

The Court of Mass Incarceration

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It's an honor for me to deliver the Simon Lecture today and to celebrate the drafting of the Constitution with all of you on Constitution Day. I'm especially happy to spend this day at Cato because of all the great work Cato does defending constitutional rights.

I primarily write about criminal law, and Cato's work in this space in particular has been nothing short of outstanding. Unfortunately, the contrast between Cato's commitment to constitutional guarantees in criminal cases and the Supreme Court's is stark. And it's the Court's almost complete abdication to the government in criminal proceedings—in spite of clear constitutional language to the contrary—that is going to be the topic of my lecture today.

There is plenty of blame to go around for America's turn to mass incarceration, but today I want to explain the Supreme Court's role. The justices may not have designed our world of mass incarceration, but they have made sure its foundation stays firmly in place.

I. Sweep of Criminal Law

Let me start by getting everyone up to speed on just how nuts America's commitment to incarceration and criminalization is before I turn to the Supreme Court's role in its evolution. America used to look like most of the rest of the world and certainly other Western democracies when it came to incarceration. Until the 1970s, we had a stable incarceration rate on par with other countries.¹ But then our

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¹ See Joshua Aiken & Peter Wagner, *State Policy Drives Mass Incarceration*, Prison Pol'y Initiative (2017) <https://bit.ly/3ydMK0S> (depicting U.S. incarceration rates from 1925 to 2015); Franklin E. Zimring, *The Insidious Momentum of American Mass Incarceration* 3–6 (2020).

incarceration rate started to explode. We now lead the world in both the total number of people incarcerated—nearly 2.3 million²—and the rate of incarceration per capita.³ The U.S. incarceration rate is more than five times what it was in 1972, when it began its record climb upward, and is a rate 5 to 10 times higher than that of other industrialized countries.⁴ America has less than five percent of the world’s population but almost a quarter of the world’s prisoners.⁵

As shocking as the incarceration numbers are, they are the tip of an even bigger iceberg of state control. One out of every 52 people in the United States is under some form of criminal justice supervision (such as probation or parole).⁶ In some states and communities, the rates are even higher. In Georgia, for example, one out of every 18 people is on probation or parole.⁷ We are now living in a country where one out of every three adults in America has a criminal record.⁸ For every 15 people born in 2001, one is expected to go to prison at some point in his or her life.⁹

² Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, Prison Pol’y Initiative (Mar. 24, 2020), <https://bit.ly/3ur73XA>.

³ See *Highest-to-Lowest Prison Population Rate, World Prison Brief*, <https://bit.ly/3ur7jG2> (last visited Nov. 1, 2021).

⁴ See Danielle Kaebel & Mary Cowhig, U.S. Dep’t of Just., Bureau of Just. Stat., Pub. No. NCJ 251211, *Correctional Populations in the United States, 2016* 4 tbl.4 (2018), <https://bit.ly/3yJEjvR>; Equal Just. Initiative, *United States Still Has Highest Incarceration Rate in the World* (Apr. 26, 2019), <https://bit.ly/3bQvS8S>.

⁵ See Peter Wagner & Wanda Bertram, “What Percent of the U.S. Is Incarcerated?” (And Other Ways to Measure Mass Incarceration), Prison Pol’y Initiative (Jan. 16, 2020), <https://bit.ly/3ONVFgH>.

⁶ See U.S. Census Bureau, *Quick Facts* (July 2019), <https://bit.ly/3RcZKfj> (estimating the U.S. population in July 2019 to be 328,239,523); Todd D. Minton, Lauren G. Beaty & Zhen Zeng, U.S. Dep’t of Just., Bureau of Just. Stat., Pub. No. NCJ 300655, *Correctional Populations in the United States, 2019—Statistical Tables* 5 tbl.1 (2021), <https://bit.ly/3nH1Ln4> (estimating the correctional population of the U.S. to be 6,344,000).

⁷ See Alexi Jones, *Correctional Control 2018: Incarceration and Supervision by State*, Prison Pol’y Initiative (2018), <https://bit.ly/2EgcwY4> (finding Georgia had a correctional control rate of 5,143 per 100,000).

⁸ Exec. Office of the Pres., *Economic Perspectives on Incarceration and the Criminal Justice System* 45 (2016), <https://bit.ly/2Uff7FN>.

⁹ Thomas P. Bonczar, U.S. Dep’t of Just., Bureau of Just. Stat., Pub. No. NJC197976, *Prevalence of Imprisonment in the U.S. Population, 1974–2001* 1 (2003), <https://bit.ly/3R8Tbei>. Broken down by race and gender, the numbers are even starker among men: 1 in 3 Black men, 1 in 6 Hispanic men, and 1 in 17 white men will spend time

This extraordinary amount of state deprivation of liberty does not fall equally on the population. Black people in America bear a disproportionate share of the brunt. African Americans make up about a third of the people incarcerated, even though they are 13.4 percent of the U.S. population.¹⁰ One third of Black men have at least one felony conviction.¹¹ Black adults are more than five times more likely to be incarcerated than white adults.¹² And here, too, the national averages, as shocking as they are, are smoothing out even more alarming statistics in some communities. In the District of Columbia, for example, more than 75 percent of Black men can expect to be incarcerated at some point during their lives.¹³ 75 percent! At our current pace, almost one out of three Black men in the country can expect to be incarcerated during his lifetime compared to six percent of white men.¹⁴

I could easily fill my time today with numbers as shocking as these that show the sweep of government overreach in criminal matters, whether by detailing the literally thousands upon thousands of collateral consequences of convictions that deprive people of rights and access to governmental benefits or by detailing inhumane conditions in prisons and jails or abuses by police and prosecutors that go unpunished. But instead of detailing the sweep of the governmental excess in all its tragic glory, I want to discuss an overarching question that applies to all of this: How can this happen under our Constitution?

in prison. *Id.* These estimates were made assuming that “incarceration rates [would] remain unchanged.” *Id.* A more recent study taking new trends into account largely confirms Bonczar’s projections. William Rhodes et al., Abt Associates, Estimating Incidence and Cumulative Incidence of Incarceration Using NCRP Data (2021), <https://bit.ly/3R62pbj>.

¹⁰ See U.S. Census Bureau, *supra* note 6; John Gramlich, The Gap between the Number of Blacks and Whites in Prison Is Shrinking, Pew Research Ctr. (Apr. 30, 2019), <https://pewrsr.ch/3bQAT1c>.

¹¹ Alan Flurry, Study Estimates U.S. Population with Felony Convictions, UGA Today (Oct. 1, 2017), <https://bit.ly/3NIT2Lx>.

¹² John Gramlich, Black Imprisonment Rate in the U.S. Has Fallen by a Third Since 2006, Pew Research Ctr. (May 6, 2020), <https://pewrsr.ch/3agMPc9>.

¹³ Jeremy Travis, *But They All Come Back: Facing the Challenges of Prisoner Reentry* 122 (2005).

¹⁴ Bonczar, *supra* note 9, at 1.

II. The Framers' Constitution

You might be thinking that the problem is that the Framers didn't anticipate that the government might be excessively punitive and abuse its coercive powers, so the Constitution doesn't speak to this. If that were the case—if the Constitution were silent on the relevant issues—that would mean we would be stuck with the whims of the democratic process to fix any problems, and the Supreme Court would not bear any of the blame because the justices cannot put things in the Constitution that are not there. But as it turns out, the Constitution is not silent on government overreach in criminal cases. The Framers didn't let state power in the criminal context slip through the constitutional cracks. Quite the opposite, the Framers of our Constitution were well aware of the state's use and abuse of the criminal laws.¹⁵ They knew of the excesses of the Bloody Code in England.¹⁶ They feared majorities that would seek to oppress opponents through the use of criminal law and punishment. They worried about a police state that would deprive people of liberty.

Far from being silent on checking the government's power in criminal matters, the Constitution is obsessed with it.¹⁷ In fact, one of the animating features of the Constitution is its preoccupation with the regulation of the government's criminal powers. Even before the adoption of the Bill of Rights, the Constitution provided protection for the rights of those accused of crimes through its structural provisions. The Framers worried that Congress might single out political enemies and other disfavored individuals through criminal laws that applied only to the targets. Alexander Hamilton observed that "[t]he creation of crimes after the commission of the fact . . . and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny."¹⁸ So Article I prohibits bills of attainder and *ex post facto* laws. Article I also limits Congress's authority to suspend the writ of habeas corpus, which is a key protection for individuals against unlawful detention.

¹⁵ See, e.g., Federalist No. 74, at 376 (Alexander Hamilton) (Ian Shapiro ed., 2009).

¹⁶ See Steven Wilf, *Law's Imagined Republic* 140 (2010) ("Criticism of the Bloody Code became commonplace in American writings of the 1780s and 1790s.").

¹⁷ For a more detailed discussion of these issues, see generally Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 *Stan. L. Rev.* 989 (2006).

¹⁸ Federalist No. 84, at 432 (Alexander Hamilton) (Ian Shapiro ed., 2009).

Article II vests the president with the power to grant pardons for all federal offenses except in cases of impeachment. As the Supreme Court has explained, this power “exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law.”¹⁹ It is, in other words, a way for the president to check excessive punishments and prosecutions.

What happens if the legislature works with the executive branch to single out disfavored minorities for prosecution or to engage in excessive overreach? The Constitution recognizes this danger and relies on the judiciary to be a key check on the political branches.²⁰ Before people can be convicted, they are entitled to judicial process. The federal scheme, with life-tenured judges who have salary protections, gives the judiciary the kind of independence that, at least in theory, would seem well suited to check both the legislature and the executive and to assure fair and impartial decisionmaking in each case.²¹

But—and this is critical—the Framers did not trust judges alone. Although Article III judges are relatively more independent than Congress and the executive branch, they are still part of the government. They are appointed through a process that favors governmental connections and sympathy to the party in power.²² The Framers thus did not think judges would be sufficient protection against the possibility of state abuse in criminal cases because of their potential partiality toward the government.²³

¹⁹ *Ex parte Grossman*, 267 U.S. 87, 120 (1925).

²⁰ See, e.g., U.S. Const. amends. IV, V, VI.

²¹ See *Commodity Future Trading Comm’n v. Schor*, 478 U.S. 833, 860 (1986) (“The Framers also understood that a principal benefit of the separation of judicial power from the legislative and executive powers would be the protection of individual litigants from decisionmakers susceptible to majoritarian pressures.”) (Brennan, J., dissenting).

²² Cf. Daryl Levinson, *Foreword: Looking for Power in Public Law*, 130 *Harv. L. Rev.* 1, 60–61 (2015) (“Owing to some combination of political selection of judicial appointments and ongoing mechanisms of control . . . the empirical reality appears to be that the Court will rarely drift very far from the agenda of a dominant national political coalition.”). See also Lee Epstein, William M. Landes & Richard A. Posner, *The Behavior of Federal Judges* 85–88 (2013); Barry Friedman, *The Politics of Judicial Review*, 84 *Tex. L. Rev.* 257, 308–20 (2005).

²³ “For the revolutionary and founding generations, the criminal jury reliably stood between the individual and government, protecting the accused against overzealous prosecutions, corrupt judges, and even tyrannical laws.” Jeffrey Abramson, *We, The Jury* 87 (1994).

The Constitution therefore provides in Article III—the article establishing the judicial role in government—that the trial of all crimes must be by jury. The jury was no afterthought for the Framers. They did not want anyone to be subject to governmental punishment without agreement from ordinary citizens.²⁴ Under the Constitution's structure, the jury's unreviewable power to acquit would check both the legislative and executive branches. The jury was the key gatekeeping check before criminal punishment of any kind could be imposed.

So even before the adoption of the Bill of Rights, we see the Framers' concern with expansive state criminal powers. The Bill of Rights then brings this home even more. Four of the first 10 amendments deal explicitly with criminal process. The Fourth Amendment regulates the state's policing and investigative powers. The Fifth Amendment acts as a check on the state's executive powers by providing for the right to a grand jury and prohibiting the state from prosecuting individuals twice for the same offense. And, of course, the Fifth Amendment's Due Process Clause (and later, the Fourteenth Amendment's Due Process Clause) requires the government to follow proper process before depriving an individual of life, liberty, or property. The Sixth Amendment reiterates the centrality of the jury's role in adjudicating criminal cases, making clear that the jury will be drawn from the community in which a crime occurs. In addition, the Sixth Amendment provides a host of additional rights to defendants: the right to a speedy and public trial, the right to notice of criminal charges, the right to confrontation, and the right to assistance of counsel. And the Eighth Amendment regulates the government's legislative judgments by putting a cap on punishment and prohibiting cruel and unusual punishments and excessive fines.

It is hard to imagine a constitution more concerned with state overreach in criminal matters. We see constitutional regulation of all aspects of the government's criminal power, from investigation

²⁴ See Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 55 (2003) ("Only by interposing the people directly between the state and the individual charged with a crime could the people guarantee that the new government would not mimic the tyranny of its predecessor."). Sources contemporary to ratification called the jury the "Voice of the People" and the "democratic branch of the judiciary power." *Id.* at 56 (quoting both Federalist and Anti-Federalist sources arguing for the jury's necessity).

to prosecution, from adjudication to the legislation defining punishment. So it is plainly not the case that the Constitution fails to protect against government excess in criminal matters.

What I want to persuade you of today is that it is not a failure of the Constitution but of its guardians: the Supreme Court justices. The Court has failed to protect against government excess in criminal matters through a host of decisions that do not bear scrutiny if one cares about the Constitution's text, original meaning, or good government design. These decisions only make sense if the animating principle is an almost pathological deference to the government.

III. The Court's Role in the Rise of Mass Incarceration

I won't go through all the examples of the Court failing to adhere to constitutional protections against government overreach in criminal matters, but I do want to highlight some of the key areas of doctrine that have a direct relationship to the rise of mass incarceration. Keep in mind that two key factors drive incarceration rates: (1) admissions into jails and prisons and (2) the length of sentences. Obviously, the more people who are charged and convicted, the more admissions. And the longer the sentence, the longer people will wait to be released, which also means more people incarcerated on any given day. The Supreme Court has been a critical player in opening the floodgates on admissions and permitting lengthy sentences.

A. Opening the Floodgates of Admissions

Let's start with the Court's role in fostering more people going into prisons and jails. The Court has done two things to accelerate admissions. It has condoned coercive plea bargaining and permitted widespread pretrial detention.

1. Plea Bargaining

The meteoric rise in incarceration in America begins in the early 1970s.²⁵ That coincides with the Supreme Court's giving its official imprimatur to coercive bargaining tactics by prosecutors that allow them to threaten defendants with punishments orders of magnitude greater if they exercise their jury trial rights. Colloquially known

²⁵ See Aiken & Wagner, *supra* note 1.

as plea bargaining, it is anything but a bargain for defendants or, frankly, for society overall. I cannot prove causation nor am I suggesting plea bargaining is the only cause of mass incarceration, but it is an absolutely critical condition for it. You cannot get mass incarceration without mass case processing, and the only way you can get mass case processing is to do away with jury trials.

Why would a defendant give up the benefit of having a jury of peers make sure the government can prove its case? Why give up the gold standard of the Constitution that the Framers took pains to include? Defendants are not giving trials up willingly. They are coerced. Prosecutors threaten them with longer punishments if they go to trial. And as more and more laws include mandatory minimums, prosecutors fully control the sentencing outcome with the charge. If a defendant is convicted, that minimum will kick in no matter what the judge thinks.

Instead of condemning this coercive regime as placing an unconstitutional condition on the right to a jury trial, in 1971, the Supreme Court gave not only official recognition, but praise to plea bargaining in *Santobello v. New York*.²⁶ The Court said: “If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.”²⁷

I guess they should get points for candor. They all but admit that they do not want life to become too difficult for judges. More than 200 years ago, William Blackstone warned us about this very thing. He told us that we must protect the criminal jury not from “open attacks” but from “secret machinations” that on their face seem convenient and benign.²⁸ He reminded us that the delays and “inconveniences” of the criminal jury were a fair price for free nations to “pay for their liberty,” and that inroads on the jury are fundamentally opposite to the spirit of the constitution.²⁹ The Framers fully agreed with Blackstone’s view of the criminal jury. That is why it was embedded in Article III and again in the Bill of Rights. But the

²⁶ 404 U.S. 257 (1971).

²⁷ *Id.* at 260.

²⁸ 4 William Blackstone, Commentaries *350.

²⁹ *Id.*

Supreme Court focused on its “inconveniences” and not remotely on the reason it is so important.

Maybe you could forgive the Court in *Santobello* for not raising the alarm about plea negotiations because the Court was not yet aware of how coercive they were. *Santobello* involved a situation in which the defendant took the prosecutor’s offer and then the prosecutor failed to keep a promise about a sentencing recommendation, so it did not really queue up the fundamental problem of a prosecutor’s threat.

But *Bordenkircher v. Hayes* did.³⁰ Hayes was charged with forging a check for \$88.30, a charge that carried a punishment of two to 10 years. During plea negotiations, the prosecutor offered to recommend a sentence of five years to the judge if Hayes pleaded guilty. If Hayes instead opted to exercise his constitutional jury right, the prosecutor threatened to amend the charges to include a violation of the Kentucky Habitual Criminal Act, which would have subjected Hayes to a mandatory sentence of life imprisonment because Hayes had two prior felony convictions. Hayes would have had to risk a mandatory life sentence to exercise his jury trial right—in a case where the prosecutor admitted a sentence of five years was actually the appropriate one. So the life sentence was for the audacity of the defendant exercising his constitutional right. Can you imagine anything more coercive than this?

Shockingly, in a 5-4 decision, the Court refused to say this violated the Constitution. The Court claimed that “defendants advised by competent counsel” are “presumptively capable of intelligent choice in response to prosecutorial persuasion and unlikely to be driven to false self-condemnation.”³¹

Let’s unpack that. First, can “competent counsel” do anything to help with the coercion? Al Alschuler has colorfully pointed out that “the presence of counsel has little relevance to the question of voluntariness. A guilty plea entered at gunpoint is no less involuntary because an attorney is present to explain how the gun works.”³² Second, how could the Court characterize this dynamic as one of

³⁰ 434 U.S. 357 (1978).

³¹ *Id.* at 363.

³² Albert Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. Colo. L. Rev. 1, 55 (1975).

“prosecutorial persuasion”? The threat was of a mandatory life sentence. True enough, that is persuasive, but it is persuasive in the same way a robber is persuasive in getting cash after telling someone “your money or your life.” Finally, the Court, without any evidence, thought this regime would not lead to “false self-condemnation.” It is hard to know what to make of that statement. Pure naiveté or duplicity? Either way, it is demonstrably false. If we look at exonerations with DNA evidence—themselves only the tip of the iceberg of wrongful convictions because so many cannot be disproven with DNA—we know 15 percent were the result of guilty pleas.³³ These were all innocent people who pleaded guilty because the prosecutor was threatening too much additional punishment if defendants exercised their jury right.

We have an entire doctrine of unconstitutional conditions that says the government cannot force people into giving up their rights by coercively withholding benefits from those who exercise them.³⁴ So you would think the Court would have said that *Bordenkircher* was a textbook example of that. Except it didn’t. It instead said this is just the give and take of plea bargaining.

Since *Santobello* and *Bordenkircher* were decided in the 1970s, guilty plea rates have skyrocketed. For example, 82 percent of federal convictions in 1979 were the product of guilty pleas—now that figure is 98 percent.³⁵ State court data are tougher to come by, but what we

³³ Nat’l Registry of Exonerations, *Innocents Who Plead Guilty 1* (2015), <https://bit.ly/3NLijEX>.

³⁴ See *Frost & Frost Trucking Co. v. R.R. Comm’n*, 271 U.S. 583, 594 (1926) (“If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.”). See also *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013) (“[R]egardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution’s enumerated rights by coercively withholding benefits from those who exercise them.”).

³⁵ Compare U.S. Dep’t of Just., Bureau of Just. Stat., *Sourcebook of Criminal Justice Statistics—1980* 428 tbl.5.22 (1981) (27,295 out of 32,913 convictions were by plea bargain) with Ram Subramanian, et. al, *In the Shadows: A Review of the Evidence on Plea Bargaining*, Vera Inst. of Justice (Sept. 2020) (“Only 2 percent of federal criminal cases—and a similar number of state cases—are brought to trial.”).

have show the same pattern.³⁶ And the difference between sentences after a plea and sentences after a trial is stark. Defendants face sentences three times greater in federal cases if they go to trial.³⁷ We have similar numbers at the state level.³⁸ How can prosecutors credibly threaten sentences that are three times longer if a person just wants their right to a jury trial? How can that be anything other than an unconstitutional trial penalty?

Because of the trial penalty, we're losing jury trials and all the protection they bring against government overreach. First, as Judge Learned Hand observed, juries are outside the government, so they are not allied with the government in the same way as judges and prosecutors.³⁹ The Framers worried that judges were "always ready to protect the officers of government against the weak and helpless citizen."⁴⁰ Sadly, the judiciary's track record in criminal cases bears this out. Judges all too often side with the government of which they are a part. Juries by design provide protection that is not affiliated with the government.

Juries act as a check against government excess in a second respect. Because the Double Jeopardy Clause shields a jury's general verdict of acquittal from any review, the jury has the power to prevent punishment either because it thinks the facts do not merit it or because it disagrees that the law should apply in a particular case.⁴¹ This is an important part of the history of the jury in America.

³⁶ See Sean Rosenmerkel, Matthew Durose & Donald Farole, Jr., U.S. Dep't of Just., Bureau of Just. Stat., Pub. No. NCJ 226846, *Felony Sentences in State Courts, 2006—Statistical Tables* (2009), <https://bit.ly/3OKo9b5> ("Most (94%) felony offenders sentenced in 2006 pleaded guilty.").

³⁷ See Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. Mich. J.L. Reform 345, 347–48 (2005) (noting that under the then-current sentencing guidelines, defendants who pled guilty "can be assured, on average, a sentence that is 300 percent lower than similarly situated defendants" who went to trial).

³⁸ See Rachel Elise Barkow, *Prisoners of Politics: Breaking the Cycle of Mass Incarceration 200* (2019).

³⁹ See *United States ex rel. McCann v. Adams*, 126 F.2d 774, 775–76 (2d Cir. 1942).

⁴⁰ *Essay of a Democratic Federalist*, Pa. Herald, Oct. 17, 1787, reprinted in 3 *The Complete Anti-Federalist* 58, 61 (Herbert J. Storing ed., 1981).

⁴¹ See Barkow, *supra* note 24, at 38–49 (noting that the Double Jeopardy Clause means that the jury has "necessarily been given the power to decide the law as well as the facts in criminal cases").

The colonists were well aware of this power because colonial juries acquitted even in the face of applicable law to resist overreach by the Crown. Criminal grand juries refused to indict persons accused either of political offenses such as rioting or of violating imperial statutes such as the revenue laws.⁴² John Adams praised the fact that “No Man can be condemned of Life, or Limb, or Property or Reputation, without the Concurrence of the Voice of the People.”⁴³ Crown attempts to interfere with the jury right were among the events leading to the American Revolution. Although we all learn about colonist opposition to the Stamp Act as an instance of taxation without representation, colonists were also outraged that violators of the act were to be tried in admiralty courts in London, thereby depriving them of a local jury.⁴⁴ In 1775, the Second Continental Congress listed England’s interference with the right to trial by jury among its grievances in the Declaration of the Causes and Necessity of Taking Up Arms.⁴⁵ The Declaration of Independence likewise listed deprivation of the jury among its grievances.⁴⁶

As my colleague and noted historian Bill Nelson has observed, “[f]or Americans after the Revolution, as well as before, the right to trial by jury was probably the most valued of all civil rights.”⁴⁷ Each state guaranteed the right to trial by jury in a criminal case, as had the Articles of Confederation.⁴⁸ So when the Framers wrote the Constitution, this was so fundamental as to require no debate. It was the rare area where Federalists and Anti-Federalists agreed. Alexander Hamilton noted in Federalist No. 83 that “[t]he friends and adversaries of the plan of the convention, if they agree in nothing else, concur

⁴² See Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 *Wis. L. Rev.* 377, 382 (describing grand juries’ refusal to convict in *Bushell’s Case* and *Seven Bishops’ Case* in the 17th and 18th centuries as landmarks for the independence of juries under English rule).

⁴³ John Adams, *Diary Notes on the Right of Juries* (Feb. 12, 1771), in 1 *Legal Papers of John Adams* 228, 229 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

⁴⁴ See Andrew Joseph Gildea, *The Right to Trial by Jury*, 26 *Am. Crim. L. Rev.* 1507, 1508 n.17 (1989).

⁴⁵ Harrington, *supra* note 42, at 395.

⁴⁶ The Declaration of Independence para. 20 (U.S. 1776).

⁴⁷ William E. Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760–1830*, 96 (1994).

⁴⁸ *Id.*; Harrington, *supra* note 42, at 396.

at least in the value they set upon the trial by jury.⁴⁹ As he put it, the distinction is, at most, between the Federalist view that it is “a valuable safeguard to liberty” and the Anti-Federalist view that it is “the very palladium of free government.”⁵⁰ As a result, guaranteeing a jury in criminal cases drew no objection at the Federal Convention or in the state ratification debates.⁵¹ The Maryland Farmer, an Anti-Federalist, described the jury as “*the democratic branch of the judiciary power*—more necessary than representatives in the legislature.”⁵² Thomas Jefferson felt the jury was so critical that he claimed, “[w]ere I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative.”

The jury is no constitutional sideshow but one of the key checks on governmental excess. At least that was how it was supposed to work, until the Supreme Court allowed it to be relegated to almost a non-entity. To be sure, even without its approval of plea bargaining, the death knell of juries, the Court significantly undercut the jury’s checking role by limiting what the jury is told about the punishment consequences in a given case.⁵³ This is another mistaken line of Supreme Court authority. Think of the insanity in having a regime in which citizens are supposed to know punishment consequences because that is supposed to incentivize us to obey the law, but, when citizens become jurors, they are not supposed to know those same punishments and cannot be told what the consequences of a guilty verdict are.

Even without that information in a trial, jurors often have an idea what a punishment will be, and when they think it is too much, they acquit. We have seen that in many communities in the few jury trials that remain. When a large proportion of the community knows the going rate for crimes, and when they think that is too high in a particular case, they acquit. In communities like D.C., Detroit, and the Bronx, acquittal rates are higher. Prosecutors have lamented this as nullification, but it is precisely the role the

⁴⁹ Federalist No. 83, at 421 (Alexander Hamilton) (Ian Shapiro ed., 2009).

⁵⁰ *Id.*

⁵¹ Gildea, *supra* note 44.

⁵² Essays by a Farmer (IV), Md. Gazette, Mar. 21, 1788, reprinted in 5 The Complete Anti-Federalist 36, 38 (Herbert J. Storing ed., 1981) (emphasis added).

⁵³ See *Shannon v. United States*, 512 U.S. 573, 579 (1994) (“[J]urors are not to be informed of the consequences of their verdicts.”).

jury was designed to play.⁵⁴ Jurors may be voting as they are in those communities because of greater skepticism of police, closer scrutiny of the government's case, or their increased awareness of the punishments at stake. Coercive plea negotiation tactics allow prosecutors to eviscerate this fundamental jury check because defendants cannot take the risk when so much more punishment is at stake.

Juries act as a check on the government in a third way: a jury trial takes time. That is the reason the Court gave for protecting plea negotiations. But the inefficiency of jury trials is actually one of its virtues. The government has to *earn* that conviction, to invest resources, to prove each element beyond a reasonable doubt. That means the government has to think about which cases are worth it and be sure it has what it takes to win given all the effort that will be expended.

But in a world of mass convictions and pleas, prosecutors do not need to give much thought to cases at all. And, sadly, they don't. They just churn them through—all too often impersonally and without much care. The Framers knew they were setting up an architecture that was not an efficient one conducive to mass processing. That was the point: it is supposed to be hard for the government to put people into cages and stigmatize them with the label of criminal. But all it took was five justices to decide that governmental efficiency was more important than the Constitution's commitment to the jury.

Even worse, when the Supreme Court allowed this protection to be dismantled, it did not insist on anything else in its place. There is effectively no oversight to this regime of prosecutorial pressure. Judges accept pleas reflexively with little thought. George Fisher has documented that judges go along to ease the burden of their dockets—the same reason the Supreme Court allowed the entire enterprise to move forward.⁵⁵ They are focused on their own professional self-interest.

⁵⁴ See Paul Butler, *Race-Based Jury Nullification: Case-in-Chief*, 30 *John Marshall L. Rev.* 911, 916–17 (1997); Carissa Byrne Hessick, *Punishment without Trial* 180–81 (2021).

⁵⁵ George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* (2004).

Defendants do not get oversight within prosecutors' offices, either.⁵⁶ They have no right to an internal appeal up the chain of command even if they are dealing with a prosecutor who is making outrageous demands. The prosecutor is not obligated to allow defendants to present evidence in their defense.

While the formal trial process is heavily regulated by constitutional provisions, the plea-bargaining process—the real site of decisionmaking for all but a small percentage of cases—is left entirely to the prosecutor's discretion. During plea negotiations, prosecutors can engage in *ex parte* contacts with the police or other investigators and witnesses, and they do not need to share with the defendant information on which they are relying—even information that is exculpatory.⁵⁷ Prosecutors never need to explain why they offered a particular sentence to one defendant but refused to do so for another similarly situated defendant. Transparency is woefully lacking in prosecutors' offices, so most defendants usually do not even know what other similarly situated defendants have been offered or if prosecutors are diverging from office policies.⁵⁸

I teach administrative law as well as criminal law, and one of the driving forces of my scholarly inquiries has been understanding how we can possibly live in a legal world where there are far more checks on agencies that regulate industries than on the agencies (prosecutor's offices) that take away liberty.

This world can only exist if you have a Supreme Court that turns a blind eye to the reality of the coercion and deprivation of the jury right. And make no mistake, other institutional actors have adjusted to this new unconstitutional normal. Congress and state legislatures now promulgate criminal statutes for a world in which plea bargaining is the overwhelming default mode of operation.⁵⁹ Prosecutors ask

⁵⁶ See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *Fordham L. Rev.* 2117, 2124 (1998) ("Because our governing ideology does not admit that prosecutors adjudicate guilt and set punishments, the procedures by which they do so are neither formally regulated nor invariably followed.").

⁵⁷ *Id.* at 2128–29.

⁵⁸ *Id.* at 2132.

⁵⁹ Rachel E. Barkow, *Administering Crime*, 52 *UCLA L. Rev.* 715, 728 n.25 (2005) (citing examples of Department of Justice requests for more stringent sentences because it would make defendants more likely to cooperate with prosecutors); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *Mich. L. Rev.* 505, 529–31 (2001).

for and receive from legislators laws with high mandatory minimums to give prosecutors the leverage they need to induce guilty pleas.

They are blatant about it, too. They say on the record they need these laws to get pleas and cooperation.⁶⁰ For example, when Congress was considering reducing mandatory minimums for certain drug offenders with no history of violence, the National Association of Assistant U.S. Attorneys—a group representing federal prosecutors—opposed the reduction because the change would make their job harder. It would “prevent[] the government from obtaining benefits gained through concessions during bargaining.”⁶¹ They are not saying they need these laws because they believe those penalties should be the actual punishments imposed. They want coercive leverage and do not even see anything wrong in asking for it explicitly. And why should they, given the Court’s imprimatur?

2. Pretrial Detention

Coercive plea negotiations are one key way in which the Court paved the way for more jail and prison admissions: it made the job of convicting exponentially easier for prosecutors. But that is not the only way the Court facilitated more admissions. We have about half a million people in America locked in cages without having been convicted of anything and without having pleaded guilty.⁶²

That is a direct result of six members of the Supreme Court giving their blessing to pretrial detention on the basis of future dangerousness in *United States v. Salerno*.⁶³ The Court decided that caging someone under the Bail Reform Act—in the exact same facility where people serve sentences after convictions—is constitutional even before conviction because the detention pretrial is regulatory in nature and not, in the Court’s view, punitive.⁶⁴ *Salerno* was decided in the

⁶⁰ See, e.g., Drug Mandatory Minimums: Are They Working?: Hearing before the Subcomm. on Criminal Justice, Drug Policy, and Human Resources of the House Comm. on Government Reform, 106th Cong. 144–53 (2000) (statement of John Roth, Chief, Narcotic and Dangerous Drug Section, Criminal Division, Dep’t of Justice) (arguing in favor of mandatory minimum drug laws because they “provide an indispensable tool for prosecutors” by creating an incentive for defendants to cooperate).

⁶¹ Letter from Dennis Boyd, Exec. Dir., Nat’l Ass’n of Assistant U.S. Attorneys, to Patti B. Saris, Chair, U.S. Sentencing Comm’n (July 2, 2014), <https://bit.ly/3ussBD4>.

⁶² Minton et al., *supra* note 6, at 2 (noting a jail population of 734,500 in 2019).

⁶³ 481 U.S. 739 (1987).

⁶⁴ *Id.* at 746.

middle of the 1980s and the peak frenzy of the War on Drugs and concern with rising crime. The Court bought into the idea of broad pretrial detention because it said the government's interest in preventing crime outweighed the individual's liberty interests.⁶⁵

I have to pause for a moment here to make sure you know that the entire regime of pretrial detention is actually terrible if your goal is preventing crime. We have empirical studies documenting that people detained pretrial are more likely to commit crimes when released than those who are released pretrial—even after controlling for the crimes they have committed, their criminal history, and whatever else you can think to control for.⁶⁶ It is the detention itself that increases the risk of crime. And that makes sense when you stop to think about it, because when people are detained, they lose their jobs; they lose their housing because they get evicted for failing to pay rent; they lose custody of their kids. Their lives are in shambles, so it is that much harder to stay on a law-abiding path on release. So as a public-policy matter, pretrial detention is just awful.

Even more egregious is that the Court would think liberty could be stripped away just because the government thought it was a good idea. I cannot do any better than Justice Thurgood Marshall in describing what is wrong here:

Throughout the world today there are men, women, and children interned indefinitely, awaiting trials which may never come or which may be a mockery of the word, because their governments believe them to be "dangerous." Our Constitution, whose construction began two centuries ago, can shelter us forever from the evils of such unchecked power. Over 200 years it has slowly, through our efforts, grown more durable, more expansive, and more just. But it cannot protect us if we lack the courage, and the self-restraint, to protect ourselves. Today a majority of the Court applies itself to an ominous exercise in demolition. Theirs is truly a decision which will go forth without authority, and come back without respect.⁶⁷

⁶⁵ *Id.* at 748 (offering a comparison to detention during times of war or insurrection).

⁶⁶ See, e.g., Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 *Stan. L. Rev.* 711 (2017) (finding a likely causal relationship between pretrial detention and future criminal activity, even after controlling for initial bail amount, offense, demographic information, and criminal history characteristics).

⁶⁷ Salerno, 481 U.S. at 767 (Marshall, J., dissenting).

Amen to that, Justice Marshall. Truly one of the worst decisions issued by the Court.

The result: over half a million people detained pretrial—35 percent of our incarcerated population—who pose no risk at all.⁶⁸ They languish in jails because the Supreme Court failed to protect their liberty interests.

And the threat of the detention becomes a bargaining chip that prosecutors use to extract pleas, particularly in misdemeanor cases. Prosecutors get defendants detained pretrial and then say in plea negotiations that they can get sentenced to time served if they plead guilty. Are you surprised that we have an enormous number of people pleading guilty even if innocent, just to get out jail?⁶⁹

Coercive plea bargaining and pretrial detention should not be permitted under our Constitution, but the Court has said otherwise. And admissions have skyrocketed as a result.

B. Keeping the Floodgates Closed with Longer Sentences

The Court also plays a vital role in the second driver of incarceration rates: length of sentences. The Court has utterly failed to police sentence length, again in complete derogation of its duty under the Constitution, which has an entire amendment devoted to cruel and unusual punishments. A majority of justices have agreed that the Eighth Amendment prohibits excessively long sentences.⁷⁰ Frighteningly and in contradiction of the language and history of the Eighth Amendment, we have had at least four justices—William Rehnquist, Antonin Scalia, Clarence Thomas, and Samuel Alito—who think no sentence of incarceration can be disproportionate.⁷¹ But the other justices have at least all agreed that a particular sentence could be so long as to be cruel and unusual.

⁶⁸ See Minton et al., *supra* note 6, at 5 tbl.1.

⁶⁹ See generally Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. Rev. Books, Nov. 20, 2014.

⁷⁰ See *Ewing v. California*, 538 U.S. 11, 20 (2003) (O'Connor, J., joined by Rehnquist, C.J., Kennedy, J.) (noting the narrow proportionality analysis against grossly disproportionate sentences, but finding that "recidivist statutes" serve a "legitimate goal of deterring offenders" and survive such scrutiny).

⁷¹ See *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991) (Scalia, J., joined by Rehnquist, C.J.) (arguing that proportionality review applies only in capital cases); *Graham v. Florida*, 560 U.S. 48, 99 (2010) (Thomas, J., dissenting, joined by Scalia, Alito, JJ.) (arguing that proscribing "grossly disproportionate" sentences is an interpretation of the Eighth Amendment that's "entirely the Court's creation").

The test the Court now uses to determine if a sentence meets that standard, however, is effectively impossible to satisfy—and in fact, no sentence has been invalidated on that test. The Court uses a test from a concurring opinion of Justice Anthony Kennedy in *Harmelin v. Michigan* that recognizes only a “narrow” proportionality principle in noncapital cases.⁷² Under that test, an individual challenging a particular sentence on Eighth Amendment grounds has to make a threshold showing that the sentence is grossly disproportionate to the crime, which in the Court’s view means that the defendant has to show that the state has no “reasonable basis for believing” that the sentence will serve any penological goal.⁷³ But the state’s penological goals can be deterrence, retribution, rehabilitation, or—and this one is usually the kicker for dooming any successful claim under this test—incapacitation.

So if the state says it needs to detain someone for stealing a slice of pizza for 25 years to life to incapacitate that person from stealing more pizza because he has a prior record of other thefts, the Court will say okay. (That’s a real case, by the way, not some crazy hypothetical I’m using to make my point.⁷⁴)

Here are some other real cases in which the Supreme Court said the sentences did not violate its Eight Amendment test:

- a mandatory life sentence for a defendant who committed three separate low-level theft offenses that cumulatively totaled less than \$230;⁷⁵
- a mandatory life sentence without parole for a defendant who did not have any prior record and whose only offense was possessing 672 grams of cocaine;⁷⁶
- a sentence of 25-years-to-life for an individual whose third strike under California’s three-strikes law was the theft of three golf clubs worth roughly \$1,200, because the defendant had a record of prior offenses, including burglaries and a robbery;⁷⁷

⁷² 501 U.S. at 996 (Kennedy, J., concurring in part and in judgment).

⁷³ *Id.* at 957.

⁷⁴ Associated Press, *25 Years for a Slice of Pizza*, N.Y. Times (Mar. 5, 1995), (§ 1), at 21.

⁷⁵ *Rummel v. Estelle*, 445 U.S. 263 (1980).

⁷⁶ *Harmelin*, 501 U.S. at 961.

⁷⁷ *Ewing*, 538 U.S. at 17–18.

- a 50-years-to-life sentence for an individual whose criminal history contained no violence and whose three strikes consisted of a petty misdemeanor theft and two separate incidents where he stole a total of nine videotapes worth \$150 from K-Mart.⁷⁸

All these cases came before the Supreme Court, and the Court ruled that all of them passed constitutional muster. They were clearly not reading the same Eighth Amendment I am when they upheld these sentences. The Court has effectively taken the judiciary out of the business of checking the state when it seeks to impose outrageously long punishments.

The Court knows how to give sentences greater scrutiny for proportionality because it has done so in its capital cases.⁷⁹ Its utter failure to do the same in noncapital cases—where the Constitution is no less relevant—is one of the worst judicial abrogations of constitutional rights in the country’s history. And there is no doubt it is a key ingredient of mass incarceration because there are effectively no limits on the sentence lengths jurisdictions can pursue.

C. Other Court Decisions Driving Mass Incarceration and the Expansion of Criminal Law

The Court has played a critical role in the expansion of criminal law and punishment in America in many other ways. It has created immunity doctrines that prevent prosecutors and police officers from being accountable for gross abuses of their authority, which has allowed these actors to be overly aggressive without fear of reprisal.⁸⁰ The Court has failed to recognize any substantive limits on what can be criminalized, allowing punishment in cases of no blame, whether through strict-liability offenses or most recently by allowing a state to do away with any defense of insanity.⁸¹ Its approach to the egregious disparate impact we see all over criminal law enforcement—from police stops on the basis of race to

⁷⁸ *Lockyer v. Andrade*, 538 U.S. 63 (2003).

⁷⁹ See Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 Mich. L. Rev. 1145 (2009).

⁸⁰ See *Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutors); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (police).

⁸¹ *Kahler v. Kansas*, 240 S. Ct. 1021 (2020).

prosecutorial charging that disfavors Black people to sentencing disparities in noncapital and capital cases—runs counter to the way it views equal protection challenges in other contexts; it ignores the implicit biases and stereotypes that permeate every aspect of criminal law and effectively turns the Equal Protection Clause into a dead letter.⁸²

In the interest of time, I will not go into detail in all these areas. But they are all areas in which the Court has been divided and, but for a few votes, the world would look very different.

IV. Reforming the Court

In many of the doctrinal areas I've discussed, the outcome is particularly puzzling because they should be spaces of agreement between more liberal justices and conservative justices who are committed to originalism. Cases involving the jury right, the Eighth Amendment, and pretrial detention, for example, should come out in favor of defendants under an originalist interpretation. At the same time, these areas should appeal to more liberal justices who otherwise have shown an interest in the poor and communities of color who have borne the brunt of excessive criminalization.

So what's particularly odd at first glance is the absence of a coalition to protect these constitutional rights. But the result is only odd if you tend to think of the Court as divided along conservative and liberal lines. Focusing on that division might make you miss that the

⁸² See Radley Balko, *There's Overwhelming Evidence That the Criminal Justice System Is Racist. Here's the Proof.*, Wash. Post (June 10, 2020), <https://wapo.st/3Ax5VWa> (cataloging studies of racial profiling and disparities in police stops); Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 Mich. L. Rev. 2001, 2023–24 (1998) (arguing that *United States v. Armstrong* placed a heightened pleading standard for selective prosecution that has the effect of “immuniz[ing] from full-scale litigation, at least in the context of a criminal trial, a claim to which the government would be required to respond more fully if it involved any state function other than criminal prosecution”); *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting) (“The Court next states that its unwillingness to regard petitioner’s evidence as sufficient is based in part on the fear that recognition of *McCleskey*’s claim would open the door to widespread challenges to all aspects of criminal sentencing. Taken on its face, such a statement seems to suggest a fear of too much justice.”) (citation omitted). See also Karlan, *supra*, at 2005 (“*Armstrong* and *McCleskey* deploy what the Court calls ‘traditional equal protection principles’ essentially to strip the concept of selective prosecution of virtually any real-world effect: they define away the right and the remedy simultaneously.”).

Court is united along one very important dimension when it comes to criminal law: deference to prosecutors and police. There always seems to be an overwhelming majority on the Court for that position regardless of the justice's ideological background or theory of jurisprudence.

One reason for that bias is that the Supreme Court bench is drawn overwhelmingly from a pool of government lawyers. These are people who have spent their careers defending and representing the government—as prosecutors, at the solicitor general's office, in other positions at the Department of Justice, or in state government. Rarely have we had justices who have represented regular individuals, who have seen their stories up close and witnessed the toll of government abuse and misconduct. Rarer still are justices who have defended those accused of crimes. So they have a skewed perspective. They see themselves in these government lawyers and these government cases, and they are too quick to defer, to assume regularity, to trust the government's position.

The Framers knew better. That is why they wanted to put regular people between the government and decisions about punishment by having jury trials. But the Court has erased that boundary protection and so many others, and it has allowed the complete dominance of the government over individual liberty.

We see this reflected in the lower courts as well. They might not be shaping doctrine in the same way as the Supreme Court, but they have enormous power through their discretionary decisions. Judges decide a host of important issues that affect the criminal justice landscape, from sentences to evidentiary rulings to calling out prosecutorial misconduct. And for the most part, what you see around the country are judges exercising discretion in deference to whatever the government wants, from pretrial detention, to sentencing recommendations, to the inability to call out prosecutors and police who engage in misconduct.⁸³

There are no easy answers to any of this, but I would like to emphasize one place to start. We should diversify the professional background of those who serve as judges. Currently the bench is dominated by former prosecutors and lawyers who represented the government. No one has done better research on this than Cato.

⁸³ See Barkow, *supra* note 38, at 69–70, 155–56, 200–01.

A May 2021 report by Clark Neily looked at the background of federal judges and found that 44 percent were former government advocates compared to just over six percent who were advocates for individuals against the government.⁸⁴ That is a seven-to-one imbalance. If we look at just those with criminal law experience, the ratio of prosecutors to defense attorneys on the bench today is almost exactly four to one.⁸⁵ Andrew Crespo notes that, since the early 1970s, the Supreme Court has seen a threefold increase in the number of its justices with experience working as criminal prosecutors before their ascension to the bench.⁸⁶

But it is not just the rise of prosecutors that is disturbing. It is the lack of justices who have represented people who have been stopped, frisked, arrested, and subject to governmental coercion. Justice Thurgood Marshall brought that experience to the Court and could share with his colleagues his perspective representing indigent criminal defendants. But, as Crespo notes, until this year, “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.”⁸⁷ Instead, we have a Court whose only direct experience with criminal law enforcement is “advocating ‘with earnestness and vigor’ on behalf of the interests of law enforcement, in the always challenging struggle to contain and combat crime.”⁸⁸ It is wholly missing the perspective of those who, in Tony Amsterdam’s words, have repeatedly “seen policemen from the nightstick end.”⁸⁹

I join and applaud Cato in calling out the need to get more criminal-defense lawyers and public-interest lawyers who defend civil liberties on the bench. We cannot have a bench dominated by former government lawyers and expect the results to be any different than what we have seen.

⁸⁴ Clark Neily, *Are a Disproportionate Number of Federal Judges Former Government Advocates?*, Cato Inst. (May 27, 2021), <https://bit.ly/3Rp0B0j>.

⁸⁵ See Barkow, *supra* note 38, at 200.

⁸⁶ Andrew Manuel Crespo, *Regaining Perspective: Constitutional Criminal Adjudication in the U.S. Supreme Court*, 100 Minn. L. Rev. 885, 1992 (2016).

⁸⁷ *Id.* at 1990. This changed with the confirmation of Justice Ketanji Brown Jackson, who spent part of her career working in public defense.

⁸⁸ *Id.* at 2000 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

⁸⁹ Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 409 (1974).

In the past few months, we have seen that's just starting to change. Many of the federal vacancies filled by President Joe Biden have been with people with civil liberties and criminal defense backgrounds.⁹⁰ That push needs to continue, and it cannot just be at the federal level. State courts and state judges matter, too.

Many of you may be aware that there is a big push right now to get prosecutors elected who understand the excesses of punishment and who are committed to achieving real public safety results instead of tough-on-crime rhetoric and approaches that are not actually effective at combatting crime. Many in this new wave of prosecutors support important reforms such as alternatives to incarceration, the elimination or curtailment of cash bail, shorter sentences, and more reentry opportunities for those coming out of prisons and jails.⁹¹ Those interested in criminal law reform need to focus on the bench as another area for this kind of fundamental personnel and outlook change. That means paying attention to local judicial elections in the same way as prosecutor elections to unseat those local and state judges who have poor track records in protecting individual rights and who reflexively side with the government in criminal matters no matter what the facts or issue.

We know other interest groups pay close attention to the judiciary and make sure their issues are addressed. Labor groups know how important the D.C. Circuit is to their issues, and abortion rights groups pay attention to Supreme Court appointments.⁹² Those interested in criminal justice reform should be just as vigilant, particularly with Supreme Court nominations, but with other judicial appointments as well.

And reformers should not assume that liberal appointees will be in favor of their positions or that conservative appointees will not. These are issues that often transcend traditional left/right splits. We frequently see judges appointed by Democratic presidents

⁹⁰ See Nate Raymond, U.S. Senate Confirms Voting Rights Advocate Perez to 2nd Circuit, Reuters (Oct. 25, 2021), <https://reut.rs/3AB9ASN>; Sahil Kapur, With Public Defenders as Judges, Biden Quietly Makes History on the Courts, NBCNews (Oct. 18, 2021), <https://nbcnews.to/3IgfR8e>.

⁹¹ Angela J. Davis, Reimagining Prosecution: A Growing Progressive Movement, 3 UCLA Crim. Just. Rev. 1, 6–14 (2019).

⁹² See Barkow, *supra* note 38, at 200 (describing organized opposition to various judicial appointments).

representing a hard line on criminal justice issues. And sometimes we see Republican presidents appointing judges who, because of their originalist and textual methodologies, end up favoring certain criminal justice positions in ways that other Republican appointees, who speak in terms of strong law enforcement or have pro-government leanings in criminal cases, often do not.

It is possible in either a Republican or a Democratic administration to seek judges who are committed to protecting constitutional rights and do not reflexively side with the government. But one key to that is to make sure we are getting criminal-defense lawyers and those who have dedicated themselves to representing individuals and protecting civil liberties. We cannot just draw from a pool of former government lawyers. Forty-one percent of President Barack Obama's judges had prosecution experience, and only 14 percent had public-defense experience.⁹³ And that is from a president who claimed to be committed to criminal justice reform. (He even wrote a law review article about it.⁹⁴) I mention the Obama track record to highlight that reformers cannot be complacent and assume that even someone who claims to be interested in criminal justice reform will reflect that concern in judicial appointments. This issue did not receive attention in the Obama administration, and that was a lost opportunity.

We are seeing a different pattern now from President Biden, and it is precisely because reformers have been clamoring for just this kind of professional diversity on the bench. It is not taking place evenly across the country, though, because there is still deference to home state senators in judicial selection.⁹⁵ And not all the senators are doing a good job on this front. So if you care about these issues, I urge you to follow what your senators are doing and encourage them to put forth judicial nominations of people who have represented individual clients and protected civil liberties instead of spending their lives siding with the government.

⁹³ See Casey Tolan, *Why Public Defenders Are Less Likely to Become Judges—And Why That Matters*, *Splinter* (Mar. 18, 2016), <https://bit.ly/2XeZFLm>.

⁹⁴ Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 *Harv. L. Rev.* 811 (2017).

⁹⁵ See generally Denis Steven Rutkus, *Role of Home State Senators in the Selection of Lower Federal Court Judges*, Cong. Research. Serv., Pub. No. RL34405 (2013).

There is room for both on the bench, but given the gross imbalance we have now, it is going to take a concerted effort to bring in more criminal-defense lawyers and those with civil-liberties experience to come anywhere close to achieving balance. And I think that balance is going to be critical to turn back the tide of mass incarceration. It won't happen overnight and it won't be easy, but it is a necessary first step. The courts have been key players in creating mass incarceration, and they are going to have to be key players in taking it down.