorneys who are a major part of the problem—insofar as they may regularly refuse to surrender the golden ticket of a Supreme Court oral argument to more expert or experienced counsel.<sup>112</sup>

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109. See Cohen, *supra* note 105, at 30–32 (describing systems of indigent defense provision); see also David Carroll, *Gideon’s Despair*, MARSHALL PROJECT (Jan. 2, 2015), <http://perma.cc/G8RG-VRUK> (asserting that “[t]he most prevalent manner for delivering indigent defense services in the United States is for a private attorney to handle an unlimited number of cases for a single flat fee, under contract to the judge presiding over the lawyer’s cases,” and estimating that “flat fee contracts are used in 64 percent of all counties” nationwide); cf. Cohen, *supra* note 105, at 36 tbl.1 (reporting that, in forty of the seventy-five largest counties, nineteen percent of defendants are represented by assigned counsel); Margaret H. Lemos, Note, *Civil Challenges to the Use of Low-Bid Contracts for Indigent Defense*, 75 N.Y.U. L. REV. 1808, 1812 (2000) (citing “widespread agreement in the legal community that low-bid contract systems . . . pose particularly serious obstacles to effective representation”).

110. Cohen, *supra* note 105, at 31, 53 (citing sources and reporting empirical findings that “defendants represented by assigned counsel received the least favorable outcomes in that they were convicted and sentenced to state prison at higher rates compared to defendants with public defenders [and] also received longer sentences”).

111. See, e.g., Eric H. Holder, U.S. Att’y Gen., Speech at Department Justice’s 50th Anniversary Celebration of the U.S. Supreme Court Decision in *Gideon v. Wainwright* (Mar. 15, 2015), <https://perma.cc/2XCQ-P5ML>.

112. See Lazarus, *supra* note 58, at 1560; see also Kinder, *supra* note 76, at 253–54.

Notably, if such behavior on the part of inexperienced criminal defense counsel does in fact occur, there is precious little that other, more expert attorneys can do to “get those cases into the hands of the absolute best supreme court advocates,”<sup>113</sup> given that any prospective expert seeking to replace a potentially inept advocate will first need to obtain the client’s consent. That, however, will be all but impossible to do. Ethical rules generally prohibit a prospective attorney from so much as contacting a represented defendant, if such contact is even permitted by the prison officials where the defendant is likely detained.<sup>114</sup> An incarcerated, indigent, criminal defendant, moreover, will not only be substantially isolated from the outside world, but will also likely lack the background knowledge about the legal system that might otherwise prompt him to doubt the skills of the attorney who, after all, may have just gotten his case accepted for review by the Supreme Court. Thus, when the Supreme Court considers a case arising from the widely populated and far flung regions of the “criminal defense bar,” where attorneys’ skill and commitment to zealous client-centered advocacy may be less than ideal, neither a central core of the criminal defense bar nor the elite Supreme Court Bar will have the legal or practical means to step in and remedy the situation.

The same, however, cannot be said for the Supreme Court itself, which has at its disposal a number of institutional tools that could substantially level the playing field between the prosecutors and defense attorneys who stand at its lectern. The most direct approach, of course, would be for the Justices to exercise their statutory and inherent authority to regulate the quality of the advocates who “are permitted to manage and conduct” arguments before the Court, including by appointing a new attorney to argue at the Court when the Justices deem existing counsel to be deficient.<sup>115</sup> Such a suggestion is not foreign to the scholarly literature,<sup>116</sup> and at least one Justice has strong-

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113. Kagan, *supra* note 67.

114. See MODEL RULES OF PROF’L CONDUCT r. 4.2 (AM. BAR ASS’N 1983) (“[A] lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer . . .”).

115. 28 U.S.C. § 1654 (2012); see also 28 U.S.C. § 2071(a) (2012); *Frazier v. Heebe*, 482 U.S. 641, 652 (1987).

116. See *Krell*, *supra* note 59, at 300 (“If one side has a significantly more experienced advocate than the other, then the Court should consider appoint-

ly condemned as “malpractice” the decision by an inexperienced attorney to argue a case when more experienced Supreme Court advocates are available.<sup>117</sup>

But tasking the Court with direct responsibility to assess and presumably replace a defendant’s attorney with counsel of the Court’s own choosing raises a number of its own significant concerns. For one, the Court has never in its history established substantive prerequisites for admission to its Bar or substantive standards of representation.<sup>118</sup> It thus lacks a readily available body of principles, standards, or institutional mechanisms to manage a regime in which it actively polices attorney quality—a delicate task if the goal is not merely to ensure minimal competence but rather to promote a consistently even match-up between opponents.<sup>119</sup> Second, given the absence of experienced defense counsel among the elite Supreme Court Bar,<sup>120</sup> were the Court simply to replace nonexperienced defense attorneys with demonstrated Supreme Court experts, it would be trading forum-specific expertise for any real depth of experience with criminal defense as a subject-matter specialty in its own right.<sup>121</sup>

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ing a more experienced counsel for the disadvantaged side.”); Lazarus, *supra* note 58, at 1562 (urging the Court to “appoint[] expert Supreme Court advocates in criminal defense cases where counsel is lacking”).

117. See Biskupic et al., *supra* note 63 (quoting Justice Sotomayor).

118. See GRESSMAN ET AL., *supra* note 54, at 953 (“At all times since 1790, the Supreme Court’s Bar has been open to any attorney of good [standing] who, for three years immediately preceding the date of application, has been qualified to practice [in] a state or territory of the United States.”).

119. Cf. *In re Berger*, 498 U.S. 233 (1991) (refusing to “adopt an individual case-by-case approach to” determining fees owed to criminal defense attorneys for representation before the Court, as “[s]uch an inquiry is time consuming . . . necessarily imprecise . . . would lead [the Court] into an area in which [it has] little experience[, and] would not be a wise expenditure of th[e] Court’s limited time and resources”). As for available standards, the only comparable analog is the ineffective assistance standard of *Strickland v. Washington*, 466 U.S. 668 (1984), which is set far too low to meaningfully impact the level of practice within the Supreme Court Bar (and which does not even apply to representation before the Court). Cf. *Wainwright v. Torna*, 455 U.S. 586, 587–88 (1982) (per curiam) (“[A] criminal defendant does not have a constitutional right to counsel to pursue . . . review in this Court . . . [and therefore cannot] be deprived of the effective assistance of counsel [here]. . . .”); Kagan, *supra* note 67 (“This isn’t a [constitutional] issue. Nobody is [constitutionally] entitled to the absolute best advocate at the Supreme Court.”).

120. See *supra* Part II.B.I.

121. See Nancy Morawetz, *Counterbalancing Distorted Incentives in Supreme Court Pro Bono Practice: Recommendations for the New Supreme Court Pro Bono Bar and Public Interest Practice Communities*, 86 N.Y.U. L. REV. 131, 202 (2011) (“Supreme Court-specific expertise . . . at times [comes] at the cost

This is especially true given that three-quarters of the elite Supreme Court Bar are alumni of the very Solicitor General's Office that sets the gold standard for *prosecutorial* appellate advocacy—excellent attorneys, to be sure, but perhaps not the most likely to have a deeply intuited “ear of a [defense] counselor.”<sup>122</sup> Finally, forcing a criminal defendant who may have spent years or decades establishing a relationship of trust with a given attorney to sever that relationship, perhaps against his will, precisely at the moment when the stakes seem most high raises its own procedural justice concerns—particularly if the attorney is replaced by a lawyer perhaps unaccustomed to establishing such relationships of trust with a marginalized or disadvantaged clientele.<sup>123</sup>

There is, however, a less aggressive alternative to having the Court micromanage the selection of defense counsel in each individual case: recognizing that *amicus curiae* arguments by the Solicitor General currently contribute to a substantial portion of the advocacy gap in the Court's criminal docket, the Court could call directly on other *amici curiae* to help remedy the situation.

Indeed, as things currently stand, one could fairly criticize the Court for being complicit in the sharply unequal advocacy

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of familiarity with the substantive legal terrain [given that] Supreme Court experts may lack an understanding of problematic presumptions made by the Court in certain kinds of cases . . . . [, or] of the procedural issues that arise with a particular subject of litigation . . . . [, or of] how things really work in an area of practice.”); see also Fisher, *supra* note 52, at 174 (emphasizing the importance of both subject-matter expertise and Supreme Court experience).

122. O'Connor, *supra* note 9; see Bhatia, *supra* note 74, at 579–80 (reporting that seventy-five percent of all Supreme Court experts “are either currently serving in the Office of the Solicitor General or had experience there”); Lazarus, *supra* note 58, at 1492–93 (“Only one attorney in the top twenty [members of the elite Supreme Court Bar] and only two out of the top thirty did not work with [the Solicitor General's] Office.”).

123. Cf. Fisher, *supra* note 52, at 166 (noting “most lawyers in law firms (even Supreme Court specialists) handle primarily business law cases” and thus lack “substantial expertise” handling criminal defense cases); Zimmerman & Tyler, *supra* note 53, at 488 (discussing the importance of trust in achieving procedural justice). Such concerns might be exacerbated by public perceptions of the Supreme Court Bar as a “clubby” Washington institution, detached from mainstream America, where much of criminal justice policy is executed. Cf. Roberts et al., *supra* note 68 (describing “ever-clubbier” Supreme Court Bar); Biskupic et al., *supra* note 63 (“[The Supreme Court Bar] has become a guild, a narrow group of elite justices and elite counsel talking to each other, . . . detached and isolated from the real world, ultimately at the price of the healthy and proper development of the law.” (quoting former Judge Michael Luttig)).



that is so evident in its criminal cases. For when it comes to *amicus curiae* arguments, the already *sui generis* Office of the Solicitor General enjoys an even more unique structural advantage that it derives directly from the Court's own policies and practices: "[t]he Court almost always grants the Solicitor General permission to participate in oral argument as *amicus curiae*, yet rarely grants similar permission to any other *amicus*" who seeks to present argument alongside a party.<sup>124</sup> Indeed, the Court has a "general policy against allowing more than one advocate per side,"<sup>125</sup> which it has formally codified in a rule that prohibits oral argument by *amici* absent "the most extraordinary circumstances."<sup>126</sup> In practice the Court deems such "extraordinary circumstances" to be present when the Solicitor General seeks to argue, but absent otherwise—including when *amici* seek leave to argue in support of criminal defendants.<sup>127</sup>

The Court's affirmative decision to welcome *amicus* participation from the nation's foremost appellate prosecutorial office, while simultaneously barring *amicus* argument that could assist the already beleaguered criminal defense bar, is significant. To be sure, expert *amici* may file written briefs supporting a criminal defendant if they so desire, and indeed the National Association of Criminal Defense Lawyers (NACDL), the country's leading criminal defense organization, routinely does so.<sup>128</sup>

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124. Lazarus, *supra* note 58, at 1493–94; see also GRESSMAN ET AL., *supra* note 54, at 743, 765; cf. Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 753 & n.25 (2000) (reporting a quintupling in the rate of Solicitor General *amicus* filings between 1946 and 1995, and a doubling between 1975 and 1995).

125. GRESSMAN ET AL., *supra* note 54, at 765.

126. SUP. CT. R. 28.7. The rule separately permits argument by *amici* "[b]y leave of the Court" if the associated counsel of record consents. *Id.*

127. According to a LexisNexis search, the National Association of Criminal Defense Lawyers has sought leave to participate in oral argument before the Court as *amicus curiae* on eleven occasions over the past half-century. In each instance, its request was denied. See *Brigham City v. Stuart*, 547 U.S. 1067 (2006); *Georgia v. Randolph*, 546 U.S. 932 (2005); *Maryland v. Blake*, 546 U.S. 807 (2005); *Devenpeck v. Alford*, 543 U.S. 953 (2004); *Pliler v. Ford*, 541 U.S. 984 (2004); *Alabama v. Shelton*, 534 U.S. 1110 (2002); *Wade v. United States*, 502 U.S. 1089 (1992); *Florida v. Jimeno*, 499 U.S. 934 (1991); *United States v. Salerno*, 479 U.S. 1026 (1987); *Zurcher v. Stanford Daily*, 434 U.S. 1005 (1978); *United States v. Marion*, 404 U.S. 814 (1971).

128. See NACDL, *AMICUS CURIAE COMMITTEE MISSION STATEMENT 1* (2015) [hereinafter NACDL MISSION STATEMENT], <https://perma.cc/AXX8-5S54> (stating that the organization's "goal is to submit amicus briefs in the majority of criminal cases heard each term by the United States Supreme Court"); see also *Amicus Briefs*, NACDL, <https://www.nacdl.org/Amicus> (last visited Apr. 4,

But such briefs are a dramatically inferior mode of advocacy—for the simple reason that the Justices rarely read them.<sup>129</sup> An *amicus* who stands up before the Justices and presents argument, by contrast, will undoubtedly receive energetic questioning from a bench that has engaged closely and deeply with the details of his or her position.

Given this reality, the Court's currently imbalanced approach to *amicus curiae* arguments in its criminal cases seems hard to justify on the merits. Surely one would look askance at a court rule that formally and consistently guaranteed an important litigation advantage to one side but not the other in cases involving employee rights, second amendment rights, religious freedom, affirmative action, or any number of other important issues that are regularly presented to the Justices for consideration. A regime that systematically affords such advantage to only one side—the prosecution—in cases involving criminal defendants' rights or civil liberties, as the Court's current practice clearly does, should be equally suspect, especially given that it is this very segment of the bar that already suffers from the most severe disparities in its baseline levels of attorney experience and ability.

A straightforward and easily implementable solution to this problem lies entirely within the Supreme Court's control. At a minimum, the Court could amend its current rule concerning *amicus* arguments (or alter its conception of "extraordinary circumstances") so as to grant, as a matter of course, requests for oral argument that are filed by *amici* supporting defendants in criminal cases. Such an approach would at least remove the formal obstacle to parity among *amici* in these important cases. To be sure, this may require the Court to choose among potential *amici* whenever more than one contender seeks to argue, and could thus raise attorney assessment and quality control issues similar to those discussed above. The Court could largely avoid such concerns, however, if it simply treated requests for

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2016) (collecting briefs).

129. See Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. & POL'Y 33, 44–45 (2004) (reporting that "most justices will not read the majority of amicus briefs" and that not even all of the Court's law clerks read every one); Adam Liptak, *Want to Be the Court's Friend? It's a Lot of Work*, N.Y. TIMES, Mar. 7, 2016, at A16 (reporting that former Justice John Paul Stevens "didn't . . . read amicus briefs" and that former Justice Antonin Scalia had his "law clerks read all [the] amicus briefs" for him).

oral argument from the NACDL, the American Civil Liberties Union, or other similarly established national organizations as presumptively appropriate.

Still, simply adjusting the Court's formal rules to permit greater participation by *amici* who seek to present argument on behalf of criminal defendants is unlikely to address the root of the problem. For as demonstrated above, there simply are not enough attorneys with expertise in both Supreme Court advocacy and criminal defense to present such arguments to the Court in the first instance.<sup>130</sup> The NACDL, for example, has sought leave to argue as an *amicus curiae* in only eleven criminal cases over the past half century, and has not made any such requests in the last decade.<sup>131</sup> Indeed, the organization's *Amicus Curiae* Committee forthrightly warns in its mission statement that it operates with "limited resources" with respect to both "budgetary constraints" and the "time" its "authors can devote to *pro bono* efforts."<sup>132</sup> Nor does this appear to be an exaggeration: the committee's small coterie of national co-chairs, who shoulder much of its workload before the Supreme Court,<sup>133</sup> includes Professor Jeffrey Fisher, who, as noted earlier, is already serving as the one-man expert Supreme Court criminal defense bar, arguing before the Justices multiple times per Term.<sup>134</sup> There is only so much that can be accomplished with existing resources and within existing institutional structures. Ending the Court's current ban on *amicus* participation by attorneys outside of the Solicitor General's Office is a necessary step, but is unlikely to be a sufficient one.

Far better would be for the Court to take a more proactive, institutional approach. Specifically, the Court should consider establishing a standing committee of its own Bar, modeled in broad strokes on the NACDL *amicus curiae* committee, but formally charged by the Court with improving the quality of Supreme Court criminal defense representation across the Court's docket. And to achieve that ultimate end, the Court should consider formally empowering such a committee to select an attor-

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130. See *supra* Part II.B.I; see also *supra* note 121 (describing the importance of both forum-specific and subject-matter expertise).

131. See *supra* note 127. The ACLU is even less active in its requests, with barely any attempts in the past 30 years—although the organization was successful in some of its early efforts.

132. NACDL MISSION STATEMENT, *supra* note 128.

133. *Id.* at 2–5 (describing national co-chairs responsibilities).

134. See *supra* Part II.B.I.

ney to argue as *amicus curiae* in any case in which the Office of the Solicitor General will present argument against a criminal defendant.

Summoned into being and institutionally endorsed by the Supreme Court itself, such a committee would almost certainly attract top flight talent to its ranks—from the academy, from established criminal defense organizations, and from the elite Supreme Court Bar (which would likely also furnish accompanying pro bono resources to support the committee’s efforts).<sup>135</sup> Indeed, given the need for such a nascent advocacy community to combine Supreme Court experience, subject-matter expertise, and practical fluency with the criminal justice system, the Court would do well to populate the proposed committee with representatives from each of these constituencies.<sup>136</sup> By building a formal and permanent structure to coordinate and channel efforts to improve criminal defense advocacy within the Supreme Court Bar itself—under the Court’s own aegis and with its affirmative blessing—the Court would facilitate precisely the accumulation of individual and institutional experience necessary to cultivate a genuinely expert and robust Supreme Court de-

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135. To the extent that such a committee may require financial support beyond that which the private bar might provide, it is worth observing that the Supreme Court currently generates between \$700,000 and \$1,000,000 per year in Supreme Court Bar membership dues. *See* GRESSMAN ET AL., *supra* note 54, at 954 (reporting that approximately 5,000 new members join the Supreme Court Bar each year); SUP. CT. J., October Term 2013, at ii (reporting approximately 3,600 new members in October Term 2013); *see also* SUP. CT. R. 5.5 (“The fee for admission to the Bar . . . is \$200, payable to the United States Supreme Court.”). Notably, this funding stream is wholly separate from the annual congressional appropriation that fully furnishes the Court’s annual operating budget. The Bar membership fund, rather, is “a separate fund to be disbursed by the Marshal” of the Court, “at the direction” and in the sole discretion “of the Chief Justice . . . for the benefit of the Court and its Bar.” *Id.*

136. *See supra* note 121 and accompanying text. Candidates from each group referenced above ought not be hard to find. *See, e.g.*, Fisher, *supra* note 52, at 166 (observing that a law school “clinic that regularly handles criminal defense and civil rights cases will probably develop substantial expertise (at the instructor level) in those areas”); *id.* at 143 (noting the rise of such clinics at a number of leading law schools); Lazarus, *supra* note 58, at 1560 n.313 (“Sidley Austin . . . for several years has provided a mostly unheralded effort to provide pro bono assistance to defense counsel, by helping in the drafting of petitions for writs of certiorari, filing amicus briefs in support of review or on the merits, and assisting in the preparation of counsel for oral argument.”); *see also* Williams v. Illinois, 132 S. Ct. 2221, 2250 (2012) (Breyer, J., concurring) (relying upon briefing presented by “the Public Defender Service for the District of Columbia et al. as Amici Curiae”); Bullcoming v. New Mexico, 131 S. Ct. 2705, 2718–19 (2011) (Ginsburg, J.) (same).

fense bar. Such an approach, in turn, would likely go a long way toward closing the advocacy gap in the Court's criminal docket, given that the Solicitor General's outsized influence before the Court has been shown to recede, if not evaporate, when the Office appears opposite another Supreme Court expert.<sup>137</sup>

The suggestion that the Court take a more proactive institutional approach to resolving the criminal defense advocacy gap is hardly a radical proposition, particularly when viewed in broader historical and institutional context. State Supreme Courts, for example, routinely reach out to respected public defender agencies or civil rights organizations and proactively invite them to present arguments as *amici curiae* alongside criminal defendants in important cases.<sup>138</sup> As for the federal system, for nearly four decades now, federal judges have been tasked by Congress not only with developing and overseeing "a plan for furnishing" adequate "representation" to each indigent defendant prosecuted in federal court, but have also been granted direct institutional oversight of federal public defender agencies within their jurisdictions.<sup>139</sup>

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137. See Fisher, *supra* note 52, at 171; Kevin T. McGuire, *Explaining Executive Success in the U.S. Supreme Court*, 51 POL. RES. Q. 505, 515 (1998); see also Lazarus, *supra* note 58, at 1545–46 ("[T]he emergence of a private Supreme Court Bar capable of matching and sometimes even bettering the Solicitor General in Supreme Court advocacy experience is particularly significant because it is reducing the Solicitor General's disproportionate influence on substantive outcome.").

138. The New Jersey Supreme Court and the Court of Appeals for the District of Columbia have long traditions of affirmatively inviting public defenders to participate in oral argument as *amici curiae*. See, e.g., *Gilmore v. United States*, 699 A.2d 1130, 1131 (D.C. 1997); *United States v. Porter*, 618 A.2d 629, 650 (D.C. 1992); *Dep't of Children & Families, Div. of Child Protection & Permanency v. E.D.-O.*, 121 A.3d 832, 833 (N.J. 2015); *State v. Baskerville*, 374 A.2d 441, 442 (N.J. 1977); see also *State v. Russell*, 890 A.2d 453, 456 (R.I. 2006). Multiple other state supreme courts welcome *amicus* arguments from public defenders as well. See *State v. Whitman*, 324 P.3d 851, 851 (Ariz. 2014); *People v. Partida*, 122 P.3d 765, 778 (Cal. 2005); *People v. Smith*, 788 N.W.2d 665, 665 (Mich. 2010); *State v. Blake*, 228 P.3d 560, 561 (Or. 2010); *State v. Myrick*, 848 N.W.2d 743, 745 (Wis. 2014).

139. See Act of Oct. 14, 1970, Pub. L. No. 91-447, § 1, 84 Stat. 916 (codified as 18 U.S.C. § 3006A(g)(2)(A)) ("A Federal Public Defender Organization shall . . . be supervised by a Federal Public Defender appointed by the court of appeals of the circuit . . . for a term of four years, unless sooner removed by the court of appeals of the circuit for incompetency, misconduct in office, or neglect of duty."); see also *In re Levenson*, 587 F.3d 925, 928 (9th Cir. 2009) (discussing a judge's administrative oversight "role as Chair of the Ninth Circuit's Standing Committee on Federal Public Defenders").

And indeed even the Supreme Court has some institutional precedent for the committee proposal set forth above. For not only has the Court previously formed committees of its Bar to address issues concerning the quality of the attorneys within that group,<sup>140</sup> but it also has a well-established (if limited) practice of affirmatively inviting *amici* to present oral argument. Today, the Court generally does this only in rare cases when neither party wishes to defend the judgment below.<sup>141</sup> In an earlier era, however, the Court took a broader view of the role of *amici*, permitting organizations such as the ACLU to argue alongside criminal defendants in criminal procedure cases.<sup>142</sup> Indeed, one of the most famous and significant constitutional criminal precedents of the past century, *Mapp v. Ohio*,<sup>143</sup> would likely have come out very differently but for the participation of the ACLU, which was “permitted to participate in the oral argument” as “*amicus curiae*” and was the only litigant in the case to “urge the Court to overrule” *Wolf v. Colorado*—which the Court did, thereby extending the exclusionary rule to the states and altering the course of constitutional criminal law for the half-century to follow.<sup>144</sup>

The Court’s willingness to allow the ACLU to argue alongside Dollree Mapp’s lawyer reflected the broader view of the Court’s membership at the time that it is in fact the “duty of a court,” including the Supreme Court, to ensure that it has “the

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140. See GRESSMAN ET AL., *supra* note 54, at 974 (describing an instance in which the Court “created a committee of three lawyers . . . selected from members of the Supreme Court Bar in good standing . . . to submit a report and recommendation to the Court” concerning an attorney disciplinary matter (citing *In re Capshaw*, 65 S. Ct. 673 (1945))); see also *id.* at 974 (asserting that the Court “[u]nquestionably . . . has inherent power to create whatever ad hoc procedure may be necessary or appropriate” to oversee its Bar); cf. *In re Crow*, 359 U.S. 1007 (1959) (Douglas, J., dissenting).

141. See Brian P. Goldman, Note, *Should the Supreme Court Stop Inviting Amici Curiae To Defend Abandoned Lower Court Decisions?*, 63 STAN. L. REV. 907, 909–11 (2011) (reporting that “the Court has tapped an attorney to support an undefended judgment below, or to take a specific position as an *amicus* . . . slightly more than twice every three Terms on average” and that “the representation provided by such highly qualified counsel was superb”).

142. See, e.g., *Michigan v. Summers*, 450 U.S. 905 (1981) (granting ACLU’s motion for leave to argue as *amicus curiae*).

143. 367 U.S. 643 (1961); see Yale Kamisar, *Mapp v. Ohio: The First Shot Fired in the Warren Court’s Criminal Procedure “Revolution,”* in CRIMINAL PROCEDURE STORIES 45 (2007) (citing multiple sources describing *Mapp v. Ohio* as the decision that launched the “criminal procedure revolution”).

144. *Mapp*, 367 U.S. at 646 n.3, 655–56; see *Wolf v. Colorado*, 338 U.S. 25 (1999).

benefit of informed argument” when deciding essential questions of national importance.<sup>145</sup> Given the stark imbalance in the quality of criminal defense advocacy at the Supreme Court today—and the ill consequences such disparities can have for individual criminal defendants, the Court, and the public more generally—it seems perhaps time to revive that conception of the Court’s duty. The Supreme Court is not powerless when it comes to closing the advocacy gap currently plaguing its criminal docket. By directing its Bar to address this issue, and by creating a structural mechanism within that Bar to support such efforts, the Supreme Court could take a powerful and worthwhile step in this direction.

### III. REGAINING PERSPECTIVE: PLEA BARGAINING AND THE PIPELINE

A discussion of institutional vexations confronting the Supreme Court that have emerged over the past forty years cannot close without at least a preliminary exploration of one final development that has reshaped the criminal justice system over those decades: the rise of plea bargaining as the near universal means of adjudicating guilt in criminal cases. In 1974, when Amsterdam wrote his *Perspectives*, somewhere between seventy to eighty-five percent of felony convictions nationwide were the result of guilty pleas.<sup>146</sup> Today, by contrast, that plea rate has climbed—and steadfastly remained—above ninety-five percent.<sup>147</sup> As a result, in the now famous words of the Supreme Court, plea bargaining today is not merely “some adjunct to the criminal justice system; it *is* the criminal justice system.”<sup>148</sup>

The academic literature on plea bargaining is massive.<sup>149</sup> Discussion within that literature of plea bargaining’s potential ramifications for constitutional criminal adjudication and the

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145. Goldman, *supra* note 141, at 916 (quoting Letter from Justice Felix Frankfurter to Chief Justice Earl Warren (Nov. 18, 1954) (on file with the Earl Warren Papers, Library of Congress)).

146. KADISH ET AL., *supra* note 105, at 1138.

147. *Id.*; see also Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (discussing the ubiquity of plea bargaining in the criminal justice system).

148. *Id.* (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)); see also Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012) (“[C]riminal justice today is for the most part a system of pleas, not a system of trials . . .”).

149. See, e.g., Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 36 (2002) (“A huge literature exists on plea bargaining, much of it produced over the past thirty years.”).

development of constitutional criminal law, however, is considerably less well developed. Indeed, few scholars have examined the issue through that lens since Amsterdam himself authored a brief and early account a few years before he wrote the *Perspectives*.<sup>150</sup> It seems fitting, then, in this revisitation of Amsterdam's work, to close by reengaging with this important question, in an effort to begin framing the issue for renewed scholarly discussion and inquiry.

In such a framing, it is helpful to begin with three salient observations regarding plea bargaining that are already well-established. First, while plea bargaining might in theory be imagined as a mutually enhancing meeting of the minds, in which the government and the criminal defendant both emerge better off and the system operates with net efficiencies,<sup>151</sup> in practice the system operates almost exclusively as a means of prosecutorial control over adjudications of guilt. This occurs because both the breadth and depth of substantive criminal law have expanded dramatically over the past few decades, such that contemporary prosecutors, by modifying the amalgam of charges they might choose to file for any given criminal event, can ratchet up or down at will the potentially overwhelming sentencing exposure a defendant will face, and can thus carefully calibrate the potentially massive pressure he will feel to accept a prosecutor's proffered deal.<sup>152</sup> As a result, modern prosecutors "are not merely law enforcers."<sup>153</sup> Rather, they are frequently "the final adjudicators" of the criminal justice system—structurally empowered in practice to determine through their charging leverage which cases will be settled as opposed to litigated, and under what circumstances and terms.<sup>154</sup>

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150. See Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 788–90 (1970).

151. See generally Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289 (1983).

152. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512–23 (2001) [hereinafter Stuntz, *Pathological Politics*]; see also William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 841 (2006) ("For prosecutors, the message is: threaten everything in your arsenal in order to get the plea bargain you want. For defendants, the message is simpler: take the deal, or else.").

153. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871 (2009).

154. *Id.*; see also Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2132 (1998) ("Defense counsel's bargaining posture may implicitly threaten a trial, but both sides . . . know that the defense is very likely arguing to the ultimate decision-maker about the nature of



Second, when prosecutors exercise this substantial discretion, they do so with multiple institutional objectives in mind. These objectives extend beyond criminal adjudication's core purpose: assigning punishment to guilty defendants commensurate with their culpability. Rather, a prosecutorial office, quite legitimately, will take into account various systemic, administrative and institutional concerns in determining what plea offer to make in a given case.<sup>155</sup> These "external" interests might include the desire to send a message to the broader community regarding relative law enforcement priorities; the desire to manage office resources and constraints; the desire to resolve a case without public attention that might impose additional stress on victims or bring unwanted scrutiny to the office; or the desire not to adversely impact other future or ongoing prosecutions, perhaps through the generation of poor atmospherics or unfavorable precedents.

Third, wide-scale plea bargaining has a direct effect not only on the day-to-day administrative operation of the criminal justice system, but also on the substantive decisional law that such a system produces through the adjudicative process. As Professor Bill Stuntz explains in the context of discussing non-constitutional criminal law, "[c]ourts make criminal law, when they do so, by interpreting criminal statutes in the context of criminal cases. . . . Courts' influence over the content of criminal law [thus] depends on the frequency and range of cases that . . . raise such issues."<sup>156</sup> A guilty plea, however, typically wipes the slate clean of any litigable issues in a case. There is no trial. There is almost always no appeal. And accordingly, there is no appellate decision to be added to the relevant jurisdiction's body of case law. As a result, the judicial system's capacity to inter-

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a fair outcome, rather than proposing an exchange of values based on relative bargaining strength.").

Notably, while there are certainly institutional efficiency incentives that drive prosecutors to resolve many cases by pleas of guilt, there are also personal and professional incentives against resolving *all* cases in such a fashion. As litigators, prosecutors generally derive personal satisfaction from trying cases, not just from pushing paper. Professional prestige and advancement, moreover, often depend in part on demonstrated trial prowess.

155. See Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 52-58 (1968); see also F. Andrew Hessick III & Reshma Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 B.Y.U. J. PUB. L. 189, 191-98 (2002); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1987-88 (1992).

156. Stuntz, *Pathological Politics*, *supra* note 152, at 565.

pret the law is functionally constrained by the decisions prosecutors make regarding charging and plea bargaining.<sup>157</sup> By avoiding “adjudication altogether,” guilty pleas “leave courts very little role to play” and allow prosecutors to “push courts to the periphery,”<sup>158</sup> on the prosecutors’ terms.

Taking these three insights together—prosecutors largely control which cases are resolved by pleas, they do so with wide ranging institutional interests in mind, and their decisions alter courts’ capacity to shape the law—a fourth insight emerges, one that has not been deeply addressed in the literature to date: plea bargaining, as a systemic practice, affords prosecutors substantial power to shape the content of *constitutional* criminal law, by influencing which constitutional claims are litigated in the first instance.

The mechanism by which such influence might be exercised is fairly straightforward. For any number of reasons, a prosecutorial office might not want a case presenting a given set of facts to be subjected to constitutional litigation. Perhaps the facts of the case would portray prosecutorial allies in the police department in a particularly unfavorable or embarrassing light. Perhaps they would render an individual officer a damaged witness, potentially impacting other important prosecutions down the road or in the works. Perhaps the facts would tee up a contested legal issue in a way that jeopardizes a beneficial status quo in the local case law or that undermines established favorable precedents in neighboring jurisdictions. Or perhaps the claim presents a significant chance that an otherwise clearly culpable defendant will escape liability altogether. The essential point is this: if a prosecutorial office—exercising its own judgment, from the perspective of its own institutional interests—determines that the alleged facts of a constitutional violation ought not be exposed to litigation in a criminal court, but nonetheless wishes to see the defendant prosecuted for his crimes, it can often use its substantial plea bargaining leverage to avoid litigating the constitutional issue altogether, simply by threatening an enhanced sentence if the defendant pursues the claim or by offering a hard-to-resist sentencing benefit if he does not.

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157. *See id.* at 541 (“The range of cases th[e] courts see is determined not by the courts themselves, but by the laws legislators write and the cases prosecutors bring.”).

158. *Id.* at 528, 561.

Indeed, the leverage a prosecutor holds when “bargaining” over constitutional claims is if anything even stronger than the leverage he or she holds when bargaining over factual guilt or innocence. For in the latter context, if a defendant is able to muster any negotiating leverage at all, it will often arise due to potential vulnerabilities in the anticipated testimony of witnesses to the alleged events—vulnerabilities that inject a degree of outcome-uncertainty that the prosecuting office may want to eliminate. Crucially, however, such testimonial vulnerabilities concerning guilt or innocence will often concern civilian witnesses, for the simple and obvious reason that crime often tends to happen when the police are not around.<sup>159</sup>

Constitutional criminal adjudication, by contrast, typically involves a very different credibility contest: it almost always pits the word of a sworn officer of the law against that of a criminal defendant, who has recently been caught red handed with some form of contraband or evidence of criminality that he is now seeking to suppress. In this inherently imbalanced credibility contest, moreover, the officer will not only be a professional witness accustomed to testifying in court, but will also be well versed in the precise testimonial “scripts” that, if credited, will typically defeat the defendant’s constitutional claim with ease.<sup>160</sup> Finally, the officer will be testifying with the knowledge that his recitation of such scripts—even if not wholly truthful—may be the difference between a conceded criminal going free or not.<sup>161</sup> Surely if prosecutorial plea bargaining leverage is suffi-

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159. The notable exceptions here being sting operations and public-order offenses.

160. See generally Jeffrey Fagan & Amanda Geller, *Following the Script: Narratives of Suspicion in Terry Stops in Street Policing*, 82 U. CHI. L. REV. 51 (2015).

161. Cf. Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 854 (1994) (“Police culture no doubt . . . plays a large role in creating incentives for perjury. The more the police see themselves as separate from the community—as an ‘us’ to be deployed against the ‘them’ of the policed population—the more the police may see perjury as an acceptable means to achieve the greater good.”); see also Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1624 (2012) (discussing “the documented problem of false police testimony” and observing that while “[n]o one is sure how much of it goes on . . . evidence and anecdote suggest a fair amount”); Christopher Slobogin, *Testilying: Police Perjury and What To Do About It*, 67 U. COLO. L. REV. 1037, 1041–48 (1996) (describing the prevalence and likely causes of police perjury); William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 915 (1991) (“Judges may tend to tilt toward the government in deciding suppression motions, since such motions are, by their nature, made by unsympathetic defendants. And for the same

cient in the ordinary guilt-innocence context to cause some genuinely innocent defendants to plead guilty (as it is),<sup>162</sup> such leverage will only be more pronounced when exerted to persuade factually *guilty* defendants to “bargain” away constitutional claims for which success, for the reasons I have just described, is at best only ever a contingent proposition.

Notably, while prosecutorial power may be even more pronounced in the context of constitutional-claim bargaining, the exercise of that power in such a context is perhaps even more normatively suspect than in the case of ordinary plea bargaining.<sup>163</sup> Indeed, constitutional-claim bargaining is subject to many of the same substantial criticisms already leveled at plea bargaining, and then some. The additional concerns are twofold: first, misalignments between the incentives of the negotiating parties and the broader public can cause constitutional-claim bargaining to under protect rights designed to preserve civil liberties on a societal level; and second, the process can produce negative externalities for the judicial system in particular, by inserting structural blind spots into the process of judicial review.

Taking first the misalignment of incentives, it is important to recognize that when a prosecutor encourages a criminal defendant to waive a constitutional claim, an important set of interests are not being represented in that negotiation: the interests of the general public in constraining police behavior. Professor Amsterdam captures the public’s interest in constitutional criminal adjudication well when he describes the Fourth Amendment as “quintessentially” an instrument for judicial “regulation of the police.”<sup>164</sup> Within that conceptual frame, individual Fourth Amendment claims operate “as components of a

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reason, police officers may face a temptation to lie in order to win at the suppression hearing, secure in the knowledge that even truthful testimony from defendants will be less credible than officers’ falsehoods.”).

162. See Jed Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty>; *When the Innocent Plead Guilty*, INNOCENCE PROJECT (Jan. 29, 2009), <http://www.innocenceproject.org/news-events-exonerations/when-the-innocent-plead-guilty>.

163. Plea bargaining as a general practice is regularly the subject of withering academic critique, given its coerciveness and the lack of procedural oversight for prosecutorial discretion. See, e.g., Albert W. Alschuler, *Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 932 (1983).

164. Amsterdam, *supra* note 1, at 370–71.

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regulatory system” in which courts are called upon to weigh considerations beyond merely the “protection of isolated enclaves of individual interest against invasion by particular police actions.”<sup>165</sup> Rather, society’s interest in assuring that “the amount of power that it permits its police to use” operates within “effective control[s]” is equally at stake,<sup>166</sup> a point underscored by the Supreme Court’s regular assertion that the “sole purpose” of Fourth Amendment remedies in criminal courts “is to deter *future* Fourth Amendment violations.”<sup>167</sup>

As Daniel Meltzer explains, this public-law feature of constitutional criminal adjudication calls upon *both* parties in a criminal dispute to serve at least a quasi-public role, insofar as it casts “criminal defendants as private attorneys general empowered to seek deterrent remedies” “that extend beyond redressing or protecting a right of the litigant himself, in order more generally to prevent government misconduct in the future.”<sup>168</sup> This framing of the criminal defendant as a quasi-public actor, however, exposes the inherent incentive-misalignment problem. For unlike a true private attorney general who litigates primarily to vindicate a public interest, the overweening goal of a criminal defendant is extraordinarily personal: he is trying to minimize a looming, potentially decades-long sentence of imprisonment. *That* is his primary objective, with the public’s interest in the vindication of civil liberties or the imposition of “deterrent remedies” likely coming in distant second. To be sure, in some cases the defendant might benefit from strategically pressing constitutional claims that resonate with such broader societal interests. But if presented with an opportunity to trade the vindication of such interests for a favorable reduction in prison exposure, a criminal defendant would act rationally—and wholly understandably—in taking such a deal. In such an instance, however, the public will have lost out on its deterrent remedy altogether.

This threat to the public’s interest, moreover, is compounded when one examines the other side of the bargaining table. For in an adversarial debate over how to strike the always difficult balance between robust law enforcement authority and a solicitude for civil liberties that constrains such authority, it is

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165. *Id.* at 371–72.

166. *Id.* at 377.

167. *Davis v. United States*, 131 S. Ct. 2419, 2426 (2011) (emphasis added).

168. *See* Meltzer, *supra* note 102, at 249, 251.

often the prosecution's role—or at its least practice—to champion law enforcement power. This is entirely understandable, given that prosecutors are institutionally and culturally aligned with the primary targets of constitutional criminal law's regulatory mandate: the police. Together, the prosecutor and the police form “the prosecution team,”<sup>169</sup> and their joint interest—indeed, their joint responsibility—is to ensure the community's safety.

When the prosecution is negotiating with a defendant over factual guilt or innocence, that interest in securing community safety will generally be served if a guilty defendant is punished, which tends, at least conceptually, to align prosecutorial incentives with public concerns. When engaging in constitutional claim-bargaining, however, the prosecution team's primary interest in community safety will tend to emphasize the need for effective, relatively unrestrained, and perhaps even aggressive law enforcement authority—perhaps at the undue expense of civil liberties.<sup>170</sup> The problem here is not necessarily that prosecutors have or pursue such an interest. Rather, it is that when this interest combines with prosecutors' substantial plea bargaining leverage, it could allow constitutional criminal law's regulated entity—the prosecution team—to set the terms of its own regulation, simply by pushing constitutional claims that might misalign with prosecutors' institutional incentives beyond the reach of adjudication altogether.

If in fact prosecutors do leverage their claim-bargaining advantage to remove such claims from the pipeline of judicial review, that would raise a final, broader institutional concern. For when a systematically culled set of constitutional claims is excluded from adjudication wholesale, courts do not simply lose the opportunity to implement deterrent remedies. They also lose a crucial opportunity to *see* the criminal justice system as it truly exists, in its day-to-day operation on the ground. They lose, in other words, the capacity to attain a fair and accurate

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169. *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1249 (2012); *see also* Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 793 (2003) (describing “institutional structures, legal rules, and professional interactions [that] combine to bind the bureaucratic elements of the federal [law] enforcement system far closer together than has been generally understood”).

170. *Cf.* HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 153 (1968) (describing a “crime control model” and a “due process model” as representing “two separate value systems that compete for priority in the operation of the criminal process”).

perspective of the system that constitutional criminal law sets out to regulate. Courts, after all, are not roving fact-finding commissions. Their interaction with the world occurs largely through the process and the prism of litigation. When courts, as institutions, repeatedly engage with other institutional actors or social issues through that process, they can gain a valuable depth of institutional knowledge and experience that can be a powerful asset as they attempt to deploy “fourth amendment doctrines as components of a regulatory system.”<sup>171</sup> If, however, a significant subset of cases becomes invisible to the judicial process—due to the strategic deployment of constitutional-claim bargaining in service of prosecutorial interests—then the universe of cases implicating constitutional criminal law could become inherently skewed. This, in turn, could have spillover effects beyond just the missing cases themselves, as judges—including the judges on the Supreme Court—mold constitutional criminal law around an understanding of the criminal justice system that they have gleaned from a pipeline of criminal cases that contains a significant, structurally generated, and potentially biased blind spot.

For all of these reasons, the potential systemic impact of plea bargaining on the development and direction of constitutional criminal law is an issue that merits much closer scholarly attention. As such academic inquiry unfolds, one question worth exploring is whether the unique attributes of constitutional-claim bargaining—in which law enforcement authorities enjoy the practical capacity to induce private parties to trade away quasi-public rights designed to constrain those very same law enforcement authorities in the first place—warrants some structural intervention aimed at insulating constitutional claims from the more problematic aspects of the bargaining process.

This is a challenging question, both in terms of its conceptual underpinnings and its practical implications. As a conceptual matter, constitutional criminal law and the rights it entails are often imagined as rights that, at least in the first instance, benefit the defendant asserting them.<sup>172</sup> They are thus generally

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171. Amsterdam, *supra* note 1, at 372; see Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. (forthcoming 2016) (discussing criminal courts’ capacity to acquire and utilize institutional knowledge about the criminal justice system).

172. See John Rappaport, *Unbundling Criminal Trial Rights*, 82 U. CHI. L. REV. 181, 194 (2015).

treated as waivable—a view reinforced by the strong adversarial belief in “the defendant’s right to control his defense,” including by bargaining portions of it away in exchange for less severe penalties if he so chooses.<sup>173</sup> On the other hand, existing literature also explores the possibility that individual rights ought to be deemed “inalienable” and thus immune from the bargaining process if they generate positive public externalities that the bargaining process fails to recognize or protect.<sup>174</sup> If one accepts this latter line of reasoning, and also accepts the proposition that at least some constitutional adjudication in criminal courts serves an important public function, as Amsterdam forcefully argues and as the Supreme Court routinely asserts,<sup>175</sup> then a modification of the current plea bargaining regime aimed at addressing this issue seems at least worthy of exploration, given the serious risk that important public interests are under protected by the regime as it currently stands.

Practical implementation of such an alternative approach to constitutional criminal adjudication, however, would raise its own set of challenges. Identifying a mechanism for implementing such a change is not so much the hard part: existing rules of criminal procedure already allow for the adjudication of constitutional claims to be decoupled from plea bargaining over factual guilt—through conditional guilty pleas.<sup>176</sup> Under this process, a court considers a constitutional claim, issues its ruling, and, if the ruling is not in the defendant’s favor, accepts his guilty plea. The defendant is then permitted to appeal that adverse constitutional ruling and, if he prevails, to go back and withdraw his plea. Judicial review of the constitutional claim is thus preserved, even in the face of plea bargaining over factual guilt.

As currently structured, this mechanism does little to actually insulate constitutional criminal adjudication from claim-

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173. *Id.* (citing Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant’s Right To Control the Case*, 90 B.U. L. REV. 1147 (2010)).

174. See Guido Calabresi & A. Douglas Melamed, *Property Rights, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1111–12 (1972); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1378–93 (1984); cf. Rappaport, *supra* note 172, at 197 & n.65 (arguing generally against inalienability, but recognizing the countervailing “concern” that plea bargaining might adversely “influence the content of criminal procedure rules” by “changing the makeup of the body of cases that are litigated rather than settled”).

175. See *Davis v. United States*, 131 S. Ct. 2419, 2426 (2011); Amsterdam, *supra* note 1, at 371–72.

176. See, e.g., FED. R. CRIM. P. 11(a)(2).



bargaining, because the process can only be engaged with prosecutorial consent. It thus has little real impact on the underlying power dynamics that shape plea bargaining and constitutional-claim bargaining alike. A simple modification of the rule, however, perhaps invited or initiated by the Supreme Court itself,<sup>177</sup> could easily change this dynamic: rather than simply permitting conditional pleas at the prosecutor's discretion, a revised procedural framework might make conditional pleas the default whenever a nonfrivolous or substantial constitutional claim is at issue in a criminal case. In such a world, prior to accepting a plea of guilt, the trial court would ask the attorneys for both sides to certify that no such claims exist. If the attorneys identify litigable issues, the court would then adjudicate those issues prior to accepting the defendant's guilty plea—just as it currently does when the existing conditional-plea process is engaged. The difference here would simply be that constitutional criminal adjudication and judicial review, including subsequent appellate and Supreme Court review, would be preserved in appropriate cases by default, rather than solely by leave of the prosecution.

Of course, to articulate a mechanism by which such a structural change might come about is not to endorse the proposal without equivocation. Any rule change that alters the process of adjudicating constitutional criminal claims in this manner could substantially increase the number of such claims that require resolution. The proposal thus must come to terms with the significant resource demands it would likely impose on a system already straining under the weight of massive case loads.<sup>178</sup> Ab-

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177. The Supreme Court has the “power to prescribe” and amend “general rules of practice and procedure” for the lower federal courts, provided that such amendments do “not abridge, enlarge, or modify any substantive right” of the parties. 28 U.S.C. § 2072 (2012). A deep dive into the Rules Enabling Act is beyond the scope of this Article. Suffice to say, however, that the Supreme Court has never found a rule of procedure to violate the terms of the Act. *See* *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (plurality opinion) (“[W]e have rejected every statutory challenge to a Federal Rule that has come before us.”). A rule that converted conditional guilty pleas from options available to the parties into presumptive defaults would most likely qualify as a rule that “really regulates procedure” under the Act, given that it creates no new substantive remedy, *id.* at 410, and concerns itself exclusively with the “judicial process,” *Hanna v. Plumer*, 380 U.S. 460, 464–65 (1965), rather than with the extrajudicial conduct of the parties, *id.* at 475 (Harlan, J., concurring).

178. Of course, one response to the imposition of greater case-processing burdens may be to reduce the number of cases flowing through the system in

sent an increase in resources—or a decrease in the total number of prosecutions—such additional costs could overwhelm not only criminal courts and prosecutors, but also the already precarious indigent criminal defense system, perhaps stretching providers of criminal defense representation beyond the breaking point.<sup>179</sup> Limiting the proposed rule’s application to cases in which a court determines that the unlitigated constitutional claims are substantial or are of particular significance to the public may alleviate some of this pressure,<sup>180</sup> but would not eliminate it. Moreover, there is also at least the possibility that a net effect of reducing constitutional-claim bargaining would be to reduce criminal defendants’ already limited leverage to secure more favorable sentences, thereby perhaps resulting in higher sentences for such litigants across the board—an outcome few would deem beneficial.<sup>181</sup>

Whether these potential adverse consequences would manifest themselves, or how they might compare to the potential benefits of curtailing constitutional-claim bargaining, are questions open to more detailed analysis and debate. But they are also questions clearly worthy of such debate, given the potential systemic benefits that a modified approach to constitutional-claim bargaining might entail. The legal academy would do a service to the criminal justice system by exploring these issues in greater depth, examining both the conceptual and practical dimensions at stake. And the Supreme Court, for its part, would do a similar service if it invited further examination, perhaps by

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the first place—which many might consider a positive development in its own right. *Cf.* Rubio, *supra* note 31.

179. *Cf.* Richard Fausset, *Suit Describes ‘Waiting List’ for Legal Aid in New Orleans*, N.Y. TIMES, Jan. 16, 2016, at A9 (describing a lawsuit filed in response to “a declaration . . . by the Orleans Public Defenders office that it would begin to refuse some felony cases . . . because it was underfunded and overloaded with cases”).

180. *Cf.* 28 U.S.C. § 2253(c) (2012) (prohibiting appeal from the denial of a petition for habeas corpus unless “the applicant has made a substantial showing of the denial of a constitutional right”).

181. *See supra* note 31. Whether in fact the proposed rule change would lead to a net increase in sentences is an open question. Such a result presumes that prosecutors seek to maximize not only convictions but also sentence length as an end in and of itself, rather than as an instrumental means of achieving pleas of guilt—an assumption that is not self-evidently true. By some anecdotal accounts, moreover, appellate waivers by criminal defendants have been substantially curtailed in some jurisdictions with no observable net harm to the affected class of litigants. *See* Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195, 1236–40 (2005).

the relevant rule-writing committees of the Judicial Conference, into whether efforts to curtail constitutional-claim bargaining might be implemented in a manner that furthers the public's interest—including the public interest in having a judiciary with a full and unbiased institutional perspective of the criminal justice system over which it presides, as that system actually operates and exists in corners that constitutional-claim bargaining might otherwise conceal.

### CONCLUSION

Constitutional criminal adjudication in the United States Supreme Court is structurally and institutionally different today than it was forty years ago. The Court's membership is different. The attorneys who argue before it are different. And the cases it considers come to the Court from a criminal justice system that itself is radically different, administered through a regime of near universal plea bargaining and constitutional-claim bargaining. Together, these developments have produced a world in which the adjudication of important criminal justice issues before the Court often consists of arguments made by expert prosecutors, to former expert prosecutors, about issues that the prosecutors themselves may well have steered to the Court for consideration.

The combined effect of these new institutional vexations could easily impact the substance and direction of the Court's jurisprudence in this important area of law, including in underexplored and unforeseen ways. A central question posed by this Article, however, is whether the Supreme Court will take any of the steps available to it to help mitigate the potential ill effects that these new vexations might entail—steps to regain a more balanced institutional perspective as the Court continues to engage in “of one of its noblest labors”: the ongoing effort to interpret and enforce the Fourth Amendment, that vital “instrument by which [our] society imposes on itself the seldom welcome, sometimes dangerous, always indispensable restraints that keep it free.”<sup>182</sup>

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182. Amsterdam, *supra* note 1, at 353.