CONSERVATIVE REFORMATION, POPULARIZATION, AND THE LESSONS OF READING CRIMINAL JUSTICE AS CONSTITUTIONAL LAW

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Legal scholars tend to segregate the Supreme Court's criminal justice cases from the rest of the Court's constitutional jurisprudence. Leading accounts of the Rehnquist Court, for instance, understandably will focus on the Court's noteworthy work in federalism, national power, race, and religion, while scarcely making even passing mention of the Court's work in criminal justice. The consequence is an incomplete picture of constitutional law that neglects the lessons that might be taken from criminal justice to illuminate our understanding of the Court and its jurisprudence.

Criminal justice is an integral component of American constitutional law that needs to be integrated into the narrative of our constitutional times. When we view criminal justice in that spirit, we discover that post–Warren Court criminal justice jurisprudence has been the conceptual, theoretical, and strategic forerunner of the Rehnquist Court's prominent and groundbreaking activity in federalism, race, religion, and the like. By including criminal justice in the picture, we can recognize with greater clarity that the nation is in a period of conservative constitutional reformation that first began some thirty-five years ago in the criminal justice area. It was there that a distinctive cultural, political, and legal dynamic took shape to support the cause of conservative constitutional law reform. And it was there that the Court developed a distinctive conservative law reform discourse to bring about change in the law. That discourse has since fanned out across the constitutional landscape, bringing about conservative reform in one area after another.

Yet even as conservative reformation proceeds in several areas today, it has ended in criminal justice. The forces that inspired the conservative reformation of criminal justice are spent; a social, cultural, and political turn has been reached. Criminal justice has entered a new period of constitutional development that is significantly more liberty affirming than stereotypes of the Rehnquist Court would lead one to expect. The Court's recent decisions indicate that we have entered a period of popularization in criminal justice, with the development of a new corresponding discourse of popularization to sustain it. What is more, there is reason to think that criminal justice may once again be in the vanguard, and that the distinctive discourse of popularization can and will spread to other areas of constitutional law.

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INTRODUCTION

Our times seem especially rich in constitutional drama, even after discounting for the appeals of recency and immediacy. The U.S. Supreme Court issues increasingly stiff challenges to race-conscious governmental efforts to empower minorities,[1] yet heartily upholds the pursuit of diversity

1. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding that racial classifications that benefit racial minorities require strict scrutiny); Shaw v. Reno, 509 U.S. 630, 657 (1993) (same); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (O'Connor, J.) (same).

in the fashion of *Regents of the University of California v. Bakke*.[2] It claims to subdue the kind of substantive due process that brought you *Roe v. Wade*,[3] yet repudiates *Bowers v. Hardwick*[4] in an opinion that warmly cites *Roe*.[5] Surprising more than a few seasoned spectators, the Court wades into the electoral controversy of 2000 and yields, if but for a day, a vigorous interpretation of the guarantee of equal protection that effectively declares George W. Bush the victor.[6] Later the Court sharply rejects Mr. Bush's assertion of virtually unreviewable authority to detain individuals in the fight against terrorism, speaking liberty to power in ways seldom heard in critical times.[7] Meanwhile, numerous decisions herald a revival of state sovereignty[8] and a corresponding imperative that the judiciary diminish

2. 438 U.S. 265 (1978); *accord* Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (upholding diversity in higher education as a compelling governmental interest sufficient to withstand strict scrutiny, affirming the position advanced by Justice Lewis F. Powell in *Bakke*, 438 U.S. at 311–12 (Powell, J., concurring)).

3. 410 U.S. 113 (1973); *accord* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (professing that judicial recognition of implied fundamental rights should be limited to those carefully described rights that are "deeply rooted" in history and tradition).

4. 478 U.S. 186 (1986).

5. Lawrence v. Texas, 539 U.S. 558, 578 (2003) (invalidating laws that criminalize private sexual conduct between consenting adults, overruling *Bowers*).

6. Bush v. Gore, 531 U.S. 98, 110 (2000) (per curiam) (holding that manual recount ordered by the Florida Supreme Court did not satisfy the Equal Protection Clause's requirement of nonarbitrary treatment of voters).

7. Rasul v. Bush, 124 S. Ct. 2686, 2698–99 (2004) (providing aliens held at Guantanamo Bay with access to the federal courts to challenge the legality of their detention); Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2648 (2004) (holding that the government must provide a U.S. citizen captured on a foreign battlefield with a meaningful opportunity to challenge his "enemy combatant" status); *see also* Rumsfeld v. Padilla, 124 S. Ct. 2711, 2735 (2004) (Stevens, J., dissenting) (arguing that the Court should address the merits of the case and that "[a]t stake . . . is nothing less than the essence of a free society," noting that "[u]nconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber," and concluding that "if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny").

8. The leading decisions to this effect revivify state sovereign immunity from suits brought by private parties. *E.g.*, Seminole Tribe v. Florida, 517 U.S. 44, 72 (1996) (holding that the original Constitution denies Congress authority to abrogate a state's sovereign immunity from suit in federal court brought by a private party seeking damages, a conclusion reinforced by the Eleventh Amendment); *see also* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760 (2002) (holding that state sovereign immunity bars a federal administrative agency from adjudicating a claim of a private party against a state or one of its entities); Alden v. Maine, 527 U.S. 706, 756–57 (1999) (finding an implied limitation in the original Constitution forbidding congressional legislation that abrogates a state's sovereign immunity from suit in its own courts brought by private parties seeking damages for violation of federal law). Also notable are the Court's decisions prohibiting federal "commandeering" of state lawmaking and executive apparatuses. Printz v. United States, 521 U.S. 898, 913–18 (1997) (barring federal legislation that commandeers state executive officials to administer federal law regulating private citizens); New York v. United States, 505 U.S. 144, 175–77 (1992) (barring federal legislation that commandeers state legislature to enact or administer federal law regulating private citizens).

deference to the U.S. Congress's judgments and curtail its legislative reach.[9] The rights of property as against the modern administrative state, while not in renaissance, gain sympathy among the Justices.[10]

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9. Symbolically, the most significant decisions to this effect have found Congress to have exceeded its power to regulate interstate commerce. *E.g.*, United States v. Lopez, 514 U.S. 549, 561 (1995) (holding that the Gun-Free School Zones Act exceeded Congress's Commerce Clause authority because possessing a gun near a school was not economic activity that substantially affected interstate commerce); *see also* United States v. Morrison, 529 U.S. 598, 617–18 (2000) (invalidating a portion of the Violence Against Women Act on similar grounds). *But see* Sabri v. United States, 124 S. Ct. 1941, 1947–49 (2004) (upholding a statute criminalizing the offering of bribes to government officials as a valid exercise of the spending power despite the absence of a connection between federal funds and each bribe, distinguishing *Lopez*); Reno v. Condon, 528 U.S. 141, 148–51 (2000) (upholding the Driver's Privacy Protection Act of 1994 as a valid exercise of Congress's Commerce Clause power).

Of greater immediate practical effect are the Court's several decisions restricting Congress's authority under section 5 of the Fourteenth Amendment, beginning with *City of Boerne v. Flores*, 521 U.S. 507 (1997), permitting Congress to enact prophylactic measures pursuant to its section 5 power only if the legislation is proportional and congruent to identified Fourteenth Amendment violations. *Accord* Bd. of Trs. v. Garrett, 531 U.S. 356, 365–74 (2001) (invalidating Congress's abrogation of state sovereign immunity from suit under provision of the Americans with Disabilities Act); *Morrison*, 529 U.S. at 619–27 (striking down civil remedy provision of the Violence Against Women Act as beyond congressional power under section 5); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82–91 (2000) (invalidating Congress's abrogation of state sovereign immunity from suit under a provision of the Age Discrimination in Employment Act); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 672–87 (1999) (holding unconstitutional Congress's abrogation of state sovereign immunity from suit under a provision of the Lanham Act); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 634–48 (1999) (invalidating abrogation of state sovereign immunity from suit under a provision of the Patent and Plant Variety Protection Remedy Clarification Act). *But see* Tennessee v. Lane, 124 S. Ct. 1978, 1994 (2004) (upholding civil remedy against the state under Title II of the Americans with Disabilities Act as a valid exercise of Congress's section 5 power, at least insofar as it applies to access to courthouses); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 740 (2003) (holding that the Family and Medical Leave Act satisfies the "proportionality and congruence" standard set forth in *Boerne*).

Any discussion of the Court's decisions restricting congressional authority should mention the seminal sovereign immunity cases. *Alden*, 527 U.S. at 733–35 (holding that Article I does not permit Congress to subject states to suits for damages in state courts); *Seminole Tribe*, 517 U.S. at 76 (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), expansively interpreting the Eleventh Amendment, and holding that Article I does not empower Congress to abrogate state sovereign immunity); *see also Fed. Mar. Comm'n*, 535 U.S. at 754–61 (holding that Congress lacks the power to make a state answer a private party claim brought before a federal administrative agency).

10. *See, e.g.*, Brown v. Legal Found. of Wash., 538 U.S. 216, 236–41 (2003) (holding that IOLTA program that requires deposit of client funds by lawyers into a separate account for a public purpose is a taking, but under the scheme in question the clients suffered no pecuniary loss and hence no compensation is due); Phillips v. Wash. Legal Found., 524 U.S. 156, 172 (1998) (holding that under state law, interest income generated by funds held in IOLTA accounts is private property of the client who owns the principal for purposes of the Takings Clause); E. Enters. v. Apfel, 524 U.S. 498, 538 (1998) (O'Connor, J.) (holding that a federal statute imposing retroactive financial obligations on employers is an unconstitutional regulatory taking); *id.* at 547–50 (Kennedy, J., concurring in the judgment and dissenting in part) (arguing that the legislation violates substantive due process); Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (holding that there must be "rough proportionality" between a condition placed on the issuance of a development permit and the legitimate public purposes justifying the condition); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992) (holding that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave

Religion's relationship with the public sphere is reordered substantially.[11]

The appraisals vary, often according to when they are rendered. In the aftermath of the 2000 Term that featured *Bush v. Gore*,[12] some warned that entrenched Justices, partisan to conservative political causes, were mounting a revolution to "redraw the constitutional map as we have known it"[13]—a good or bad thing, depending on one's point of view.[14] A year later the Court's 2001 Term was proclaimed the "triumph of William H. Rehnquist," with the Court "mov[ing] far toward accomplishing his long-term goals, lowering the barrier between church and state and elevating states' rights through expanding the concept of sovereign immunity."[15] When the 2002 Term served up *Lawrence v. Texas*[16] and *Grutter v. Bollinger*,[17] the Court's direction was judged neither revolutionary nor Rehnquistian but the product of centrist-minded jurists reflecting contemporary mainstream American opinion.[18] The passage of another twelve months and decisions such as *Hamdi v. Rumsfeld*,[19] *Rumsfeld v. Padilla*,[20] *Rasul*

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his property economically idle, he has suffered a taking"); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 838–39 (1987) (holding that public easement to cross beachfront property, imposed as condition for obtaining a construction permit, constitutes a taking).

Though falling under a different rubric, the Court's recent decisions restricting the imposition of punitive damages merit mention for their responsiveness to the complaints of business interests against hardships imposed by the law. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 428 (2003) (holding that, where plaintiff was awarded $1 million in compensatory damages, a punitive damages award of $145 million was unconstitutionally arbitrary and excessive under the Due Process Clause); BMW of N. Am. v. Gore, 517 U.S. 559, 585–86 (1996) (holding that a punitive damages award 500 times greater than the compensatory damages award is "grossly excessive" and violates the Due Process Clause).

11. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 662–63 (2002) (upholding school voucher program against an Establishment Clause challenge); Mitchell v. Helms, 530 U.S. 793, 829 (2000) (relaxing judicial scrutiny of government aid to religious schools); Agostini v. Felton, 521 U.S. 203, 222 (1997) (same); *see also* Locke v. Davey, 124 S. Ct. 1307, 1311–12 (2004) (upholding state authority to limit general scholarship program to exempt support for study of devotional theology but expressing view that the exemption is not required by the Establishment Clause).

12. 531 U.S. 98 (2000) (per curiam).

13. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1051, 1053 (2001).

14. *Compare* Steven G. Calabresi, *A Constitutional Revolution*, WALL ST. J., July 10, 1997, at A14, *cited in* Balkin & Levinson, *supra* note 13, at 1051 n.19 (defending the Rehnquist Court's jurisprudence (prior to *Bush v. Gore*) as a welcome return to first principles and the restoration of a good constitutional order), *with* Balkin & Levinson, *supra* note 13, at 1049–51 (criticizing the Court's transformative decisions as a constitutional coup spearheaded by five politicized Justices).

15. Linda Greenhouse, *Court Had Rehnquist Initials Intricately Carved on Docket*, N.Y. TIMES, July 2, 2002, at A1.

16. 539 U.S. 558 (2003).

17. 539 U.S. 306 (2003).

18. *See* Sanford Levinson, *Redefining the Center: Liberal Decisions From a Conservative Court*, VILLAGE VOICE, July 2–8, 2003, at 38.

19. 124 S. Ct. 2633 (2004).

v. Bush,[21] and *Tennessee v. Lane*[22] spurred commentary suggesting that the 2003 Term "may go down in history as the one when Chief Justice William H. Rehnquist lost his court."[23] Perhaps the twists and turns are best attributed to the power of the nation's constitutional culture to temper the Supreme Court's supremacist impulses.[24] Or perhaps it is the emergence of a new order of ideologically polarized politics that cannot renounce, and so instead chastens, the ambitions of the New Deal and the Great Society.[25] For now, let us simply note a basic point with which observers seem to agree: Whether revolutionary or evolutionary, what we are witnessing is an important and even major constitutional development.[26]

One subject, however, remains conspicuous by its absence. There is virtually no talk these days of significant, unified transformative activity in constitutional criminal justice—by which I mean not simply criminal procedure jurisprudence under the Bill of Rights, but all the doctrinal areas where the Constitution and criminal law regularly meet. (For brevity's sake I will hereafter refer to such areas as "criminal justice," dropping the implicit "constitutional.") Time was when no commentary on the zeitgeist would marginalize the Supreme Court's criminal justice docket, an area described in terms of revolution and counterrevolution for decades. Yet today criminal justice gets only passing mention, and even then mainly to strike a note of differentiation. Focusing on the Rehnquist majority's innovations in federalism, national power, religion, race, and the like, observers see interrelated

20. 124 S. Ct. 2711 (2004).

21. 124 S. Ct. 2686 (2004).

22. 124 S. Ct. 1978 (2004).

23. Linda Greenhouse, *The Year Rehnquist May Have Lost His Court*, N.Y. TIMES, July 5, 2004, at A1 (noting the Chief Justice's relative "invisibility" during the Term).

24. *See generally* Robert C. Post, *The Supreme Court 2002 Term Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003) (arguing that the Court responds to and regulates cultural change).

25. *See generally* MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER (2003) (arguing that ideological polarization prevents the Court from working radical changes in the status quo and results in a climate of chastened constitutional aspiration). For a review sharing Tushnet's perspective that claims that the Rehnquist Court is revolutionary are overwrought, but which raises the possibility that such claims may prove "prematurely prescient" in light of the events of September 11, 2001, and their aftermath, see L.A. Powe, Jr., *The Not-So-Brave New Constitutional Order*, 117 HARV. L. REV. 647, 647–49 (2003) (book review).

26. In addition to the authorities already cited in this discussion, see Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363 (2003), arguing that President Reagan, through Supreme Court appointments, helped to propel the Court's recent federalism turn; Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 570 (2003), identifying 1994 as the year when the Court began reworking its federalism jurisprudence; and Christopher H. Schroeder, *Causes of the Recent Turn in Constitutional Interpretation*, 51 DUKE L.J. 307, 351–59 (2001), arguing that a rising public distrust in the federal government fueled the Court's recent federalism shift.

movements that reveal a purposive conservative agenda at work. Meanwhile, they set criminal justice aside as a contrastingly unremarkable and presumably steady-state phenomenon that is divorced from all the rest. Occasional episodes in the field merit recognition, such as the Court's reaffirmation of *Miranda v. Arizona*,[27] its assertion of limits on legislative authority to alleviate the prosecution's burden of proof and sidestep the jury,[28] its announcement of firmer Confrontation Clause protection against out-of-court testimonial statements,[29] its curbing of a few police practices under the Fourth Amendment,[30] and its intervention in some capital punishment issues.[31] But these are treated as incidental, modest, and superficial pro-defendant digressions from the dominant theme. Criminal justice, the story goes, has been stuck in a pro-prosecution, conservative "retrenchment" that began when Chief Justice Earl Warren retired more than a generation ago.[32]

27. 384 U.S. 436 (1966); *accord* Dickerson v. United States, 530 U.S. 428, 444 (2000) (reaffirming *Miranda*).

28. The groundbreaking decision was *Apprendi v. New Jersey*, 530 U.S. 466 (2000). A major decision in its aftermath was *Ring v. Arizona*, 536 U.S. 584, 609 (2002), holding that juries must find aggravating circumstances beyond a reasonable doubt before a defendant can be sentenced to death. The more recent *Blakely v. Washington*, 124 S. Ct. 2531 (2004), had the most profound impact as it invalidated a mandatory determinate sentencing system and set the stage for *United States v. Booker*, 125 S. Ct. 738 (2005), in which the Court felt compelled to render the Federal Sentencing Guidelines merely advisory.

29. Crawford v. Washington, 124 S. Ct. 1354, 1374 (2004) (holding that the Sixth Amendment bars the use at trial of testimonial evidence unless the declarant is unavailable and the defendant had the opportunity to cross-examine).

30. *E.g.*, Kyllo v. United States, 533 U.S. 27, 40 (2001) (holding that the government's warrantless use of a device not in general public use to obtain information about the interior of a home that would not otherwise be discoverable absent physical intrusion is presumptively unreasonable); Ferguson v. City of Charleston, 532 U.S. 67, 86 (2001) (invalidating drug testing of pregnant women at the hospital where results are turned over to law enforcement if the patient declines referral for drug treatment); City of Indianapolis v. Edmond, 531 U.S. 32, 47–48 (2000) (holding that roadblocks set up to enforce drug laws are unconstitutional).

31. *E.g.*, *Ring*, 536 U.S. at 609 (holding that aggravating circumstances necessary for the imposition of the death penalty are matters subject to the right to trial by jury and the requirement of proof beyond a reasonable doubt); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (declaring execution of the mentally retarded unconstitutional); *see also* Wiggins v. Smith, 539 U.S. 510, 538 (2003) (finding ineffective assistance of counsel in capital case where defendant's attorney failed to look further than the pre-sentence report for mitigating evidence).

Equivalently noteworthy is the Court's decision in *Roper v. Simmons*, No. 03-633 (U.S. Mar. 1, 2005), handed down as this Article was going to press. In *Roper*, the Court held that the Eighth Amendment forbids the execution of a juvenile offender who was younger than eighteen at the time he committed the capital crime. *See also infra* notes 192 & 312.

32. One is hard-pressed to find discussion of the Supreme Court's criminal justice work in any of the leading recent broad-gauged scholarly appraisals of the Rehnquist Court and its constitutional jurisprudence. For instance, Mark Tushnet's persuasive assessment of our new constitutional order pays considerable attention to the Rehnquist Court's decisions in a wide range of areas. TUSHNET, *supra* note 25, at 33–93. Tushnet scarcely references criminal justice with an approximately one-page discussion of *Dickerson* and what that case suggests about the

Mired, old, and therefore uninteresting, criminal justice is distinct and apart from constitutional times that are otherwise positively interesting.

This attitude holds among constitutional law scholars and studious Court watchers even after the tragedies of September 11, 2001. A number of the Bush Administration's responses to the perils of terrorism test the balance between liberty and order, and already they have produced landmark Supreme Court decisions.[33] As those decisions bear out, the dominant American legal mindset strives to conceptualize the relevant issues as out-of-the-ordinary struggles between freedom and safety, belonging to the rubrics of war, emergency, and national security rather than everyday criminal justice.[34]

Court's posture toward stare decisis. *Id.* at 92–93. In their attack on the Rehnquist Court's majority as a group bent on constitutional revolution and illustrative of the phenomenon of "partisan entrenchment," Jack Balkin and Sanford Levinson devote two sentences and two supporting footnotes to criminal justice, setting it aside as an area mired in long-term retrenchment that should be distinguished from the more recent revolutionary activity. Balkin & Levinson, *supra* note 13, at 1056 (stating that "[c]riminal procedure has been in retrenchment from the days of the Warren Court almost continuously since the 1970s. Here, the Rehnquist Court has simply carried on the work of its predecessors, though it proved unwilling in 2000 to overrule that great bete noire of American conservatism, *Miranda v. Arizona*."). (To their credit, three years earlier both authors urged that constitutional law theorists should overcome their tendency to neglect criminal justice issues. J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1012–13 (1998)). The tendency to pass lightly over criminal justice and to focus instead on the recent decisions with self-evident currency and dramatic potential—the cases in federalism, national power, race, fundamental rights, and religion—is equally observable in other forerunning works that seek to take a broad measure of the Rehnquist Court's jurisprudence. *See, e.g.*, Merrill, *supra* note 26, at 654–55 (confining study to areas other than criminal justice); Post, *supra* note 24, at 77 (making brief mention of criminal justice decisions).

Akhil Reed Amar, on the other hand, is a constitutional theorist who has written extensively on criminal procedure, producing a book-length appeal for a return to first principles in the intratextualist vein he favors. AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES (1997). For elaboration of Amar's intratextualist approach to constitutional exegesis, see Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999), and Akhil Reed Amar, *The Supreme Court 1999 Term Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000) [hereinafter Amar, *The Document and the Doctrine*]. Amar's writings in criminal procedure, however, tend to resemble what one sees from specialists in the criminal field—which is to say they are long on prescriptive vision of what the Court *should* do and on criticism when the Court fails to do it, but uninclined to take a bottom-up approach that imagines what the Court might actually be doing and doing respectably. For criticism of Amar's work to that effect, see Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down That Wrong Road Again,"* 74 N.C. L. REV. 1559 (1996), criticizing Amar's top-down approach to criminal procedure. For discussion of the work of specialists in criminal procedure, see *infra* note 36 and accompanying text.

33. Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004); Rasul v. Bush, 124 S. Ct. 2686 (2004); Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004).

34. Both the majority opinion by Justice O'Connor and the dissenting opinion of Justice Scalia in *Hamdi* build from the premise that the detention of individuals by the executive in times of national emergency raises constitutional questions that are to be conceptualized as distinct from the problems of criminal justice and the prevailing structure of the criminal justice system.

Perhaps surprisingly, the attitude that consigns criminal justice to the constitutional periphery also pervades the work of legal scholars who pay special attention to the intersection of the Constitution and the criminal law, and who therefore might be expected to milk the most excitement from the subject. Sensing that scholarship in their specialty has been too much criminal and not enough constitutional, a number of these scholars endeavor, as the slogan goes, "to bring constitutional theory to criminal justice."[35] Much of that scholarship assumes a forward-looking reformist cast, arguing that one or another constitutional theory is the right one and that the right theory rightly applied either supports or refutes some modification of criminal justice doctrines as we know them. Other works in the vein seek to develop interpretive accounts and perspectives that resonate better with contemporary

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Hamdi, 124 S. Ct. at 2643–52 (O'Connor, J.) (viewing detention of the individual by the executive as permissible where authorized by Congress, but holding that procedural due process safeguards are required under the approach set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976)); *id.* at 2660–74 (Scalia, J., dissenting) (viewing detention of an individual by the executive as permissible in case of national emergency provided that Congress suspends the writ of habeas corpus; in absence of suspension of the writ, the individual's detention is dependent upon his or her remittal to the criminal justice system).

To be sure, the bracketing of terrorism from criminal justice is not airtight. *See, e.g.*, Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1096–1102, 1130–33 (2003) (arguing that the best model of emergency executive powers is one that operates outside the law; warning that judicial precedents that are sought to be confined to emergency settings have the tendency to radiate outwards and affect other areas of the law and other contexts). *See generally* Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004) (arguing for the adoption of a structural model of emergency powers calculated to limit longer-term effects of emergency measures that restrict liberty); Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1871 (2004) (same); Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801 (2004) (critiquing Ackerman's proposal). A number of scholars have observed, moreover, that terrorism's emergence as a serious threat to America could bring about change in the methods and perhaps the rules of criminal procedure. *See, e.g.*, William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137 (2002) [hereinafter Stuntz, *Local Policing*] (arguing that tactics from the war on terrorism will drift into domestic law enforcement and suggesting ways that this might come about); William J. Stuntz, *Terrorism, Federalism, and Police Misconduct*, 25 HARV. J.L. & PUB. POL'Y 665 (2002) (arguing that the bleed-over of terrorism tactics into domestic law enforcement coupled with the local nature of law enforcement in the United States sets the stage for an increase in police misconduct). *But see* Donald A. Dripps, *Terror and Tolerance: Criminal Justice for the New Age of Anxiety*, 1 OHIO ST. J. CRIM. L. 9, 10–11 (2003) (recognizing the concern that the war on terrorism has implications for criminal law but suggesting that the impact will be insignificant in the end).

As we shall see later in this Article, the interchanges between terrorism and everyday criminal justice can run both ways. In particular, it is possible that liberty affirming practices, habits, and expectations sharpened in criminal justice can operate to shape the jurisprudence on the war on terror in a liberty affirming way. *See infra* Part III.

35. *See, e.g.*, Erik G. Luna, *The Models of Criminal Procedure*, 2 BUFF. CRIM. L. REV. 389, 399 (1999) (referring to scholarship "of constitutional theory with particular application to criminal procedure").

constitutional thinking.[36] Yet all of this literature is related in one critical respect: It regards criminal justice as having very little of interest to say that might illuminate our understanding of constitutional law generally. For the specialists, constitutionally interesting lessons *might* be derived from criminal justice someday, but they are not discernible to date. Interesting developments *could* come to criminal justice that cast light more broadly on our constitutional times, but they have not occurred yet.

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36. The recent criminal justice scholarship that accents constitutional interpretation, theory, or practice tends to fall into three general categories. The first is work that proceeds in a broad reformist spirit—offering prescriptive frameworks and insights to reorient thinking generally in criminal procedure and thereby provide a platform for critique and reform of the law. *See, e.g.*, AMAR, *supra* note 32; Scott W. Howe, *The Troubling Influence of Equality in Constitutional Criminal Procedure: From* Brown *to* Miranda, Furman *and Beyond*, 54 VAND. L. REV. 359 (2001); Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998); Erik Luna, *Constitutional Road Maps*, 90 J. CRIM. L. & CRIMINOLOGY 1125 (2000); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001) [hereinafter Stuntz, *Pathological Politics*]; William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393 (1995); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997); George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145 (2001); Robert Weisberg, *Foreword: A New Agenda for Criminal Procedure*, 2 BUFF. CRIM. L. REV. 367 (1999).

The second category is scholarship that might be called discretely reformist, tackling particular rubrics or features of criminal justice and proposing new constitutional understandings to redirect the law in those areas. *See, e.g.*, Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509 (2004); Susan R. Klein, *Identifying and (Re)formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030 (2001); Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828 (1999); Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. REV. 1771 (2003); David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229 (2002); Susan R. Klein, *Enduring Principles and Current Crises in Constitutional Criminal Procedure*, 24 LAW & SOC. INQUIRY 533 (1999) (book review).

The third category is scholarship that presents interpretive accounts of the field or perspectives on the strengths and limits of various constitutional methods in criminal justice. Among the interpretive accounts are Luna, *supra* note 35; Stephen F. Smith, *Activism as Restraint: Lessons From Criminal Procedure*, 80 TEX. L. REV. 1057 (2002) [hereinafter Smith, *Activism as Restraint*]; Stephen F. Smith, *The Rehnquist Court and Criminal Procedure*, 73 U. COLO. L. REV. 1337 (2002) [hereinafter Smith, *Rehnquist Court*]; and Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466 (1996). *See also* Douglas E. Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289; Kent Roach, *Four Models of the Criminal Process*, 89 J. CRIM. L & CRIMINOLOGY 671 (1999). The scholarship offering perspectives on method includes Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN'S L. REV. 1149 (1998), and Donald A. Dripps, *Constitutional Theory for Criminal Procedure:* Dickerson, Miranda, *and the Continuing Quest for Broad-But-Shallow*, 43 WM. & MARY L. REV. 1 (2001).

The foregoing authorities certainly do not represent an exhaustive list. The three categories suggested, moreover, leave out a substantial body of scholarship on constitutional history and its bearing on contemporary criminal justice issues, as well as many influential works that offer analysis, synthesis, and criticism relating to the doctrines of criminal justice.

This relegation of criminal justice to a nondescript space outside our constitutional times is unfortunate. It neglects a richer account of the unity of criminal justice and constitutional law—one that recognizes criminal justice's pivotal role as not only the precursor of what we now witness across constitutional law, but also as the harbinger of what the future may bring. Criminal justice represents a healthy slice of the Court's constitutional docket. Historically a primary forum for working out the evolving relationship between liberty and order, it has hosted some of the greatest clashes over constitutional ideology and methodology. One of constitutional law's most accessible dimensions, it is sensitive to even subtle shifts in politics and culture. Criminal justice is practiced and made *as* constitutional law by judges and lawyers in an integrated environment that draws few self-conscious distinctions between the two. How plausible is it, then, that criminal justice ever would have so little to say about the constitutional whole of which it is a substantial part, or that it would remain static for very long?

What comes into view if we read criminal justice as an integral component of contemporary constitutional jurisprudence? We will recognize that the story of our constitutional times is one of *conservative reformation*, with criminal justice occupying a central role that is essential to a full understanding of that story. In Part I, we shall see that criminal justice was the theoretical, conceptual, and strategic forerunner of all the celebrated transformative activity currently occurring in federalism, national power, race, fundamental rights, and religion. These areas are companion instances of a broad conservative reformation of constitutional law that first began in criminal justice some thirty-five years ago. It was in criminal justice that a distinctive late twentieth-century dynamic of constitutional development first emerged, driven by the ascension of conservative cultural and political forces intent on change. And it was in criminal justice that the Supreme Court devised a distinctive discourse that could reflect this dynamic and convert those conservative cultural and political forces into a disciplined, effective program of law reform. That discourse, which we will examine in some detail, is criminal justice's enormous yet unappreciated contribution to contemporary constitutional law—the *discourse of conservative law reform*. Highly successful in its place of origin, that discourse has spread across constitutional law and set the dominant tone of our times.

Reading criminal justice as constitutional law provides additional lessons that illuminate our times. As Part II demonstrates, criminal justice in the Supreme Court has taken a pronounced turn since the year 2000. In case after case, the Court has made it increasingly clear that criminal justice is no

longer a project in conservative law reform. The forces that called for reform in the name of law and order have been satisfied; now they have yielded the cultural and political space they once monopolized. In the altered environment left by their departure, new forces from the left, the right, and the center are challenging weaknesses in the criminal justice system and pressing the case for a greater appreciation of liberty. If criminal justice is the ongoing elaboration of ordered liberty, these new forces rise to criticize the law for its emphasis on order at liberty's expense and to move for correction.

Criminal justice, then, has made its post-reformation turn. The discourse of conservative law reform is leaving the domain where it got its start. In its place is emerging a new discourse that is distinctive in its own right, a discourse of *popularization*. Calculated to respond to the cultural shift, it is far more liberty affirming in posture, structure, content, and tone than its predecessor. The new discourse is more inclusive, less doctrinaire, and more amenable to deploying the Court's power pragmatically in service of liberty.

The discourse of popularization has produced significant new holdings and opinions that are changing the shape of criminal justice jurisprudence and redirecting its course. It is augmenting liberty in ways that defy the expectations ingrained by years of conservative reformation. And ultimately, there are reasons to think that it could be criminal justice's next significant contribution to constitutional law.

I. CRIMINAL JUSTICE AND THE ERA OF CONSERVATIVE CONSTITUTIONAL LAW REFORM

To locate criminal justice's place in contemporary constitutional law, we begin with the last three decades of the twentieth century. The story of what happened to criminal justice during those years will be familiar to many readers, although the points I emphasize and the lessons they teach about our times likely are not.

A. The Rehnquist Conservative Reformation of Criminal Justice

What happened was the Rehnquist conservative reformation of criminal justice. I choose the word "reformation," the adjective "conservative," and the ascription to William H. Rehnquist advisedly. Some would say that the Supreme Court's efforts in criminal justice since then Associate Justice

Rehnquist joined the Court early in 1972[37] deserve to be called a "revolution" (or, to similar effect, a "counterrevolution" in response to the Warren Court's "revolution").[38] Going that far is not indefensible, but it requires taking a position on theoretical and factual questions that simply will not produce widely satisfactory answers. The questions themselves (what conditions are necessary and sufficient for constitutional development to be labeled a "revolution," and are those conditions present here?) are tough and by nature contestable; their answers inevitably fuel ongoing polemics about the law and its future, making differences of opinion certain.[39] We do better working from premises that do not provoke insoluble quarrels, particularly when they lead to reasonably acceptable terms that actually promote our understanding. Three such premises can be stated:

> *First*, that the liberal criminal justice initiatives of the Warren Court, along with similarly liberal ventures of the early Burger Court, elicited strong criticisms in conservative political, cultural, and legal circles that shape and lead opinion;
>
> *Second*, that the substance of those criticisms found its way into Supreme Court case law, not entirely, and certainly not without compromise and accommodation, but substantially so nonetheless; and
>
> *Third*, that the process of translating political and cultural criticism into the law of the land was sustained over many years, producing consistent and pervasive changes throughout criminal justice jurisprudence.

In sum and substance, then, it was a program in law reform that succeeded—which is literally to say that it worked a "reformation." Its objective was to recast criminal justice in terms reflective of the conservative criticism that mounted against the liberal doings of the 1960s and early 1970s—making the reformation "conservative." Many contributed to the reformation's accomplishment, but no

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37. *See* SUPREME COURT OF THE UNITED STATES, THE JUSTICES OF THE SUPREME COURT 1 (2005), *at* http://www.supremecourtus.gov/about/biographiescurrent.pdf.

38. *See, e.g.*, Smith, *Activism as Restraint*, *supra* note 36 (arguing that the Rehnquist Court is engaging in a counterrevolution in criminal procedure that is a justified form of "reactivism" in response to the Warren Court revolution). *But see* Susan R. Klein & Jordan M. Steiker, *The Search for Equality in Criminal Sentencing*, 2002 SUP. CT. REV. 223, 269 (maintaining that "[n]ot since the Warren Court era has the Court embarked on a significant revolution in constitutional criminal procedure"); Steiker, *supra* note 36, at 2470 (arguing that the Court's decision-rules cases have diverged far more from Warren Court precedents than have conduct-rules cases).

39. The announcement that a constitutional revolution is occurring or has occurred often serves as a rhetorical prelude to harsh criticism of the ostensibly revolutionary developments and a call to arms in resistance, *see, e.g.*, Balkin & Levinson, *supra* note 13, at 1049–51, or to celebratory praise and good wishes for the revolution's long life and continued success, *see, e.g.*, Smith, *Activism as Restraint*, *supra* note 36, at 1065–69.

one doubts the identity of the person on the Supreme Court who was most influential throughout. As voice of critique, promoter of basic vision, source of energy, and maker of doctrine to reformist ends, Associate and thereafter Chief Justice Rehnquist[40] has had no equal. This makes it only right to post the conservative reformation of criminal justice to the list of Rehnquist achievements.

This nomenclature of reformation, I indicated, can serve to advance our understanding. It gets the mind to focus directly on the important connections between criminal justice and the rest of constitutional law that tend to go unnoticed in contemporary thinking. Heady recent developments in federalism and other areas are reformational in just the same way that criminal justice developments were during the last three decades of the twentieth century—in just the same way because they came about for the same reasons, by the same means, and to like effect. When these connections are spotlighted, criminal justice no longer appears as a detached outlier. It stands instead as the harbinger of what was to come in constitutional law more generally, the initiating chapter of a broader conservative reformation that, with time, has now reached a number of areas of constitutional law. Indeed, it was in criminal justice, starting some thirty-five years ago, that a distinctive brand of late twentieth-century conservative law reform discourse crystallized. That discourse channeled prominent conservative sentiments from American politics and culture into the language of constitutional interpretation, employing identifiable elements of style to transform those sentiments into the forms of law. Achieving virtually complete success in the criminal justice area by the 1990s, this conservative reformation discourse now is operating to transform other areas of constitutional law where it arrived somewhat later. As went criminal justice, so—with time—go federalism, national power, and the like.

The discourse that came of age in the Rehnquist reformation of criminal justice will be a focal point as we proceed. By tracing its migration from criminal justice to other fields, we see important unities and continuities that leave us with a picture of an integrated constitutional law stronger than the sum of its parts. The remainder of this subpart will occupy itself with that inquiry.

40. Rehnquist assumed the chief justiceship on September 26, 1986. *See* SUPREME COURT OF THE UNITED STATES, *supra* note 37, at 1.

B. Reformation Law

To get at the features of the conservative law reform discourse that came of age in criminal justice, consider first this broad-sweep recollection of the Rehnquist reformation from which they will emerge.[41]

To know the Rehnquist reformation is to know the resistance between opposing forces that shaped it. On the one hand, and the dominant one, was an antagonistic force targeted directly at the Warren Court's liberal criminal justice program. The Warren Court worked an expansion of criminal justice jurisprudence along two dimensions—generously interpreting the Constitution's content in favor of the rights of the accused while also elaborating robust remedial doctrine to enforce those rights, especially as against the states.[42] Welcomed by some, the expansion also received harsh critique in some legal circles and in various national, state, and local political arenas. Richard Nixon carried the critique in his 1968 presidential campaign and then fulfilled his pledge to change direction with his four appointments to the Court shortly thereafter.[43] The recomposed Court, including then Associate Justice Rehnquist, channeled much of that criticism into the jurisprudence by clamping down on any further growth of the rights unleashed in the Warren era and by cutting back the remedial expansions. Significantly, however, the Court largely refrained from repudiating the substantive content of the rights that its Warren Court predecessors had developed. The explanation lies with an aggregation of counterforces that provided resistance. Outright repudiation

41. The account that follows echoes much that has appeared in the legal literature over the years. Professor Carol Steiker's appraisal of criminal justice in the Rehnquist years comes closest to the mark in my estimation. Steiker, *supra* note 36. While much of the ensuing discussion diverges and follows paths that Professor Steiker had no occasion to take in her article, I regard it as largely compatible with and often complementary to her account. Among the earlier commentaries on the Burger and Rehnquist Courts that inform the discussion are Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319 (1977); Stephen A. Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151 (1980); and Robert Weisberg, *Foreword: Criminal Procedure Doctrine: Some Versions of the Skeptical*, 76 J. CRIM. L. & CRIMINOLOGY 832 (1985).

42. This is not to deny that the Warren Court's innovations in criminal procedure can be exaggerated. *See* CRAIG M. BRADLEY, THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION (1993) (seeing the Warren Court's criminal procedure decisions as an acceleration of development initiated in the 1930s rather than as a "revolution"); Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361 (2004) (arguing that the Warren Court's criminal procedure decisions were less countermajoritarian than generally believed); *see also* Louis D. Bilionis, *Legitimating Death*, 91 MICH. L. REV. 1643, 1643 n.3 (1993) (discussing how the Warren Court's more renowned accomplishments in criminal justice built upon existing principles in the jurisprudence, heightening but not initiating federal constitutional regulation in the area).

43. *See* Smith, *Rehnquist Court*, *supra* note 36, at 1338–39.

of the Warren Court's work would have entailed direct challenges to established rights. Such high-visibility action would have infuriated those who championed the rights revolution, but it also would have elicited qualms from people who, though initially skeptical of those rights, nonetheless had come to appreciate some of their aspects. Coming so soon after the Warren years, repudiation also would have threatened to unsettle a legal system in which the Supreme Court stands as a font of stable evolving law. Call the resistance what you will—the claims of stare decisis, concern for the Court's institutional capital and legitimacy, recognition of the symbolic appeal of the rights spotlighted by the Warren Court, an acknowledgement of the importance of narrative continuity, conflicted feelings as Warren Court rights took deeper root in American culture—a majority of the Court could not ignore it. The reformation Court therefore reconciled the competing forces with a tidy concession: Respect would be maintained for the "core" of the Warren Court's substantive expressions about rights.

The concession went only that far. It precluded an explicit undoing of the Warren Court's contributions but did not forbid their curtailment in more equivocal ways. All hinged on the inherently elastic concept of the "core," which the Court operationalized in two ways to significantly limit the Warren Court's precedents. First, minimalist readings of the cases became the principal measure of the so-called core. Thus, any claim which could be characterized as an arguable extension of the right laid down by a Warren Court decision could be refused as an inappropriate excursion beyond the core.[44] Second, a sharp distinction was drawn between rights and the remedies attaching to them, with the latter presumptively located outside the core and hence subject to contraction.[45] By denying any extensions and reducing the remedial consequences, the Court could satisfy much of the conservative objection

44. The right to counsel at pretrial identification procedures, for instance, was nominally preserved, but its rationale was recast to confine its reach. *Compare* United States v. Wade, 388 U.S. 218, 237–39 (1967) (holding that a post-indictment lineup is a critical stage of the prosecution at which a defendant has a right to counsel, and noting that counsel's presence would help assure meaningful confrontation at trial), *with* Kirby v. Illinois, 406 U.S. 682, 688 (1972) (holding that the right under *Wade* applies only to identification procedures that occur at or after the initiation of adversary judicial proceedings, notwithstanding the fact that counsel's presence would help assure meaningful confrontation at trial), *and* United States v. Ash, 413 U.S. 300, 321 (1973) (holding that the right under *Wade* does not apply to photo identifications, reasoning that because a defendant is absent the procedure is not a "trial-like confrontation").

45. *See, e.g.*, Oregon v. Elstad, 470 U.S. 298, 314 (1985) (limiting the applicability of the exclusionary rule under *Miranda* to allow the admission of warned confessions obtained after an earlier unwarned confession); United States v. Leon, 468 U.S. 897, 919–22 (1984) (adopting a "good faith" exception to the Fourth Amendment exclusionary rule to permit introduction of evidence obtained by officers acting in reasonable reliance on a search warrant later found to be unsupported by probable cause).

directed at the Warren project without posing the complications of a direct assault on the rights themselves. Warren Court holdings thus survived in name and continued to apply to cases closely controlled by their facts and reasoning. However, those rights-protective precedents saw their interpretive methods impugned, their logical reach limited, their generative potential nullified, and their practical costs to law enforcement minimized. All this occurred in the relative obscurity of sequel litigation about implementing the details of the major visible cases. In such cases, sustained public opposition is not easily mobilized and a wide variety of doctrinal devices permit ceremonial respect to be paid to a right even as it is being drained of practical significance.

And so there would be no banner headlines to trumpet the overruling of *Miranda* or *Mapp v. Ohio*,[46] no stunning about-face that clearly would merit the proclamation of a further revolution or counterrevolution. Indeed, by the year 2000, Chief Justice Rehnquist himself would come to author the definitive reaffirmation of *Miranda*.[47] He could do so without discomfort because by then the reformation had triumphed. A long string of decisions of lesser public notoriety had recast criminal justice in terms far more favorable to the forces of law and order than popular opinion might ever realize. Fourth, Fifth, Sixth, and Fourteenth Amendment rights against various police practices remained, but they applied in confined circumstances[48] and

46. 367 U.S. 643 (1961).

47. Dickerson v. United States, 530 U.S. 428, 444 (2000) (Rehnquist, C.J.) (reaffirming *Miranda*).

48. Examples abound, but a few illustrations will suffice for present purposes. The *Miranda* right itself was not renounced, but the circumstances triggering the right were limited to reduce its impact. The Court created a "public safety" exception to *Miranda*, New York v. Quarles, 467 U.S. 649, 655 (1984); limited the definition of "custody," *see, e.g.*, Minnesota v. Murphy, 465 U.S. 420, 433–34 (1984) (holding that the defendant was not in "custody" for purposes of *Miranda* when he was questioned by his probation officer at a mandatory meeting); and limited the definition of what counts as police "interrogation," *see, e.g.*, Arizona v. Mauro, 481 U.S. 520, 529–30 (1987) (holding that there was no "custodial interrogation" when the officers taped a conversation between the accused and his wife in the police station after the accused had asserted his right to counsel); Rhode Island v. Innis, 446 U.S. 291, 300–01 (1980) (holding that police "interrogation" occurs for *Miranda* purposes only when the accused is subject to "express questioning or its functional equivalent" and that subtle compulsion does not amount to interrogation).

The Court used the same technique in the Fourth Amendment context to narrow the circumstances in which a "seizure" takes place. *Compare* Katz v. United States, 389 U.S. 347, 353–54 (1967) (stating that whether there has been a search or seizure "cannot turn upon the presence or absence of a physical intrusion"), *with* California v. Hodari D., 499 U.S. 621, 626 (1991) (holding that a seizure amounting to an arrest requires either physical force or submission to the assertion of authority), *and* United States v. Mendenhall, 446 U.S. 544, 553 (1980) (holding that "a person is 'seized,' only when, by means of physical force or a show of authority, his freedom of movement is restrained").

In similar fashion, the Court held in *Colorado v. Connelly*, 479 U.S. 157 (1986), that a schizophrenic individual's spontaneous confession to a police officer was "voluntary" within the meaning of the Due Process Clause because there was no police coercion. *Id.* at 167; *see also supra* note 44.

were reviewed under standards more forgiving of law enforcement.[49] Evidence derived from violations of those rights became more freely admissible as new exceptions to and limits on the exclusionary rules were identified.[50] Even when evidence was admitted erroneously under these more permissive rules, the practice of excusing the error as harmless was welcomed and encouraged.[51] Criminal procedure buffs recognize these developments—the loosening of Warren Court shackles on the police—as the grist of the Rehnquist reformation. But this conception falls short of capturing the full extent to which a pro-prosecution vision was impressed upon criminal justice during the final three decades of the last century. Trial safeguards like the right to effective assistance of counsel, the right of confrontation, and the right to the disclosure of exculpatory evidence were subordinated to the government's interest in obtaining convictions and making them stick.[52] The protection

49. *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 230, 236 (1983) (replacing the two-pronged test of *Aguilar v. Texas*, 378 U.S. 108 (1964), with a more flexible totality of the circumstances test for determining probable cause and directing appellate courts to employ a deferential standard of review when reviewing probable cause and determinations); *see also* Alabama v. White, 496 U.S. 325, 330–32 (1990) (fashioning a totality of circumstances test, similar to *Gates*, for determining reasonable suspicion).

50. *See, e.g.*, Illinois v. Krull, 480 U.S. 340, 349–55 (1987) (recognizing a good faith exception to the Fourth Amendment exclusionary rule where police rely on a state statute); *Elstad*, 470 U.S. at 314 (declining to apply the exclusionary rule to a confession preceded by *Miranda* warnings that followed a voluntary, but unwarned, confession); *Leon*, 468 U.S. at 922 (establishing a "good faith" exception to the Fourth Amendment exclusionary rule where an officer relies on a warrant); Oregon v. Hass, 420 U.S. 714, 721–24 (1975) (holding that a defendant's statement was admissible for impeachment purposes where he asserted his right to counsel, but the right was refused by the police); Michigan v. Tucker, 417 U.S. 433, 450–51 (1974) (declining to apply the exclusionary rule to a witness's testimony where the police learned of the witness through the defendant's unwarned but voluntary statement); Harris v. New York, 401 U.S. 222, 226 (1971) (holding that the exclusionary rule did not prevent the government from introducing for impeachment purposes a defendant's statement that followed defective *Miranda* warnings).

51. *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279, 310 (1991) (holding that the admission of an involuntary confession is subject to harmless error analysis).

52. The right to effective assistance of counsel was subordinated to the truth-seeking objectives of the criminal trial in *Strickland v. Washington*, 466 U.S. 668, 684, 687 (1984), which noted that "the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial," and holding that a defendant who claims ineffective assistance must show not only that counsel's performance was deficient, but that counsel's deficiency was actually prejudicial in that it rendered the result at trial unreliable. The right of confrontation similarly was subordinated to the social interest in achieving reliable trial results in cases such as *Ohio v. Roberts*, 448 U.S. 56 (1980), establishing a framework for admissibility of hearsay where the declarant is unavailable and the statement bears particularized guarantees of trustworthiness, and *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986), holding that a violation of the right of confrontation is subject to harmless error analysis. The defendant's right to complain of the prosecution's failure to divulge exculpatory evidence was hinged more tightly to a showing of relevance in *Pennsylvania v. Ritchie*, 480 U.S. 39, 58–60 (1987), and *United States v. Bagley*, 473 U.S. 667, 675–76 (1985).

afforded by double jeopardy principles was circumscribed.[53] Existing checks against vindictive administration of the criminal law, never strong, were weakened.[54] Safeguards against unjustifiable prosecutorial selectivity were resisted.[55] Principles that might inhibit a legislature's power to reduce the prosecutor's burden, the factfinder's power, or the sentencer's latitude through artful definition of crimes were stunted.[56] The Due Process Clause's voice in the realm of criminal law was deemed to be fainter than in other areas.[57] A burgeoning body of Eighth Amendment law aimed at ensuring fair, nonarbitrary, and nondiscriminatory imposition of the death penalty—the paradoxical product of the early Burger Court—was brought to heel within a few short years of Rehnquist's ascension to the chief justiceship.[58] Last but certainly not least, the writ of habeas corpus, the most powerful

53. *See, e.g.*, Missouri v. Hunter, 459 U.S. 359, 368–69 (1983) (holding that where "a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct . . . the trial court or jury may impose cumulative punishment under such statutes in a single trial").

54. *Compare* North Carolina v. Pearce, 395 U.S. 711, 726 (1969) (announcing that whenever a trial court imposes a sentence on remand that is greater than the one originally imposed, it must affirmatively state objective reasons for doing so to rebut a presumption of vindictiveness, and holding that the state failed to offer adequate reasons for the increased punishment), *with* Alabama v. Smith, 490 U.S. 794, 795 (1989) (holding that the presumption of vindictiveness does not arise when the first sentence is based upon a guilty plea and the second, more severe sentence follows a trial), *and* Texas v. McCullough, 475 U.S. 134, 138–39 (1986) (holding that no presumption of vindictiveness arose when the trial court itself ordered the second trial on account of prosecutorial misconduct).

55. *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 464 (1996) (holding that the government enjoys a "presumption of regularity" against selective prosecution claims); Wayte v. United States, 470 U.S. 598, 614 (1985) (refusing to find selective prosecution where the defendant claimed he was prosecuted only because he vocally opposed the draft).

56. *See, e.g.*, Patterson v. New York, 432 U.S. 197, 210 (1977) (permitting the government to place on the defendant the burden of proving affirmative defenses). The Court also created a distinction between "sentencing factors" and elements of the offense, with the former not subject to the requirement of proof beyond a reasonable doubt. McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986) (holding that the government may designate "visible possession of a firearm" as a sentencing factor rather than an element of a particular defense).

57. *See, e.g.*, Medina v. California, 505 U.S. 437, 443 (1992) (rejecting the application of the due process standard of *Mathews v. Eldridge*, 432 U.S. 319 (1976), to questions of criminal procedure). The Court noted:

> The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order.

Id. This is not to say that the Court set an unattainable standard. *See* Cooper v. Oklahoma, 517 U.S. 348, 369 (1996) (holding that a requirement that a defendant prove his incompetency to stand trial by clear and convincing evidence violated due process).

58. For an extensive discussion of those decisions, see Bilionis, *supra* note 42, at 1650–61.

weapon in the Warren Court arsenal for vindicating federal constitutional rights in state prosecutions, became increasingly more difficult to obtain.[59]

That *Miranda*, the totem of the Warren Court revolution, was spared overruling in *Dickerson v. United States* and expressly reaffirmed in an opinion authored by William H. Rehnquist is one of those delicious facts meant to be savored. Much as some might be tempted to see a climactic high-noon showdown from which *Miranda* emerged standing tall, that view misses the plot altogether. *Miranda* survived because the forces of reformation won the contest long before. *Dickerson* declared its victory.

C. Reformation Discourse

The foregoing account conveys the general sweep of the Rehnquist reformation and its tilt toward order over liberty. Of greater interest for our purposes, however, are four elements packed into that tale. They drove the reformation, set its tone, and lent it legal shape. Each will be elaborated below, but let us extract and state them now:

1. *A reform vision drawn from critical conservative sentiments in American politics.*
2. *A deeply embedded antagonism toward the preceding legal regime.*
3. *A strategic moderation expressed in the metaphor of "core" and "periphery."*
4. *A doctrine of core and periphery that privileges the reform vision and brackets competing values.*

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59. *See, e.g.*, Brecht v. Abrahamson, 507 U.S. 619, 623 (1993) (holding that, in reviewing state court convictions, federal courts should not grant the writ of habeas corpus unless the petitioner shows that constitutional error "had substantial and injurious effect or influence in determining the jury's verdict" (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946))); Coleman v. Thompson, 501 U.S. 722, 750 (1991) (holding that the more lenient "deliberate bypass" standard of *Fay v. Noia*, 372 U.S. 391 (1963), has been superseded by a more stringent standard that respects state procedural rules and enforces defaults under those rules); Teague v. Lane, 489 U.S. 288, 310 (1989) (holding that "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced"); Wainwright v. Sykes, 433 U.S. 72, 87–91 (1977) (holding that where a defendant fails to comply with state procedural rules and is thereby precluded from litigating a constitutional claim, the claim may be considered on habeas review only if the defendant shows cause for the default and actual prejudice resulting therefrom); Stone v. Powell, 428 U.S. 465, 494–95 (1976) (denying habeas corpus review of a claim that evidence was admitted at trial in violation of the Fourth Amendment's exclusionary rule, so long as the defendant was given full and fair opportunity to litigate the claim in state court). Congress followed the Court's lead and drew the writ back even further. *See* Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2241–2266 (2000).

Together, these features define the discourse that reformed criminal justice. Indeed, they are the elements of a distinctive conservative reformation discourse that went on to prove its mettle on each major front of constitutional change in recent years—federalism, national power, race, fundamental rights, and religion.

Some words about method and about the choice of the word "discourse" are appropriate before we proceed much further. One can size up the Supreme Court's performances in constitutional law in various ways and from different angles, and so it is with the Rehnquist Court's efforts in criminal justice. The method taken here is ecumenical in its temperament and perspective, and intentionally so. On the one hand, I want to accent the roles of politics, culture, the preferences of the Justices, and strategic choices in the elaboration of constitutional law. Doing so not only speaks to the instincts and judgments of political leaders, constitutional lawyers, and commentators who act on the belief that such things matter, but takes to heart the teachings of a significant body of political science scholarship as well.[60]

60. Political science scholarship on Supreme Court decisionmaking can be divided roughly into three camps. The attitudinal approach describes judicial decisionmaking as a process governed entirely by the exogenously formed personal policy preferences of individual judges who act unconstrained by institutional contexts. For political science works in this vein, see generally JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002); and HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT (1999). For a critical review of Segal and Spaeth's work, see Howard Gillman, *What's Law Got to Do With It?: Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465 (2001). *See also* Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251 (1997) (providing a summary and critique of the attitudinal model and pointing out the lessons legal scholars and lawyers could learn from attitudinalism).

Rational choice theorists accept the attitudinalists's basic premise that judges seek to maximize their own personal policy preferences but believe that internal and external institutions constrain judges and force them to act strategically to achieve a goal as close as possible to their ideal outcome. For the classic political science work in the realm of rational choice, see WALTER F. MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964). For more contemporary analyses, see LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998), arguing the fundamental premises of the theory as well as providing brief descriptions of both the internal and external models; FORREST MALTZMAN ET AL., CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME (2000), focusing on the interactions between the Justices on the Court, including opinion assignment and coalition formation; and Lee Epstein & Jack Knight, *Mapping Out the Terrain: The Informational Role of* Amici Curiae, *in* SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 215 (Cornell W. Clayton & Howard Gillman eds., 1999), arguing that the Court's limited fact-finding ability forces the Justices to rely heavily on amicus curiae briefs, particularly those filed by the Solicitor General. For legal academic works, see Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437 (2001), arguing that the Court is not substantially constrained by the threat of congressional overrides, but that the Justices are constrained by threats of impeachment, jurisdictional controls, budgetary restrictions, and reluctance on the part of other governmental actors to enforce the

On the other hand, I want to heed the detail of doctrine making and the professional and institutional norms that bear on it. Doing so will allow us to account for the "law" (or perhaps it is the "art") in constitutional law—the legal handiwork that marks the practice and occupies the energies of judges and lawyers.[61] An associative analysis that touches all of the foregoing considerations speaks more comprehensively and with greater relevance to a broader audience. What is more, it promises to speak instructively. If (to extend Robert Post's nice metaphor) the membrane that both connects and separates constitutional law and American culture is where the interesting chemistry occurs, then an associative approach of

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Court's decisions; William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991), applying rational choice equilibrium theory to demonstrate that the Court is constrained by the possibility of congressional overrides; Barry Friedman & Anna L. Harvey, *Electing the Supreme Court*, 78 IND. L.J. 123, 125 (2003), arguing from an externalist rational choice perspective that the Rehnquist Court had to postpone its federalism agenda until Congress was more amenable to it; and Merrill, *supra* note 26, explaining the shift in federalism doctrine using the attitudinal model, rational choice theory, and an original "flux and stasis" theory.

The historical/interpretive new institutionalist school accepts that judges act on personal policy preferences but asserts that, rather than being constrained by institutional contexts, preferences actually are constituted by institutional contexts ranging from the perceived role of the judge to broader sociopolitical movements. For works in political science, see Cornell W. Clayton, *The Supreme Court and Political Jurisprudence: New and Old Institutionalisms*, *in* SUPREME COURT DECISION-MAKING, *supra*, at 1; and Howard Gillman, *The Court as an Idea, not a Building (or a Game): Interpretive Institutionalism and the Analysis of Supreme Court Decision Making*, *in* SUPREME COURT DECISION-MAKING, *supra*, at 65. *See also* THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS (Howard Clayton & Cornell Clayton eds., 1999). For innovative works of legal scholarship informed by this approach, see TUSHNET, *supra* note 25, at 33–34, who states that because we live in an era of divided government, the Supreme Court could do essentially anything its majority wanted to do but nevertheless develops doctrine to fit the new order in which it operates; Schroeder, *supra* note 26, at 352–56, who employs the psychological theory of "motivated reasoning" to argue that the public's loss of trust in Congress over the past few decades internally influences the reasoning process of Supreme Court Justices when deciding federalism cases; and Reva B. Siegel, *Text in Contest: Gender and the Constitution From a Social Movement Perspective*, 150 U. PA. L. REV. 297, 300 (2001), who states that "if judges have played the central role in articulating constitutional norms in the American tradition, their understanding of the Constitution has been deeply shaped by mobilized citizenry, acting through electoral processes, and outside of them."

61. *See* Clayton, *supra* note 60, at 18 (noting that lawyers and judges continue to use the traditional tools of case study and doctrinal analysis); Cross, *supra* note 60, at 253 (noting that legal doctrine still occupies much of lawyers' time). This is not to say that the personal policy preferences of judges do not matter greatly. It is to say that the judge, like all of us, is situated within a multiplicity of contexts, some common to us all and some peculiar to the role of the judge in society. Judicial preferences are amenable to shaping by swings in the political mood and also to molding by strategic interactions both inside and outside of the courts. It also is to say that judges bring to the bench habits and traditions of lawyers and take with some seriousness the responsibility to craft doctrine in accordance with perceived institutional norms.

this sort—focusing on the principal elements, their interaction, and their yield—would seem a promising source for useful insights.[62]

It is in this spirit that I speak of "discourse," using the term with a deliberate looseness that nods to the lawyer's colloquial (what judges and lawyers talk about, and why and how) and the cultural theorist's technical (a discursive practice replete with ideological and power implications). At its most rudimentary, constitutional law is elaborated in outcomes that reflect judicial choices manifesting the preferences of the Justices. But judicial choices are hardly uninfluenced by social, political, and cultural forces that can vary with time and context. Those choices—and at the very least, the manners in which they are expressed—also are affected by the professional and institutional norms that bear on the Justices. The engagement of political, cultural, and institutional forces naturally raises strategic implications, and these too figure in the process. Finally, constitutional law is a practice that is expected to memorialize its outcomes in doctrinal forms with accompanying opinions that explain and justify or, in the case of concurrences and dissents, qualify or dispute. It thus calls upon ideology, rhetoric, narrative, and the forms of legal reasoning and law.

1. A Reform Vision Emanating From Critical Conservative Sentiments in American Politics

It is fashionable these days to criticize the Supreme Court for a hyperdeveloped sense of its own authority over constitutional meaning. The Court, it is said, elides the difference between the Constitution and the Court's proclamations about it,[63] disrespects principles of institutional authority that counsel deference and judicial self-restraint,[64] and treads in derogation of the precepts that inform the political question doctrine.[65] Whatever judgments one might reach on these scores, the Rehnquist reformation of criminal

62. *See* Post, *supra* note 24, at 9–10.

63. *See* Amar, *The Document and the Doctrine*, *supra* note 32; *see also* Larry Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4, 16–33 (2001) (arguing that the public, not the Court, was intended to control constitutional meaning).

64. *See* Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 85 (2001) (noting that Rehnquist Court doctrines of judicial review "have resulted in growing disrespect for Congress"); *see also* H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS 136–37 (2002) (criticizing the current Court's encroachment upon matters of judgment that earlier constitutional thinkers in the nation's history thought reserved for Congress).

65. *See* Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 241 (2002) (arguing that the Court "ignores the existence of political questions" in its quest for supremacy).

justice clearly was no judicial frolic in disregard of the constitutional views then prevailing in American culture and politics. On the contrary, it embraced, assimilated, and championed a reform vision emanating from critical conservative sentiments being expressed on the nation's various political stages. During the days of mounting civil, social, cultural, and political unrest in the 1960s, conservative politicians and opinion leaders increasingly lent voice to (and stimulated and reinforced) public skepticism of the alleged liberal misdeeds of the Warren Court.[66] Judge-made rights bespeaking sentimentality toward criminal offenders were assailed as dubious matters of constitutional interpretation and costly threats to the stability of the social order.[67] Added to the mix was the further complaint that these "soft on crime" constitutional transgressions were coming from federal judges who ought to be more mindful of state prerogatives in our federal system.[68] The critique, commonly taken as a conservative's objection to liberal Warren Court ways, had an affirmatively phrased, prescriptive side as well. It was this reform vision that Richard Nixon promoted during his run for the presidency in 1968 and brought to his selection of judicial nominees: the reassertion of popular majoritarian control over matters of law and order, and the loosening of federal fetters on law enforcement, through allegiance to a "strict construction" of the Constitution by federal judges.[69]

66. *See* Lain, *supra* note 42, at 1447–48 (discussing backlash against the Warren Court); George C. Thomas III & Richard A. Leo, *The Effects of* Miranda v. Arizona: *Embedded in Our National Culture?*, 9 CRIME & JUST. 203, 213 (2002) (observing that during the 1968 presidential campaign not even Hubert Humphrey, Richard Nixon's opponent, would defend the Warren Court's criminal procedure decisions).

67. *See* Patrick A. Malone, *"You Have the Right to Remain Silent"*: Miranda *After Twenty Years*, *in* THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING 75 (Richard A. Leo & George C. Thomas III eds., 1998) (noting Richard Nixon's accusations that the Warren Court "coddl[ed] criminals" and "handcuff[ed] the police"); *see also* Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 191–92 (1983) (explaining that many of the procedural safeguards attributed to the Warren Court eroded public confidence in the judiciary because they led to the release of criminals on "technicalities").

68. *See* Harry N. Schreiber, *Redesigning the Architecture of Federalism—An American Tradition: Modern Devolution Policies in Perspective*, 14 YALE L. & POL'Y REV. 227, 279 (1996) (noting that "serious efforts at starting constitutional amendment campaigns were focused on nearly all the major decisions of the Warren Court that came down against state authority").

69. *See* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 407–10 (2000) (discussing the political response to Warren Court liberalism in police conduct cases); SAMUEL WALKER, POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE 201 (2d ed. 1998) (noting that crime control became a salient issue in the 1964 presidential election and remained so into the 1990s); *see also* SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 252 (2d ed. 1999) (discussing backlash against Warren Court liberalism and the Nixon "law and order" campaign); *see also id.* at 357–58 (discussing the "get tough on crime" politics of the Reagan era); *id.* at 362, 374 (noting that personal interests of citizens and concerns for safety helped fuel "get tough" attitudes, making civil libertarian initiatives in criminal justice more difficult); *id.* at xvi (discussing persistence of the same dynamic into the 1990s).

The Justices doubtless contributed to and embellished this vision, but we should not lose sight of its external grounding in American culture and political activity of the sort associated with organized electoral politics. Whether the conditions amount to an Ackermanian constitutional moment need not detain us.[70] It is enough to note that the conservative vision of criminal justice reform forged in Nixon-era politics had political and cultural warrants ample enough to ensure its incorporation into the thinking of the Supreme Court where, it so happened, sat new appointees with dispositions congenial to it.[71] In addition, this vision also had clarity, accessibility, conciseness, and comprehensiveness going for it. All it needed was translation into law consistent with the limits of its conditions. In other words, it needed a legal discourse capable of projecting a new conservative reformative gloss on the law that stopped short of thorough upheaval.

The remaining three elements of reformation discourse would see to that. Whereas the preceding discussion examined the reformation's relationship to politics and culture external to the Court, we will now be turning to considerations internal to the Court and its labor. They concern the way the Justices translated the reform vision from politics into law—pitting the vision against the liberal precedents bequeathed by its predecessors, accounting for recognized institutional norms and cultural forces that limit the freedom to change the law, and employing the tools of the legal profession.

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70. According to Professor Bruce Ackerman, the conditions were ripe for a constitutional moment but ultimately failed with the defeat of Robert Bork's nomination. Bruce A. Ackerman, *Transformative Appointments*, 101 HARV. L. REV. 1164, 1178 (1988).

71. On this score, one might say that the conservative reformation's political and cultural warrants were on a par with those that supported the Warren Court's efforts. *See generally* ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 151 (Sanford Levinson rev., 3d ed. 2000) (noting that the election of President Kennedy demonstrated that America was ready for innovative developments and that the civil rights movement furnished opportunities for the Court to assert itself); PAUL L. MURPHY, THE CONSTITUTION IN CRISIS TIMES 1918–1969, at 353–58, 378 (1972) (stating that the Court fell in line behind President Kennedy's commitment to civil rights and civil liberties); Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 522 (1975) (suggesting that the rise of totalitarian regimes in Europe produced anxiety about the exertion of governmental force through the criminal justice system); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2204–19 (2002) (noting the influence of strategies employed by groups such as the ACLU and the NAACP Legal Defense and Education Fund on the development of criminal procedure); Michael J. Klarman, *Rethinking the Civil Rights and the Civil Liberties Revolutions*, 82 VA. L. REV. 1, 62–66 (1996) (linking the Warren Court's criminal procedure decisions to societal concerns with race, poverty, and a renewed sense of responsibility in the administration of criminal justice following the war against the Nazis); Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 65 (1964) (asserting the centrality of civil rights and poverty issues in the development of criminal procedure). At the same time, however, it seems safe to say that the Warren Court led by filling perceived voids and meeting perceived shortcomings it thought it saw in politics. *See* POWE, *supra* note 69, at 443–44 (discussing how the Court acted "because no one else would").

2. A Deeply Embedded Antagonism Toward the Preceding Legal Regime

Pervading the reformation cases is what best is described as a deeply embedded antagonism toward the liberal criminal justice jurisprudence of the Warren and early Burger Courts. This antagonism is the second key component of reformation discourse. It set the dominant tone and established a rhetorical and analytical environment predisposed toward change in a conservative direction.

Students of criminal justice will remember well the harsh rhetoric of reformation era opinions. Liberal criminal justice was excoriated for its "sporting theory of criminal justice"[72] that "punish[ed] the public for the mistakes and misdeeds of law enforcement officers,"[73] disrespecting the difficulty of their jobs and their strength of character.[74] It was derided for imperiling public safety[75] and demeaning the victims of crime,[76] for trivializing the criminal trial,[77] and for flouting the states.[78] It was mocked as the dupe of society's outvoted dissenting elements,[79] the undemocratic product of judicial hubris and misguided sentimentality toward those who offend society's norms.[80]

Vituperative language is no stranger to the *United States Reports*, not even in frequent and heavy helpings. What makes the antagonism deep and embedded is the narrative of villainy and the ideology of distrust that these scornful attacks connoted. Liberal criminal justice consistently was portrayed

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72. Brewer v. Williams, 430 U.S. 387, 417 (1977) (Burger, C.J., dissenting).

73. *Id.* at 416.

74. *See, e.g.*, Welsh v. Wisconsin, 466 U.S. 740, 761 (1984) (White, J., dissenting) (criticizing the test established by the majority for failing to take into account the difficulty of in-the-field police work and the time constraints under which officers must act).

75. *See, e.g.*, Payton v. New York, 445 U.S. 573, 618 (1980) (White, J., dissenting) (contending that the rule announced by the majority will "severely hamper effective law enforcement" (quoting United States v. Watson, 423 U.S. 411, 431 (1976) (Powell, J., dissenting))).

76. For instance, in overruling *Booth v. Maryland*, 482 U.S. 496 (1987), and holding victim impact evidence admissible at the penalty phase of capital murder trials, the Court declared that *Booth* had rendered the victim a "faceless stranger." Payne v. Tennessee, 501 U.S. 808, 825 (1991) (quoting South Carolina v. Gathers, 490 U.S. 805, 822 (1989) (O'Connor, J., dissenting)).

77. *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 88–90 (1977) (criticizing the Warren Court's *Faye v. Noia*, 372 U.S. 391 (1963), as an inducement to defendants to treat the state trial on the merits as a mere "tryout on the road" to the federal courts).

78. *See, e.g.*, Withrow v. Williams, 507 U.S. 680, 698–701 (1993) (O'Connor, J., concurring in part and dissenting in part) (criticizing the majority for ignoring principles of federalism and comity in overturning a murder conviction on habeas).

79. *See, e.g.*, Simmons v. South Carolina, 512 U.S. 154, 185 (1994) (Scalia, J., dissenting) (accusing those who oppose the death penalty of being a "heavily outnumbered" group waging a "guerilla war to make this unquestionably constitutional sentence a practical impossibility").

80. *See, e.g.*, Walton v. Arizona, 497 U.S. 639, 665–67 (1990) (Scalia, J., concurring in part and concurring in the judgment) (criticizing past decisions that required full consideration of mitigating circumstances in capital sentencing as catering to violent criminals).

as untrustworthy, undemocratic, and threatening to the social order. It empowered fringe and even illicit elements of society with access to an unelected forum where their interests were given weight disproportionate to their numbers and their supposed moral worth. In catering to these interests, judges—elite, unaccountable federal judges distanced from the realities of crime—succumbed to the temptation to make law when they were authorized only to interpret it. The law they created made light of guilt and punishment. It left a fearful society more vulnerable. Moreover, it destabilized society's foundational institutions.

Even when the rhetoric was dialed down (as was often the case in the Court's majority opinions), deep antagonism nevertheless infused the Court's discussions. Over the years, reformation opinions increasingly urged "truth," "federalism," and the needs of the police officer—what we simply might call "authority"—as essential and wrongly devalued ingredients in the criminal justice calculus.[81] Indeed, these three ingredients made up the trinity of

81. For examples of the Court's exaltation of the truth-seeking function of the criminal justice system over other values, see, for example, *Strickland v. Washington*, 466 U.S. 668, 687 (1984), requiring, for a successful ineffective assistance of counsel claim, that the defendant show not only that counsel's performance was deficient but that the deficiency was prejudicial in that it rendered the result at trial unreliable; *United States v. Leon*, 468 U.S. 897, 906–08 (1984), subordinating the exclusionary rule and its truth-inhibiting consequences to second-order status; and *United States v. White*, 401 U.S. 745, 753–54 (1971), holding that the use of an undercover informant does not constitute a search and stressing the reluctance to erect barriers to relevant and probative evidence. *See generally* AMAR, *supra* note 32 (espousing a theory of criminal procedure that places primacy on truth-seeking function); Edwin Meese III, *Promoting Truth in the Courtroom*, 40 VAND. L. REV. 271 (1987) (arguing that legal doctrines designed to ensure the constitutional rights of the accused, such as the Fourth Amendment's exclusionary rule and *Miranda*, should be subordinated to a truth-seeking principle); Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369 (1991) (arguing that under the truth-seeking views the criminal justice system seeks to reduce the total number of erroneous verdicts rather than focusing primarily on erroneous convictions); Weisberg, *supra* note 41, at 834–38 (summarizing the debate over the competing values of protecting constitutional rights and maintaining the truth-seeking function of the criminal justice system).

The Court expressed its concern for federalism most thoroughly in its habeas corpus jurisprudence. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 726 (1991) (beginning an opinion in which the Court held that a capital defendant was barred from habeas relief because of counsel's failure to meet a state-court filing deadline with the following two sentences: "This is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus."); *Wainwright*, 433 U.S. at 87–91 (holding that where a defendant fails to comply with state procedural rules the claim can be considered on habeas review only if the defendant shows cause for the default and actual prejudice resulting therefrom). *See generally* Kathleen Patchel, *The New Habeas*, 42 HASTINGS L.J. 939 (1991). The sounds of federalism also can be heard in cases involving the scope of the constitutional rights of defendants. *See, e.g.*, *Payne*, 501 U.S. at 824–27 (alluding to the virtues of state experimentation in holding that victim impact statements are not constitutionally forbidden in capital cases); Patterson v. New York, 432 U.S. 197, 201 (1977) (stressing federalism as a reason for limited federal judicial scrutiny of legislative decisions defining the elements of crimes).

The Court's intent on respecting, preserving, and bolstering the authority of law enforcement is reflected in a wide range of opinions, including cases that trim constitutional rights in the name

privileged precepts that the Court used to translate the conservative reform vision into constitutional law. Each precept, of course, was a restatement in the affirmative of negative attributes of liberal criminal justice. The trustworthy hero had arrived to counter the villain, with the former's every appearance embedding the antagonism toward the latter all the more deeply.

3. A Strategic Moderation Expressed in the Metaphor of "Core" and "Periphery"

Although the Court was committed to challenging liberal criminal justice, we know with hindsight that the consequence was not the counter-revolutionary upheaval that some wanted and others dreaded. Conditions external to the judicial process—the cultural and political warrants—would not license it. The Warren Court's appeal in some segments of American society doubtless had an inhibiting effect. Perhaps more significantly, the conservative law and order campaign had its stride broken in the 1970s, as the streets and campuses quieted and a series of executive branch scandals reminded the nation of the dangers of amassing official power. (The momentum would resume in the 1980s with rising crime rates and the Reagan Administration's war on drugs, but any opportunity for dramatic transformation had been lost to the interruption.) Considerations internal to the Court likewise militated against upheaval. The conservative critique had advocates in Justice Rehnquist and Chief Justice Warren E. Burger, but liberal criminal justice had its own stalwarts in Justices William J. Brennan and Thurgood Marshall. Institutional norms of stare decisis, stability, continuity, and self-restraint induced the remaining Justices to acknowledge the footing that liberal criminal justice rulings had secured in American culture and the law even as they subscribed, in varying degrees, to the conservative reform vision. These Justices of the center included Potter Stewart, John Paul Stevens, Lewis F. Powell, Byron R. White, and Harry A. Blackmun, and thereafter Sandra Day O'Connor and Anthony M. Kennedy. Supreme Court

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of police protection, *see, e.g.*, Maryland v. Buie, 494 U.S. 325, 337 (1990) (permitting officers to do a protective sweep following an in-house arrest when the officer has reasonable suspicion that dangerous persons may be in the house), and proclaim the need for rules that will not complicate police practice, *see, e.g.*, Illinois v. Gates, 462 U.S. 213, 230, 237–38 (1983) (replacing the two-pronged test of *Aguilar v. Texas*, 378 U.S. 108 (1964), with a more flexible totality of the circumstances test for determining probable cause, out of deference to the needs of police); Rhode Island v. Innis, 446 U.S. 291, 300–01 (1980) (defining "interrogation" for *Miranda* purposes narrowly in order to relax federal impositions on local law enforcement). *See generally* Wayne R. LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 SUP. CT. REV. 127 (discussing how the Court deferred to the judgments of police officers and took pains to protect them).

litigators talk of the need to count to five. Even as the conservative reformation built momentum, getting to five required accommodating liberal criminal justice.

The discourse accordingly took on a third feature—a strategic moderation that found its expression in the metaphor of "core" and "periphery." By preserving the metaphorical core of liberal criminal justice, the Justices could affirm the importance of continuity and stability in constitutional development. By consigning a sizeable remainder to the metaphorical periphery, they opened ample room for change that could be cast as the nonthreatening synthesis of the past and the present. Reform, not counterrevolution, would be the end product. But followed over time, there was no reason why the strategy could not effectively dispel liberal criminal justice as a vital force. After all, the periphery may be metaphysically and rhetorically marginal. In the worldly realm, however, it is where most of legal life is lived.

4. A Doctrine of "Core" and "Periphery" That Privileges the Reform Vision and Brackets Competing Values

The three features thus far discussed bring to the discourse the vision, energy, and strategy for conservative reform. Political and cultural forces for change are channeled into a judicial commitment to displace liberal criminal justice. This commitment, while steadfast and determined, is moderated for reasons of institutional identity, the limits of the political and cultural warrants, and the attractions of the preceding regime and its most prominent symbols. The vocabulary and strategy necessary to legitimate the effort are provided, and a trinity of values (truth, federalism, and authority) is mustered to honor the metaphorical core of liberal precedents even as it confines that core and takes command of the rest of the field. What remains is the business of turning it all into law in a fashion consistent with the demands of the legal profession. And so enters the fourth feature of reformation discourse: *a doctrine of "core" and "periphery" that privileges the reform vision and brackets competing values*.

The doctrine's intricacy should not go unnoted but also need not be belabored, as shelves of literature on the constitutional law governing criminal justice speak to it. Mindful that simplification leaves much unsaid, we can boil the doctrine down to two relatively simple components.

a. Doctrinal Dichotomies to Bracket Liberalism and Allow the Expression of Conservatism

Handed a strategy to restrict the influence of liberal criminal justice, the reformation-minded lawyer naturally looks for doctrinal cleavages in the law. The reformation Court scarcely missed an opportunity to create such a divide or widen an existing one: rights versus remedies;[82] constitutional rules of the first order versus judge-made prophylactic rules of secondary stature;[83] the "criminal prosecution" versus the processes that precede and follow it;[84] the determination of guilt versus the imposition of sentence;[85] the criminal sanction versus the civil or administrative sanction;[86] rights that promote the

82. *See, e.g.*, Michigan v. Harvey, 494 U.S. 344, 349–51 (1990) (characterizing *Michigan v. Jackson*, 475 U.S. 625 (1986), as establishing only a "prophylactic" safeguard of the Sixth Amendment right to counsel); Oregon v. Elstad, 470 U.S. 298, 306–07 (1985) (distinguishing *Miranda*'s exclusionary remedy from the Fifth Amendment right it serves to protect); United States v. Leon, 468 U.S. 897, 907 (1984) (announcing that "the exclusionary rule is neither intended nor able to cure the invasion of the defendant's rights which he has already suffered," and that the rule therefore operates as a judicially created remedy rather than a personal right (internal quotation marks and citations omitted)); United States v. Janis, 428 U.S. 433, 458–59 n.35 (1976) (stating that the operation of the exclusionary remedy depends not on whether the defendant's rights were violated, but on whether admitting the evidence would encourage violations of those rights); United States v. Calandra, 414 U.S. 338, 354 (1974) (holding the exclusionary rule inapplicable to grand jury proceedings despite the existence of a Fourth Amendment violation).

83. *See, e.g.*, Smith v. Robbins, 528 U.S. 259, 273 (2000) (characterizing the rule laid down in *Anders v. California*, 386 U.S. 738 (1967), concerning the withdrawal of appellate counsel, as a "prophylactic" standard rather than a four-square constitutional rule); *Leon*, 468 U.S. at 906 (noting that admitting evidence obtained in violation of the Fourth Amendment does not itself violate the Fourth Amendment); Michigan v. Tucker, 417 U.S. 433, 446 (1974) (asserting that *Miranda* warnings are not constitutional rights but "prophylactic standards" designed to safeguard the privilege against self-incrimination).

84. *See, e.g.*, Murray v. Giarratano, 492 U.S. 1, 10 (1989) (stating that the Due Process Clause does not require states to appoint counsel to capital defendants seeking post-conviction relief); Kirby v. Illinois, 406 U.S. 682, 688–90 (1972) (Stewart, J.) (declaring that a criminal defendant is only entitled to counsel at pretrial identification procedures after the initiation of formal proceedings against him and not during the investigation that precedes the formal charge).

85. *See, e.g.*, McMillan v. Pennsylvania, 477 U.S. 79, 91 (1986) (distinguishing between elements of an offense that must be proved beyond a reasonable doubt at trial and sentencing factors that the government need prove only by a preponderance of the evidence).

86. *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 362–63 (1997) (treating Kansas's Sexually Violent Predator Act as providing for civil rather than criminal commitment); *see also* United States v. Ursery, 518 U.S. 267, 292 (1996) (holding that in rem civil forfeitures are not criminal for the purposes of the Double Jeopardy Clause if they are not intended as punishment); United States v. Salerno, 481 U.S. 739, 751–52 (1987) (characterizing pretrial preventive detention as "regulation" rather than "punishment"); Allen v. Illinois, 478 U.S. 364, 375 (1986) (holding the Fifth Amendment privilege against self-incrimination inapplicable to commitment proceedings under the Illinois Sexually Dangerous Persons Act because the statute's purpose is treatment and not "punishment"); *cf.* South Dakota v. Opperman, 428 U.S. 364, 370 n.5 (1976) (distinguishing between a purely administrative inventory search and one performed for crime control purposes); Cady v. Dombrowski, 413 U.S. 433, 447–48 (1973) (same).

truth-seeking function of the criminal justice system versus those that serve other distinct values;[87] personal interests of the accused versus systemic concerns of broader social interest;[88] trial rights versus structural rights;[89] and the pre-finality stage versus the post-finality stage.[90] These are among the dichotomies that spread like clover throughout criminal justice during the Rehnquist reformation.[91]

For the reformation, the most pivotal dichotomy was the one that differentiates rights and remedies, thereby zoning doctrinal space into a presumptive core and periphery. Standing alone, this dichotomy was powerful enough to

87. *See, e.g.*, Nix v. Williams, 467 U.S. 431, 445 (1984) (refusing to impose a bad faith limitation on the "inevitable discovery exception" to the exclusionary rule because doing so would "fail[ ] to take into account the enormous societal cost of excluding truth in the search for truth in the administration of justice"); Strickland v. Washington, 466 U.S. 668, 687 (1984) (requiring that for defendant to prevail on a claim of ineffective assistance of counsel, he or she must show not only that counsel's performance was deficient but that counsel's deficiency was prejudicial so as to render the result at trial unreliable).

88. *See, e.g.*, Rakas v. Illinois, 439 U.S. 128, 133–34, 143 (1978) (stating that "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted," and holding that an individual's mere presence on the premises creates no Fourth Amendment interest to be asserted and that the individual instead must demonstrate a reasonable expectation of privacy in the premises (quoting Alderman v. United States, 394 U.S. 165, 174 (1969))); *see also* Minnesota v. Carter, 525 U.S. 83, 87–90 (1998) (applying *Rakas*); United States v. Payner, 447 U.S. 727, 731–33 (1980) (same). In a different vein but to the same effect in principle is *McCleskey v. Kemp*, 481 U.S. 279, 294–95 (1987), refusing to permit a statistical demonstration of racial discrimination's persistence in Georgia's capital punishment system to impugn the defendant's death sentence absent a showing of actual discrimination in his case.

89. Whereas "trial rights" are subject to harmless error analysis, so-called "structural" errors—defects "affecting the framework within which the trial proceeds"—are not. *See* Arizona v. Fulminante, 499 U.S. 279, 310 (1991). Total deprivation of the right to counsel, Gideon v. Wainwright, 372 U.S. 335 (1963), erroneous reasonable doubt instructions, Sullivan v. Louisiana, 508 U.S. 275 (1993), and the lack of an impartial trial judge, Tumey v. Ohio, 273 U.S. 510 (1927), all implicate structural rights. Improperly instructing the jury on an element of the offense charged, Yates v. Evatt, 500 U.S. 391 (1991), and failing to submit to the jury the issue of materiality in a perjury prosecution, Johnson v. United States, 520 U.S. 461 (1997), do not.

90. *Compare* Brecht v. Abrahamson, 507 U.S. 619, 638 (1993) (holding the defendant must demonstrate that constitutional error was prejudicial in order to obtain relief on federal habeas review), *with* Chapman v. California, 386 U.S. 18, 24 (1967) (holding that constitutional errors require reversal on direct appeal unless the government demonstrates they were harmless beyond a reasonable doubt).

91. Among the additional dichotomies one might add to the list is the distinction between rules (and bright-line rules for ease of police application) and standards, *see, e.g.*, United States v. Robinson, 414 U.S. 218, 235 (1973) (establishing a bright-line rule permitting officers to search an individual incident to arrest); *see also* LaFave, *supra* note 81, the distinction between objective evaluations of police behavior and assessments turning on the officer's subjective state of mind, *see, e.g.*, Whren v. United States, 517 U.S. 806, 813 (1996) (refusing to consider a police officer's subjective intentions in determining reasonableness under the Fourth Amendment), and the distinction between broader systemic-oriented regulations and more discrete procedural safeguards, *see McCleskey*, 481 U.S. at 309–10, 319–20 (refusing to forbid death sentences returned by sentencing system shown to be infected by systemic racial discrimination and relying, instead, on particularized procedural safeguards to minimize the risk of racial discrimination).

produce significant practical conservative reform. It was thus that the exclusionary rule, conceptualized as a remedy for police transgression against the Fourth Amendment right to be free from unreasonable searches and seizures, could be infused with the conservative values of truth, finality, and authority without disturbing the Fourth Amendment core.[92]

The rights versus remedies distinction was augmented by other dichotomies that further subdivided doctrinal space to serve one of two objectives (and perhaps even both). Some fulfilled a substantive objective, tightening the core by limiting the occasions when rights will attach or prejudicing their further expansion. Institutional context—the time and place in which the accused finds himself or herself vis-à-vis the criminal justice system—figured heavily here. The right to counsel, for instance, was located in the protected core,[93] but reformation decisions made its application hinge on a formally initiated "criminal prosecution" rather than the individual's encounters with law enforcement during the investigative stages that precede prosecution or the punishment stages.[94] Another core principle was that the determination of guilt must accord with the dictates of due process and the Bill of Rights,[95] but reformation decisions dichotomized the ascertainment of guilt and the assignment of sentence (a function that merits fewer constitutional safeguards), expanding the latter at the expense of the

92. *See, e.g.*, United States v. Leon, 468 U.S. 897, 906 (1984) (stating that the exclusionary rule is a judicially created remedy rather than a personal constitutional right); United States v. Janis, 428 U.S. 433, 459–60 (1976) (noting that "the judicially created exclusionary rule should not be extended to forbid the use in the civil proceeding of one sovereign of evidence seized by a criminal law enforcement agent of another sovereign"); United States v. Calandra, 414 U.S. 338, 344, 354 (1974) (holding the exclusionary rule inapplicable to grand jury proceedings in part because "[t]he grand jury's investigative power must be broad if its public responsibility is adequately to be discharged").

93. *See, e.g.*, Massiah v. United States, 377 U.S. 201, 206 (1964) (holding that the government violates Sixth Amendment rights when it deliberately elicits incriminating information from the defendant outside the presence of counsel); *see also* United States v. Wade, 388 U.S. 218, 236–37 (1967) (announcing that a defendant is entitled to counsel at a post-indictment lineup).

94. *See, e.g.*, Kirby v. Illinois, 406 U.S. 682, 688 (1972) (Stewart, J.) (noting that a defendant has no Sixth Amendment right to have counsel present at a lineup until formal charges have been brought against him). Similarly, at the core resides a right to counsel at the criminal trial. *See Gideon*, 372 U.S. at 342–450 (extending Sixth Amendment right to counsel to the states and holding that indigent defendants are entitled to court-appointed counsel). Yet reformation decisions limited this right by creating a dichotomy between criminal trials resulting in actual incarceration and those that do not. *See, e.g.*, Scott v. Illinois, 440 U.S. 367, 373–74 (1979); Argersinger v. Hamlin, 407 U.S. 25, 37 (1972). Reformation decisions further limited the application of the right to counsel at a criminal trial by distinguishing between trial and post-conviction stages. *See, e.g.*, Murray v. Giarratano, 492 U.S. 1, 7–8 (1989) (holding that individuals enjoy no constitutional right to counsel to pursue post-conviction remedies).

95. *See, e.g.*, *In re* Winship, 397 U.S. 358, 363, 368 (1970) (noting the vital role of the reasonable doubt standard in assuring due process and extending its application to juvenile proceedings).

former.[96] The core likewise included the principle that a valid determination of guilt is a prerequisite to punishment, but reformation decisions distinguished formal criminal punishment from other stigmatizing and liberty denying sanctions that it labeled civil or administrative instead.[97] Taking the importance of institutional context to an altogether different level, reformation decisions also pressed a dichotomy between rights that serve the truth-seeking function of the criminal justice system and those that promote other values (such as human dignity or human fulfillment), privileging the former interpretation over the latter whenever possible.[98]

Other reformation dichotomies fulfilled a remedial objective, subclassifying defendant rights into a hierarchy of variable remedial entitlements to reduce the number of convictions delayed, foregone, or upset. Reformation cases stressed the importance of carefully separating the personal constitutional interests of the defendant from more general concerns for the system's greater integrity, with the former deserving a remedy much more readily than the latter.[99] Trial rights were distinguished from structural rights, with violations of the former amenable to harmless error analysis to save the conviction.[100] The dichotomy between the prefinal phase of a defendant's odyssey

96. *See, e.g.*, McMillan v. Pennsylvania, 477 U.S. 79, 90–91 (1981). In a similar vein, the right to trial by jury was narrowed by use of a distinction between petty and nonpetty offenses as gauged by the potential sentence. *See, e.g.*, Blanton v. City of N. Las Vegas, 489 U.S. 538, 542–43 (1989) (holding that any offense that carries a maximum penalty of six months imprisonment or less is a petty offense to which the Sixth Amendment's right to trial by jury does not attach).

97. *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 362–71 (1997) (upholding statute providing for involuntary confinement upon a finding of dangerousness because the confinement is for the purpose of treatment rather than punishment); United States v. Salerno, 481 U.S. 739, 750 (1987) (holding a pretrial detention statute facially constitutional because the government may detain individuals accused of crime upon a strong showing of dangerousness).

98. *See, e.g.*, United States v. Bagley, 473 U.S. 667, 682–83 (1985) (imposing a stricter materiality requirement where the prosecutor fails to disclose exculpatory evidence to the accused); Strickland v. Washington, 466 U.S. 668, 691–92 (1984) (requiring that the defendant show actual prejudice in addition to deficient performance by counsel in order to establish a claim of ineffective assistance of counsel); Ohio v. Roberts, 448 U.S. 56, 65–66 (1980) (establishing a Confrontation Clause framework that essentially balances the truth-seeking objectives of the criminal trial against other concerns).

99. *See, e.g.*, Minnesota v. Carter, 525 U.S. 83, 88 (1998) (stressing that only when the defendant's personal Fourth Amendment rights have been violated is exclusion of illegally obtained evidence appropriate); McCleskey v. Kemp, 481 U.S. 279, 319–20 (1987) (refusing to overturn a death sentence based on evidence of systemic failures in the operation of the death penalty); Rakas v. Illinois, 439 U.S. 128, 132 (1978) (noting that "[t]he proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure"). *But see* Powers v. Ohio, 499 U.S. 400, 409 (1991) (conferring on criminal defendants standing to complain of peremptory challenges to prospective jurors based on race).

100. *See, e.g.*, Johnson v. United States, 520 U.S. 461, 468–69 (1997) (stating that the right to have the issue of materiality submitted to the jury in a perjury prosecution is not a structural right; distinguishing such rights as the right to counsel (citing Gideon v. Wainwright, 372 U.S. 335 (1963)) and the right to an impartial trial judge (citing Tumey v. Ohio, 273 U.S. 510 (1927))).

(that is, litigation prior to the conclusion of direct appeal) and the post-final phase took on increasingly critical significance along several dimensions. A defendant's claim could draw on favorable law that emerged before her case was final, but almost no such law announced thereafter.[101] A meritorious constitutional claim left unvindicated by courts during the prefinal phase would remain so for federal purposes unless the defendant preserved the claim with procedural meticulousness all along the way[102] and demonstrated prejudice to his trial's outcome.[103] Even that would not suffice, except in the most exceptional circumstances, if the claim was the wrongful admission of evidence obtained in violation of the Fourth Amendment.[104]

One familiar dichotomy operated both substantively and remedially, making it something of the pièce de résistance of reformation discourse: the well-known distinction between constitutional rules of the first order and judge-made prophylactic rules of secondary stature. Used here and there,[105] its claim to fame is its subjugation of *Miranda* law. Beginning in 1974 with an opinion by then Justice Rehnquist,[106] a steady line of reformation decisions depicted the *Miranda* "right" as really just an overbroad prophylactic device created by judges to forestall the genuinely coercive interrogations that would violate the Fifth Amendment. Cast in second-order terms, *Miranda*'s core could be honored[107] even as its reach,[108] effect, and impact[109] were limited by repeated cost-benefit reappraisals.

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101. *See* Teague v. Lane, 489 U.S. 288, 310 (1989).

102. *See, e.g.*, McCleskey v. Zant, 499 U.S. 467, 489 (1991) (holding that the defendant abused the writ of habeas corpus by raising a claim in a second habeas petition that he could have raised in his first petition); Delo v. Stokes, 495 U.S. 320, 321–22 (1990) (observing that a defendant can abuse the writ without deliberately abandoning a claim in the first petition).

103. *See, e.g.*, Brecht v. Abrahamson, 507 U.S. 619, 638 (1993).

104. *See* Stone v. Powell, 428 U.S. 465, 494 (1976) (preventing relitigation of most Fourth Amendment claims on habeas review). Notably, the Court resisted taking the same step with *Miranda*. Withrow v. Williams, 507 U.S. 680, 686 (1993) (refusing to extend the reasoning of *Stone* to *Miranda* claims).

105. *See, e.g.*, Alabama v. Smith, 490 U.S. 794, 799–802 (1989) (characterizing *North Carolina v. Pearce*, 395 U.S. 711 (1969), as establishing a prophylactic rule designed to prevent constitutional violations but whose violation does not itself implicate four-square constitutional rights, thereby allowing some relaxation of *Pearce*'s requirements to guard against vindictive retaliation against a defendant who successfully appeals a conviction); *see also* Smith v. Robbins, 528 U.S. 259, 273 (2000) (characterizing the rule laid down in *Anders v. California*, 386 U.S. 738 (1967), concerning the withdrawal of appellate counsel as a prophylactic rule).

106. Michigan v. Tucker, 417 U.S. 433, 439 (1974) (reasoning that safeguards prescribed by *Miranda* are "prophylactic rules" developed to protect the Fifth Amendment privilege against self-incrimination and that failure to observe those safeguards does not require the same evidence-excluding consequences as would a direct violation of the amendment's dictates).

107. *See, e.g.*, Minnick v. Mississippi, 498 U.S. 146, 50 (1990) (citing *Miranda* for the proposition that, once an accused requests counsel, all interrogation in the absence of counsel

If the foregoing leaves you with the impression that reformation discourse takes a divide-and-conquer approach to liberal criminal justice, you have gotten the point. As the dichotomies unfolded on reformation terms, liberal criminal justice precedents were gradually whittled down to their core and steered to doctrinal corners to dwell quietly. Seen but seldom heard, they were acknowledged ambivalently, primarily for reasons of stare decisis and with few testaments to their rightness on the merits. Liberal criminal justice as a distinct voice grew fainter and fainter.

b. Ideological Postulates and Assurances

Reformation discourse had more in its arsenal to perfect the bracketing of liberal criminal justice. It infused its doctrine of core and periphery with material calculated to legitimate the endeavor ideologically and assuage concerns that it was indifferent to injustices that could occur.

Accompanying the doctrinal exercises are postulates that bathe the jurisprudence in an ideology of trust. Constables blunder and judges err, but reformation discourse insisted that these transgressions are minor exceptions to a major rule that cannot be overemphasized. If the reformation Court never uttered the phrase that "the criminal justice system finds no refuge in a jurisprudence of doubt,"[110] it said as much in so many words: The criminal justice system is an inheritance whose design is fundamentally effective and fair,[111] and it is essential that faith in that proposition be affirmed by the Court in its jurisprudence both to vindicate

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must cease); Edwards v. Arizona, 451 U.S. 477, 484–85 (1984) (holding that after the accused invokes his right to counsel, the police may only resume interrogation if the defendant reinitiates communication); Michigan v. Mosley, 423 U.S. 96, 104 (1975) (holding that law enforcement officials must "scrupulously honor" an accused's assertion of the right to remain silent).

108. *See, e.g.*, Davis v. United States, 512 U.S. 452, 460 (1994) (taking a narrow view of what constitutes an invocation of the right to counsel under *Miranda* because the alternative "would needlessly prevent" police questioning of suspects); New York v. Quarles, 467 U.S. 649, 655 (1984) (creating a "public safety" exception to the general requirement that law enforcement officials advise an accused of his or her *Miranda* rights prior to questioning).

109. *See, e.g.*, Oregon v. Elstad, 470 U.S. 298, 314 (1985) (sharply limiting the scope of the "fruit of the poisonous tree" doctrine in the Fifth Amendment context); *Tucker*, 417 U.S. at 452 (allowing the admission of the testimony of a witness whose identity the police learned from the defendant's unwarned statement). For a nice discussion on this point, see generally Steiker, *supra* note 36, at 2522–26.

110. *Cf.* Planned Parenthood v. Casey, 505 U.S. 833, 844 (1992) (stating that "[l]iberty finds no refuge in a jurisprudence of doubt").

111. *See, e.g.*, Medina v. California, 505 U.S. 437, 443 (1992) (regarding the Bill of Rights, with its explicit attention to many dimensions of criminal procedure, as striking a careful balance between liberty and order that the Court should be wary of altering by the creation of additional rights under the Due Process Clause).

the hardworking people on the front lines and to stabilize the system in an anxious age.[112] Politics can and must be trusted to strike the appropriate balance between order and liberty.[113] The good intentions of the police on the street can and must be trusted so that they may better perform the difficult task of protecting the public.[114] Confidence similarly is owed the magistrates who keep the police in check[115] and the officials who establish law enforcement policy and oversee its administration.[116] The conservative reform vision respected and affirmed the authority of these institutions of law enforcement; its doctrine of core and periphery inscribed that trust in the forms of law.

Although these postulates painted a rosy picture, they stopped short of an ideology of infallibility. The Court recognized that its ideology of trust, especially when fortified by claims of practical necessity, could generate some bright-line rules that effectively left a law enforcement fox to guard the henhouse.[117] More commonly, however, reformation discourse acknowledged some risk (albeit depreciated in magnitude) and offered the assurance of a doctrinal auxiliary to catch the recalcitrant cases. The auxiliary did not need to be a sturdy backstop; indeed, the sturdier it was the more it resembled a reincarnation of liberal criminal justice. A modest placeholder bereft of much normative content or

112. *See, e.g.*, United States v. Robinson, 414 U.S. 218, 232–35 (1973) (establishing a per se rule that officers may search an individual incident to arrest to allow the police to fight crime more effectively and for the officer's own protection).

113. *See, e.g.*, Patterson v. New York, 432 U.S. 197, 201, 210 (1977) (stating that the Court "should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States" and that "[t]raditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch" subject to judicial review in cases where limits are clearly transgressed).

114. *See, e.g.*, Whren v. United States, 517 U.S. 806, 816 (1996) (refusing to consider a police officer's subjective intentions in determining the reasonableness of a seizure supported by probable cause).

115. *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 236 (1983) (instructing appellate courts to review deferentially magistrates' determinations of probable cause).

116. *See, e.g.*, Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (upholding a suspicionless sobriety checkpoint in part because the checkpoint was established pursuant to guidelines); Illinois v. Lafayette, 462 U.S. 640, 643–48 (1983) (holding that probable cause is irrelevant to an inventory search of a suspect's belongings when the police are acting in an administrative capacity and pursuant to established procedures); South Dakota v. Opperman, 438 U.S. 364, 367–76 (1976) (allowing the police wide latitude to conduct an inventory search of an impounded vehicle for caretaking purposes); Cady v. Dombrowski, 413 U.S. 433, 439–48 (1973) (same).

117. *See, e.g.*, New York v. Belton, 453 U.S. 454, 458 (1981) (creating a per se rule allowing police officers to search, incident to an arrest, the passenger compartment of the car and any containers found therein, and stating that "a single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront" (quoting Dunaway v. New York, 442 U.S. 200, 213–14 (1979))); *Robinson*, 414 U.S. at 232–35 (establishing a per se rule, justified by officer safety, allowing police officers to automatically search a suspect incident to arrest).

methodological framework—and rather in the nature of a pledge to hear extraordinary appeals on a case-by-case basis—usually sufficed.[118]

D. Unity and Affinity: Criminal Justice as the Precursor of a Broader Conservative Constitutional Reformation

We are now in a position to fix criminal justice's central place in our constitutional times and enrich our account of them in the process. The transformative activities in federalism, national power, race, and religion that capture so many headlines these days are deeply connected to the tale of criminal justice just told. They are chapters in a much larger story—the broad, unified conservative reformation of American constitutional law in the closing decades of the twentieth century.

Follow the discourse and the story comes clearly into view. Criminal justice is the first of a series of chapters in which distinct conservative visions successively crystallized in American culture and politics and then obtained expression in a reformed constitutional law. The point is not merely that Supreme Court decisions in different areas share the commonality of having reached results that satisfy conservatives. The affinities run much deeper. At each level—the cultural and political, the narrative, the strategic, the doctrinal—the dynamic of conservative change has been notably consistent. The distinctive discourse of conservative law reform that first came into being in criminal justice has been the dominant constant throughout. By dint of that discourse, twentieth-century liberalism's grander nationalist, libertarian, humanitarian, egalitarian, and secularist ambitions have been (and still are being) suppressed and displaced in constitutional law. Reform, not revolution, remains the theme throughout.

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118. *See, e.g.*, *Whren*, 517 U.S. at 813, 816 (refusing to establish a Fourth Amendment rule that would invalidate a seizure objectively supported by probable cause on the basis of the officer's impermissible subjective motivations, but noting that the Equal Protection Clause might provide a basis for challenging the officer's conduct and that the Fourth Amendment might provide relief in cases where the search or seizure is "conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests"); Payne v. Tennessee, 501 U.S. 808, 825 (1991) (holding that the Constitution does not generally forbid admission of victim impact statements in capital sentencing hearings, but that "[i]n the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief"); McCleskey v. Kemp, 481 U.S. 279, 297–99 (1987) (declining to invalidate Georgia's death penalty scheme upon a showing that racial discrimination pervades the system; observing that relief might be obtained if defendant could show racial discrimination actually affected his conviction or sentence); *Patterson*, 432 U.S. at 210 (holding that legislatures have wide latitude in determining whether factors shall be elements of a crime or matters of affirmative defense upon which the defendant might bear the burden, but noting that "there are obviously constitutional limits beyond which the States may not go in this regard," and offering illustrative examples).

Liberalism's major legal achievements survive in a reduced core. Conservative conceptions predominate in the rest of the legal space.

The challenges presented by issues of criminal justice, state sovereignty, national power, race, implied fundamental rights, and religion differ enough conceptually and technically to ensure that constitutional discussions in these areas will diverge. All the more striking, then, that the Rehnquist Court's bellweather decisions in each area incorporate the four hallmarks of reformation discourse with such a high degree of congruence. With little appreciable change, the discourse honed in criminal justice migrated across constitutional law to operate with similar effect toward similar ends.

As with criminal justice, the Rehnquist Court's transformative decisions in these other areas are rooted in conservative critiques of liberal constitutionalism that first achieved a cohesive expression in politics—this time, during the years of Ronald Reagan's presidency and into the 1990s. The Court's federalism and national power innovations—*United States v. Lopez*[119] and *United States v. Morrison*,[120] the anticommandeering decisions,[121] the sovereign immunity rulings,[122] the cases on congressional power under section 5 of the Fourteenth Amendment[123]—convey a distrust of government generally, and the national government in particular, that was central to President Reagan's conservative vision for America and is still resonant today.[124] The Court's race cases—placing affirmative action and race-based redistricting under stricter scrutiny[125] and relaxing judicial

119. 514 U.S. 549 (1995) (limiting Congress's Commerce Clause power to regulate "activities that substantially affect interstate commerce" (citing Mayland v. Wirtz, 392 U.S. 183, 196 n.27 (1968))).

120. 529 U.S. 598 (2000) (applying *Lopez* and holding a portion of the Violence Against Women Act to be an unconstitutional exercise of Congress's Commerce Clause power).

121. Printz v. United States, 521 U.S. 898, 925 (1997) (holding that the federal government cannot compel states to implement federal regulatory programs, thereby invalidating a provision of the Brady Act); New York v. United States, 505 U.S. 144, 174–77 (1992) (invalidating the "take title" clause of the Low-Level Radioactive Waste Policy Amendments Act of 1985 on anti-commandeering grounds).

122. *See* cases cited *supra* notes 8–9.

123. *See* cases cited *supra* note 9.

124. *See, e.g.*, Schroeder, *supra* note 26, at 351–59 (exploring public distrust of government as a contributing factor in the Supreme Court's federalism and national power decisions); *see also* Johnsen, *supra* note 26, at 387–96 (discussing the Reagan Administration's views and legal strategies on congressional power).

125. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding strict scrutiny applicable to federal affirmative action programs); Shaw v. Reno, 509 U.S. 630, 642–49 (1993) (applying strict scrutiny to a congressional redistricting plan where the Court found that the lines were drawn for racial purposes); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989) (holding strict scrutiny applicable to state affirmative action programs).

supervision over school desegregation[126]—are avowedly responsive to public resentment of racial preferences and suspicion of race's continued role in decisionmaking, sentiments that achieved significant political traction during those same years.[127] The Court's remaking of abortion law in *Planned Parenthood v. Casey*[128] and its effort to bridle substantive due process more generally in *Washington v. Glucksberg*[129] followed naturally from the long, steady clamor against *Roe v. Wade*[130] that evolved into a broader indictment by conservative opinion leaders and the Reagan Administration of judicially elaborated fundamental rights.[131] The Court's recent decisions opening the public sphere to religion, in turn, answer charges that the Court and its law have been hostile toward religion. Such charges came to public and political prominence with the emergence of the Moral Majority and other faith-based political movements.[132]

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126. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 60, 88–92 (1995) (confining the discretion of the district courts to order remedies related to past discrimination); Freeman v. Pitts, 503 U.S. 467, 489 (1992) (holding that district courts have the discretion to withdraw incrementally their supervision of schools under court order to integrate). For an excellent discussion of *Freeman* and its relationship with cultural forces, see ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 263–307 (2000).

127. *See* Marylee C. Taylor, *White Backlash to Workplace Affirmative Action: Peril or Myth?*, 73 SOC. FORCES 1385, 1386 (1995) (noting the "widespread presumption" that affirmative action programs evoke resentment among nonrecipients); Stanley Fish, *How the Right Hijacked the Magic Words*, N.Y. TIMES, Aug. 13, 1995, at E15 (discussing the political right's forceful, and largely successful, rhetorical campaign against affirmative action); Pama Mitchell, *School Integration Debate Begins Anew: Blacks, Whites Wondering if It's the Path to Equality*, ATLANTA J. CONST., May 15, 1994, at A1.

128. 505 U.S. 833 (1992) (O'Connor, Kennedy, Souter, J.J.) (recrafting the right of abortion as a right to be free from an "undue burden" imposed by government on a woman's ability to obtain an abortion prior to viability).

129. 521 U.S. 702 (1997) (attempting to tether substantive due process rights to those carefully described rights that are "deeply rooted in . . . history and tradition" (citing Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion))).

130. For discussions of the clamor against *Roe*, see DAVID J. GARROW, LIBERTY & SEXUALITY 600–704 (1994), discussing political and legal battles following *Roe*; and LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 140–61 (1992), describing the social and political developments in the aftermath of *Roe*. *See also Casey*, 505 U.S. at 995 (Scalia, J., concurring in the judgment in part and dissenting in part) (noting that "*Roe* fanned into life an issue that has inflamed our national politics in general").

131. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 110–15 (1990) (criticizing *Roe* and its predecessors for creating rights without moorings in the constitutional text and history); Edwin Meese III, *A Return to Constitutional Interpretation From Judicial Law-Making*, 40 N.Y.L. SCH. L. REV. 925, 927 (1996) (comparing the Warren Court to the *Lochner*-era Court in that both "ignored the limitations of the Constitution and blatantly usurped legislative authority").

132. *See* SAMUEL S. HILL & DENNIS E. OWEN, THE NEW RELIGIOUS/POLITICAL RIGHT IN AMERICA (1982) (describing the rise of the religious right); PEGGY L. SHRIVER, THE BIBLE VOTE: RELIGION AND THE NEW RIGHT (1981) (assessing the impact of religious movements on conservative politics); Michael Lienesch, *Right Wing Religion: Christian Conservatism as a Political Movement*, 97 POL. SCI. Q. 403 (1982) (same); Joseph Tamney & Stephen Johnson, *Explaining*

These cultural and political forces for conservative change are expressed in a deeply embedded antagonism toward liberal jurisprudence that permeates the Rehnquist Court's opinions in these fields no less than it did in criminal justice. Consider the liberal constitutional jurisprudence that once prevailed in these areas: its great solicitude for national power, its patience with race-conscious government actions to empower racial minorities (exhibited by a relatively noninterventionist posture), its active defense of individual liberty and personal autonomy, and its wariness of religion's presence in the public sphere. These views and the doctrines of judicial review associated with them—what I elsewhere have called the "old scrutiny"—have been situated in a narrative of villainy as pointed and as entrenched as the one we saw in the reformation criminal justice opinions.[133] By the Rehnquist Court's account, liberal jurisprudence's old scrutiny is a licentious constitutional renegade. Its lax deference toward Congress has encouraged our elected leaders to think and act as if they were possessed of a national police power.[134] Its lukewarm identification with principles of federalism and state sovereignty has permitted an upset of the Constitution's structural balance.[135] Its lenity toward race-conscious efforts to rearrange power and privilege has disrespected the personal interests of members of the racial majority and the imperatives of a constitutional order premised on neutral principles.[136] Its excessive protection of personal autonomy has led to a judicial arrogation of the power of the

Support for the Moral Majority, 3 SOC. F. 234, 235 (1988) (noting the considerable media attention given to the Moral Majority and other politically mobilized religious groups).

133. Louis D. Bilionis, *The New Scrutiny*, 51 EMORY L.J. 481, 486–512 (2002) (discussing the "old scrutiny" and the narrative of villainy found in reformation opinions).

134. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 627 (2000) (Thomas, J., concurring) (criticizing the Court's Commerce Clause jurisprudence for "encourag[ing] the Federal Government to persist in its view that the Commerce Clause has virtually no limits," and urging that until the Court alters its doctrines in favor of the original understanding, "we will continue to see Congress appropriating state police powers under the guise of regulating commerce"); United States v. Lopez, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring) (noting that lenient rational basis review fails to provide the structural mechanisms necessary to ensure that Congress respects the federal-state balance); *id.* at 602 (Thomas, J., concurring) (criticizing lenient review of congressional authority under the Commerce Clause: "[s]uch a formulation of federal power is no test at all: It is a blank check.").

135. *See, e.g.*, Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 687–91 (1991) (chastising the dissenters for adhering to precedents that advance a jaundiced view of state sovereignty).

136. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240–41 (1995) (Thomas, J., concurring in part and concurring in the judgment) (arguing that use of racial classifications to benefit racial minorities is "just as noxious as discrimination inspired by malicious prejudice," "undermine[s] the moral basis of the equal protection principle," "engender[s] attitudes of superiority," and "provoke[s] resentment among those who believe that they have been wronged by the government's use of race"); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 527 (1989) (Scalia, J., concurring in the judgment) (arguing that affirmative action works a "very real injustice" on members of the racial majority).

democratic majority to pursue its legitimate interests.[137] In its zeal to keep church and state separate, it has relegated religion to an ever-shrinking private sphere that the faithful experience as a discriminatory and hostile exile.[138] Completing the narrative pattern seen in criminal justice, the Rehnquist Court's cases in these areas introduce a hero as well—a Court with the virtue and fortitude to limit others as well as itself. Limits on Congress must be devised and enforced by the Court, the opinions insist, so that the Constitution's grand scheme and design may be sustained.[139] Race-based measures must be strictly scrutinized by the Court to limit their use to cases of necessity.[140] The judicial elaboration of unenumerated rights must be limited to a carefully circumscribed rendition of the nation's traditions.[141] The Court's intervention in matters of church and state must be limited to correcting unevenhanded acts that attack religion, treat it with bias, coerce its observance, or lend it official endorsement.[142]

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137. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 979–82 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (criticizing the Court for its unprincipled interpretation of the Due Process Clause designed to implement the Justices' own preferences against the preference of the majority of the citizenry).

138. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793, 827–28 (2000) (noting that "it is most bizarre that the Court would, as the dissent seemingly does, reserve special hostility to those who take their religion seriously, who think that their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views to children"); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 318 (2000) (Rehnquist, C.J., dissenting) (accusing the Court's opinion forbidding organized prayer at a high school football game as "bristl[ing] with hostility to all things religious in public life").

139. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 728–29 (1999) (noting that the scope of a state's sovereign immunity is demarcated not by the Eleventh Amendment alone, but by the overall constitutional design); *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring) (declaring that "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far").

140. *See, e.g.*, *Adarand Constructors*, 515 U.S. at 237 (requiring a classification narrowly tailored to achieve compelling interests); *J.A. Croson Co.*, 488 U.S. at 511 (invalidating an affirmative action scheme because it "failed to identify the need for remedial action"); *see also* Freeman v. Pitts, 503 U.S. 467, 503–07 (1992) (Scalia, J., concurring) (arguing that plaintiffs should bear the burden of proving that the segregation present was the product of state action).

141. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (stating that fundamental rights found in the Due Process Clause must be carefully described and deeply rooted in history and tradition); *see also* Michael H. v. Gerald D., 491 U.S. 110, 126 n.6 (1989) (Scalia, J.) (arguing that fundamental rights should be defined at the most specific level possible).

142. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 662–63 (2002) (upholding a private school voucher program because of the programs' neutrality to religion); Agostini v. Felton, 521 U.S. 203, 234–35 (1997) (upholding a federal program providing federal aid to sectarian schools because the program was neutral as between religious and nonreligious schools); Church of the Lukumi Babalu Aye Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993) (invalidating an ordinance because its sole purpose was to burden a particular religious group); Lee v. Weisman, 505 U.S. 577, 592–94, 599 (1992) (holding a nonsectarian prayer at a middle school graduation unconstitutional because it

As the Court's opinions demonstrate, antagonism toward liberal jurisprudence sets the tone and direction but does not always carry the day. The project of limiting Congress's power, for instance, has met its own limits.[143] Affirmative action in higher education has been upheld.[144] *Roe* has not been overruled.[145] Official school prayer is still taboo[146] and states remain at liberty to treat devotional religious activity differently from other activities that seek a share of government largesse.[147] That is so because the Court has brought strategic moderation to these areas just as it did to criminal justice—for the same amalgam of political, cultural, and institutional reasons and expressed in the same metaphor of core and periphery. No clearer example exists than *Casey*, which bared for all to see the Court's belief in the power of the metaphor to synthesize the forces of the past with those of the present. The Court explicitly cut *Roe* to its so-called "central" or "essential" core to make room for conservative values, while it respected *Roe*'s considerable claim to entrenched status in American constitutional culture.[148] In the same vein, Chief Justice Rehnquist's rendering of Commerce Clause precedents in *Lopez* avoided explicit use of the metaphor's terms but surely called them to mind. Liberal precedents were distilled into a definition of core regulatory power that the Court would continue to honor, leaving legislation at the periphery

subtly coerced nonreligious children to participate); Employment Div. v. Smith, 494 U.S. 872, 879–82 (1990) (holding that, in the absence of a hybrid claim, only legislation that singles out religion for different treatment is subject to strict scrutiny); Lynch v. Donnelly, 465 U.S. 668, 680–81, 687 (1984) (upholding a city's nativity scene display because the city was not endorsing religion).

143. *See, e.g.*, Tennessee v. Lane, 124 S. Ct. 1978, 1994 (2004) (upholding Title II of the Americans with Disabilities Act under section 5 of the Fourteenth Amendment); Sabri v. United States, 124 S. Ct. 1941, 1948–49 (2004) (upholding a federal statute criminalizing the offering of bribes to government officials as a valid exercise of the spending power despite the absence of a direct connection between federal funds and each bribe and refusing to extend the reasoning of *United States v. Lopez*); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 725, 740 (2003) (holding that the Family and Medical Leave Act is a constitutional exercise of Congress's section 5 authority and that an employee could sue the state for damages in federal court for its violation); Reno v. Condon, 528 U.S. 141, 148–49 (2000) (upholding the Driver's Privacy Protection Act of 1994 as a valid exercise of Congress's Commerce Clause power).

144. Grutter v. Bollinger, 539 U.S. 306, 343–44 (2003) (upholding the University of Michigan Law School's affirmative action program).

145. Planned Parenthood v. Casey, 505 U.S. 833, 869 (1992) (upholding the core of *Roe*); *see also* Stenberg v. Carhart, 530 U.S. 914, 938 (2000) (applying *Roe* and invalidating a ban on the so-called partial birth abortion procedure). *Lawrence v. Texas*, 539 U.S. 558 (2003), contains a surprisingly strong endorsement of *Roe* as well; *Lawrence* presents special considerations that we will touch upon in Part III.

146. *Weisman*, 505 U.S. at 599 (holding prayer at a middle school graduation unconstitutional); *see also* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301 (2000) (holding unconstitutional a prayer at a high school football game even when the students voted to have the prayer).

147. Locke v. Davey, 124 S. Ct. 1307, 1315 (2004) (permitting the State of Washington to exclude individuals seeking theology degrees from a state scholarship program).

148. *Casey*, 505 U.S. at 869–79.

subject to question. Similarly, by holding Congress to a new test of proportion and congruence when exercising its power under the Fourteenth Amendment, the Court in *City of Boerne v. Flores*[149] and succeeding decisions[150] summoned the metaphor to offer a reconciliation with the liberal jurisprudence it aimed to curb. These cases invoke the image of a secure core of precedent that upholds vintage civil rights legislation that was written to vindicate established Fourteenth Amendment rights; the new limits imposed upon Congress are relatively little to fear, then, for it is only the disproportionate and incongruent regulations on the periphery that the Court means to target. The Court's toughened posture toward affirmative action surely renounces the strong liberal position advanced by Justices Marshall and Brennan,[151] but its insistence in *Grutter v. Bollinger* that strict scrutiny need not be fatal was a gesture in recognition of the liberal position's irreducible core position that race sometimes must be considered in order to move society beyond race.[152] In religion, the Rehnquist Court's ground-shifting decision in *Employment Division v. Smith*[153] may fail to convince readers that any meaningful vestiges of liberal Free Exercise Clause policy remain. However, the Court's claims to the contrary are telling.[154] The Court's Establishment Clause decisions, on the other hand, represent a large ongoing project to reconceptualize, qualify, amend, and elide *Lemon v. Kurtzman*[155] without ever overruling it—in other words, they are an exercise in articulating a sustainable liberal core and an expandable conservative periphery.[156]

149. 521 U.S. 507 (1997).

150. *See* cases cited *supra* note 9.

151. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 225–28 (1995) (discussing and overruling *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), in which the majority opinion authored by Justice Brennan held that congressional use of racial classifications benefitting minorities should be subjected to intermediate scrutiny); *see also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 528–61 (1989) (Marshall, J., dissenting) (advocating intermediate scrutiny for race-based classifications that benefit minorities).

152. 539 U.S. 306, 342 (2003) (upholding the University of Michigan Law School admissions affirmative action program under strict scrutiny).

153. 494 U.S. 872 (1990).

154. *Id.* at 876–82 (holding that laws of general applicability that adversely affect religious exercise are not subject to strict scrutiny unless they infringe upon another right as well or provide a scheme for exemptions that fails to exempt religion). For a good discussion of the ground that *Smith* might leave for assertions of claims under the Free Exercise Clause, see Garrett Epps, *What We Talk About When We Talk About Free Exercise*, 30 ARIZ. ST. L.J. 563 (1998).

155. 411 U.S. 192 (1973).

156. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 648–50 (2002) (transforming *Lemon*'s "effects" prong from an inquiry into substantiality into a question of whether the governmental aid directly or indirectly supports religion); Mitchell v. Helms, 530 U.S. 793, 807–12, 836 (2000) (applying a "modified" *Lemon* test and concluding that a government program that provides aid to public and private schools did not violate the Establishment Clause because it

The fourth and final characteristic of the conservative reformation discourse also appears prominently in all of these areas. Each utilizes a doctrine of core and periphery that relies on dichotomies to subdue liberalism and legitimates itself with ideological postulates and assurances of accommodation. Out of respect for time and scope, let me sketch impressionistically and at some remove from the precise lineaments. Suffice it to say that each of the areas we have been discussing has grown richer with and increasingly dependent upon doctrinal cleavages in recent years. A dichotomy between economic and noneconomic activity, for instance, looms large under the Commerce Clause today.[157] A distinction between remedial and substantive ends now operates pivotally in the law of congressional power under the Fourteenth Amendment[158] and—but for *Grutter v. Bollinger*—in the law of affirmative action as well.[159] The Court's sovereign immunity decisions establish a critical dichotomy between regulatory and remedial power that liberal jurisprudence tended to obscure.[160] After *Casey*, abortion law hinges on the distinction between burdens that are undue and those that are not.[161] Questions of church and state turn increasingly on dichotomies between private and public choice,[162]

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dispensed funds neutrally in a manner mediated by private choice); Agostini v. Felton, 521 U.S. 203, 233–37 (1997) (preserving the core of *Lemon* while eliminating its "excessive entanglement" prong).

157. *See* United States v. Morrison, 529 U.S. 598, 611, 617 (2000) (noting the constitutionality of congressional regulation of economic activity that substantially affects interstate commerce, but rejecting the argument that Congress may regulate noneconomic conduct based solely on its aggregate effect on interstate commerce).

158. *See* City of Boerne v. Flores, 521 U.S. 507, 518–20 (1997) (stating that Congress's section 5 power generally extends only to measures designed to remedy constitutional violations, not to legislation that makes a substantive change in constitutional law).

159. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (requiring all racial classifications to be narrowly tailored to achieve precise remedial ends). *But see* Grutter v. Bollinger, 539 U.S. 306, 328–33 (2003) (treating diversity in education as a compelling interest and distinguishing it from the remedying of past discrimination).

160. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 754–55 (1999) (noting that the states are still bound to follow federal law even though transgressions are not remediable by a private right of action). Note that in *Tennessee v. Lane*, 124 S. Ct. 1978 (2004), where the Court upheld the private right of action in Title II of the Americans with Disabilities Act insofar as it requires states to provide access to courtrooms, the dichotomy between regulation and remedy would have been difficult to maintain; a decision invalidating Congress's decision to abrogate state sovereign immunity also would have drawn into question Congress's power to require the accommodations at issue. One would not be unjustified in thinking that the difficulty of maintaining the distinction in these circumstances bore favorably on the case for upholding the private right of action.

161. *See* Stenberg v. Carhart, 530 U.S. 914, 921 (2000); Planned Parenthood v. Casey, 505 U.S. 833, 876 (1992).

162. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 650 (2002) ("That the program was one of true private choice, with no evidence that the State deliberately skewed incentives toward religious schools, was sufficient for the program to survive scrutiny under the Establishment Clause.").

intended burdens and ancillary ones,[163] general laws and specific laws,[164] and the presence or absence of neutrality.[165]

Just as we saw in criminal justice, these cleavages create doctrinal space for the expression of conservative cultural and political forces, steering the values of liberal constitutional jurisprudence into constricted zones. The contingency and malleability of these doctrinal devices make them vulnerable to criticism from all sides. And so, as in criminal justice, the Court defends them with ideology and accommodating assurances. In these areas, the Court champions a conception of constitutional well-being and judicial stewardship that artfully legitimates and assuages. I have described this conception at some length elsewhere, calling it a vision of "measured reasonableness."[166] It postulates that a healthy constitutional order is one in which government treats constitutional values with a sense of proportion, congruence, moderation, measure, and balance—a quality of measured reasonableness that liberal jurisprudence failed to inculcate. The Court does its duty when it acts to ensure the observance of measured reasonableness by government, and when it modifies its own practices to ensure that they project its observance as well. For the Court to do anything less, we are told, would be to shirk its responsibility.[167] These are the postulates that the Court invokes to legitimate its doctrinal reworkings on the transformative frontiers. The new doctrines give conservative values greater play in order to rectify a liberal imbalance. In the hands of conscientious judicial stewards, however, these new doctrines need not result in an equivalent imbalance in conservatism's favor. Indeed, the Court can now say that each of its portentous decisions has its own assuring counterpoint. *United States v. Lopez* has *Reno v. Condon*[168] and *Sabri v. United States*.[169] *City of Boerne v. Flores* and *Board of Trustees v. Garrett*[170] have *Nevada Department*

163. *See* Church of Lukumi Babalu Aye Inc. v. City of Hialeah, 508 U.S. 520, 531–33 (1993) (distinguishing between laws that only incidentally burden religion and legislation that is intended to burden religion).

164. *See* Employment Div. v. Smith, 494 U.S. 872, 876–82 (1990) (holding that laws of general applicability normally will not require strict scrutiny even if they adversely affect religious exercise).

165. *See* Mitchell v. Helms, 530 U.S. 793 (2000) (concluding that a government program that provides aid to public and private schools did not violate the Establishment Clause because it dispensed funds neutrally).

166. Bilionis, *supra* note 133, at 513–55.

167. *Id.* at 485.

168. 528 U.S. 141, 148 (2000) (upholding the Driver's Privacy Protection Act of 1994 as a valid exercise of Congress's Commerce Clause power).

169. 124 S. Ct. 1941, 1947–49 (2004) (upholding a federal statute criminalizing the offering of bribes to government officials as a valid exercise of the spending power and declining to extend the reasoning of *Lopez*).

170. 531 U.S. 356 (2001) (applying *City of Boerne v. Flores* and invalidating the abrogation of state sovereign immunity under Title I of the Americans with Disabilities Act as an unconstitutional exercise of the section 5 power).

of Human Resources v. Hibbs[171] and *Tennessee v. Lane*. *Adarand Constructors v. Pena*[172] and *City of Richmond v. Croson*[173] have *Grutter v. Bollinger*.[174] *Planned Parenthood v. Casey* has *Stenberg v. Carhart*;[175] *Washington v. Glucksberg* has *Lawrence v. Texas*. *Employment Division v. Smith*[176] has *Church of the Lukumi Babalu Aye v. City of Hialeah*;[177] *Mitchell v. Helms*[178] and *Zelman v. Simmons-Harris*[179] have *Locke v. Davey*.[180]

Bringing criminal justice into the broader narrative of constitutional law as we have does not dash all our prior understandings. It sharpens perspective, unearths unities, and softens the extremist tendencies to which appraisals of the Court and its work—and interpretations of those appraisals—are sometimes prone. From the legal academic's point of view, criminal justice may appear estranged from constitutional law and theory writ large. Yet we can see that it is as central to constitutional law's elaboration and evolution as any theorist could ask.[181] Criminal justice gave today's constitutional law its distinctive voice: the discourse of conservative law reform. Whether that discourse's migration from criminal justice to other areas of constitutional law represents a conscious decision by the Justices or instead was a subconscious replication of the familiar, comfortable, and successful is a question I do not propose to answer. It is enough to know that the

171. 538 U.S. 721 (2003) (announcing that the Family and Medical Leave Act is a constitutional exercise of Congress's section 5 authority).

172. 515 U.S. 200, 227 (1995) (announcing that strict scrutiny applies to all race-based classifications whether or not they are designed to benefit racial minorities).

173. 488 U.S. 469, 511 (1989) (invalidating an affirmative action program designed to strengthen participation of minority businesses in public projects).

174. 539 U.S. 306, 343–44 (2003) (upholding affirmative action program in law school admissions).

175. 530 U.S. 914, 945–46 (2000) (invalidating a state statute criminalizing partial birth abortions).

176. 494 U.S. 872, 876–82 (1990) (holding that laws of general applicability will not normally require strict scrutiny even if they adversely affect religious exercise).

177. 508 U.S. 520, 547 (1993) (invalidating an ordinance banning animal sacrifice because its sole purpose was to burden the practice of a particular religious group).

178. 530 U.S. 793, 828–29 (2000) (relaxing judicial scrutiny of government aid to religious schools).

179. 536 U.S. 639, 662–63 (2002) (upholding a private school voucher program because of the programs' neutrality with respect to religion).

180. 124 S. Ct. 1307, 1315 (2004) (permitting the government to exclude persons seeking theology degrees from a publicly funded scholarship program).

181. To be sure, this account places academic theoretical debates about originalism, textualism, the Living Constitution, and the like in a position of secondary importance. Such top-down theories might be criticized for pursuing an objective that can never be attained. *See* DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS (2002) (critiquing several prominent constitutional theories as flawed by their "foundationalism" assumptions). Whether or not that is so, such theories still retain the capacity to interest and inform us and to illuminate our understanding of the Court's work. But they do not corner the market on theory—if by theory we mean to include, as we should, satisfactory explanations of how constitutional law is actually elaborated.

affinities are too strong to be chalked up to coincidence. From the engaged observer's standpoint, criminal justice might seem mired in a nondescript retrenchment while the newer frontiers appear to unfold as places of protorevolutionary upheaval. After locating criminal justice's role in the larger narrative, however, we can see that neither perception captures the reality. All the fields are integrally connected in spirit, style, inspiration, strategy, and technique. They are the scenes of a long-term conservative reformation of constitutional law that is now into its fourth decade. This is the Rehnquist reformation.

If there are differences between the Rehnquist reformation of criminal justice and its reformation of other areas of constitutional law, they are principally ones of timing, breadth, and depth. As regards timing, the conservative political and cultural impetus to reform criminal justice arose thirty-five or more years ago. By the mid-1980s, reformation discourse was fully formed and dominating the Court's criminal cases. The forces that would propel conservative reform in other areas, by contrast, were at that time still shy of their tipping point. That point was reached in the late 1980s (for race) and the early to mid-1990s (for the rest). The end of the Cold War not only served to vindicate President Reagan's vision for America, but it erased a significant psychological factor in support of broader national power from the cultural calculus.[182] Bipartisan credence was lent to the conservative critique when President Clinton embraced much of it in the name of New Democrats, and the Republican triumph in the 1994 election only underscored its successful ascension. The Supreme Court by then was ready as well. New Justices congenial to these forces had taken their seats, and the Justices most solidly opposed to them had departed.[183] By the time the conditions were right for serious conservative reform in federalism, national power, race, and religion, the major work in criminal justice was nearly done. Indeed, this temporal difference may go a long way toward explaining why criminal justice falls by

182. *See* H.W. BRANDS, THE STRANGE DEATH OF AMERICAN LIBERALISM 165–74 (2001) (arguing that America is traditionally conservative and greatly skeptical of national power, but that in times of war and other such national crises, the country shows greater tolerance for claims to national power; arguing, further, that twentieth century liberalism in America depended upon a succession of national crises, including various wars, but that the conclusion of the Cold War has led to the demise of liberalism and a return to foundational conservative values).

183. Justice Antonin Scalia joined the Court in 1986, the same year that Justice Rehnquist assumed the Chief Justiceship. Justice Anthony M. Kennedy took his seat in 1988 and Justice Clarence Thomas followed in 1991. *See* SUPREME COURT OF THE UNITED STATES, *supra* note 37, at 1–2. The Court's foremost liberals, William J. Brennan and Thurgood Marshall, retired in 1990 and 1991 respectively. *See* SUPREME COURT OF THE UNITED STATES, MEMBERS OF THE SUPREME COURT OF THE UNITED STATES (2005), *at* http://www.supremecourtus.gov/about/members.pdf.

the narrative wayside these days. The pathbreaker begins to look like an unnewsworthy retrenchment as time passes and fresh battles are waged.

Criminal justice now stands heavily remade, whereas the transformation in other areas—although significant—does not run nearly so deeply or widely through the jurisprudence. Perhaps this difference in breadth and depth is merely symptomatic of the difference in timing. Reform does not occur overnight, and the newer frontiers simply may need more time to develop. Three facts, however, suggest that the difference in breadth and depth will endure.

The first fact is that criminal justice is an institutionally different creature from all the others. It is an identifiable administrative structure that operates within discrete metes and bounds on social problems—violence, thievery, and the like—that do not change all that significantly over time or place. That is why we can speak meaningfully about the criminal justice "system" and about changing its gears or levers to alter the machine's operation. The metaphor of machinery makes little sense when applied to the other areas of conservative reform. They are not systems in any helpful meaning of the word but instead are open, porous conceptual fields concerned with wide-ranging and nuanced social activity. The opportunities for working constitutional change in such environments are occasional and piecemeal. Reform's potential is thus limited.

The second fact is that the political economy of constitutional litigation in criminal justice differs from its counterparts in the other areas of conservative reform. The vehicles for change—cases—are plentiful in criminal justice, with fifty states, the District of Columbia, and the federal system bringing thousands upon thousands of prosecutions each year. With a prosecutor in every case, the incentive to advocate conservative reform is ever present, and the resources to press for it are ample and publicly funded. Appropriate vehicles for reform litigation are scarcer in the other areas we have been discussing, as they depend upon a coincidence of meaningfully challengeable governmental action and parties with the standing, the interest, the will, and the means to make the challenge on conservatism's terms. The federal government often is not a party; when it is, its interests do not always align and often will conflict with conservative reform. The states can be counted on to assert their sovereignty when they can, but their stances vis à vis the rest of conservative reform can vary widely when they are called upon to take a position. In short, the major repeat institutional players in these areas can bring nothing like the concerted, sustained support for conservative reform that criminal justice experienced.

No doubt, the resources for private parties to advocate conservative reform are enhanced by interest groups willing to provide direct representation, amicus curiae filings, and other assistance. The substantial difference between the political economies of litigation nonetheless remains.[184]

These two facts make it unlikely that conservative reform in other constitutional areas will prove as deep, broad, or disciplined as that which was achieved in criminal justice. Even if the political and cultural warrants for conservative reform are fully as strong in federalism, national power, race, rights, and religion as those that bore on criminal justice—a doubtful proposition—their realization is uniquely facilitated in criminal justice and hindered in the other fields.

The third fact is that time cuts more than one way. If time's passage can enable further conservative reform to occur, so too can it bring changes in the social conditions and sociopolitical forces that make conservative reform a lesser priority or even passé. Ultimately, forces can change for reasons independent of the law or in response to the very legal reforms that they once welcomed. Criminal justice knows about this. As we shall now see, it has important lessons to share with constitutional law.

II. POST-REFORMATION CRIMINAL JUSTICE

With his opinion in *Dickerson*[185] the Chief Justice distilled three decades into a single moment that signified the triumph of the Rehnquist reformation of criminal justice. The foremost symbol of Warren-style liberalism in criminal justice was reaffirmed precisely because it had been domesticated, confined by limiting interpretations and doctrines intended to accommodate conservative and pro-prosecution perspectives.[186]

It would have been impossible to say then, but it now seems that *Dickerson* also might mark the end of the Rehnquist reformation. As events of the past four years have made increasingly evident, criminal justice is

184. For good discussions of the relationship between resources and law reform, see Charles R. Epp, *External Pressure and the Supreme Court's Agenda*, *in* SUPREME COURT DECISION-MAKING, *supra* note 60, at 255; and Ruth B. Cowan, *Women's Rights Through Litigation: An Examination of the American Civil Liberties Union Women's Rights Project, 1971–1976*, 8 COLUM. HUM. RTS. L. REV. 373 (1976).

185. Dickerson v. United States, 530 U.S. 428 (2000).

186. In declaring peace with *Miranda*, the Chief Justice proclaimed the peace that a victor dictates. His opinion draws on the reformation story for its strength. Stare decisis principles do not merit the overruling of *Miranda*, the Chief Justice reasoned, because "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture" and "[i]f anything, our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief." *Id.* at 443–44.

now moving to different rhythms in the Supreme Court. A post-reformation criminal justice with an identifiable discourse of its own has begun.

A. Criminal Justice Decisions at the Dawn of the Twenty-first Century

Since *Dickerson* was decided, the Court has produced a run of cases that fails to conform to reformation expectations. Consider for openers *Atkins v. Virginia*[187] and *Ring v. Arizona*,[188] each a case overruling a prominent reformation precedent of the Rehnquist Court itself. In *Atkins*, the Court ruled by a 6-to-3 margin that the Constitution forbids the execution of a mentally retarded offender.[189] In so holding, the Court emphasized and strengthened its independent role under the Eighth Amendment to assure proportionality in capital sentencing[190] and overruled a thirteen-year-old precedent from the Rehnquist Court which in its own time meant to curtail such expansionist behavior under the Amendment.[191] The Chief Justice was in dissent with Justices Scalia and Thomas.[192] By a 7-to-2 vote four days later, the Court held in *Ring* that the Constitution requires a jury determination (rather than a judge's finding) of the existence of aggravating factors necessary to render a defendant eligible for the death penalty.[193] Another Rehnquist Court precedent was overruled, this time a 1990 decision emblematic of the reformation's resistance to constitutional claims from death row.[194] The turnabout was stark enough that Justice Scalia—unhappy with the Court's path back in 1990 only

187. 536 U.S. 304 (2002).

188. 536 U.S. 584 (2002).

189. *Atkins*, 536 U.S. at 321.

190. The *Atkins* Court widened the range of objective factors it considers in evaluating proportionality and stressed the need for the Justices' own judgment as well. *Id.* at 312–13.

191. The Court overruled *Penry v. Lynaugh*, 492 U.S. 302 (1989), insofar as that case held that the Eighth Amendment does not forbid the execution of the mentally retarded. Characteristic of the reformation, *Penry* gestured moderation with its second holding, finding infirmity in Texas's sentencing instructions for their failure to ensure the sentencing jury's consideration of the defendant's mental retardation as a mitigating circumstance. *Id.* at 318.

192. *Atkins*, 536 U.S. at 321 (Rehnquist, C.J., dissenting); *id.* at 337 (Scalia, J., dissenting) (joined by Rehnquist, C.J., and Thomas, J.).

Consistent with *Atkins* is the Court's decision in *Roper v. Simmons*, No. 03-633 (U.S. Mar. 1, 2005), handed down as this Article was going to press. In an opinion authored by Justice Kennedy, the Court held that the Eighth Amendment forbids the execution of a juvenile offender who was younger than eighteen at the time he committed the capital crime, finding the Court's decision to the contrary in *Stanford v. Kentucky*, 492 U.S. 361 (1989), "no longer controlling on this issue." *Roper*, No. 03-633, slip op. at 20. Justice O'Connor filed a dissent, and Justice Scalia filed a dissent joined by Chief Justice Rehnquist and Justice Thomas.

193. *Ring*, 536 U.S. at 609.

194. Walton v. Arizona, 497 U.S. 639 (1990), *overruled by Ring*, 536 U.S. 584.

because it was not reformationist enough, yet now voting with the majority to reverse course and overrule—felt it appropriate to publish his own special recipe for humble pie in a concurrence.[195] The Chief Justice dissented, as did Justice O'Connor.[196]

A major reformation precedent of earlier vintage fell during the 2003 Term in *Crawford v. Washington*.[197] A seven-Justice majority repudiated *Ohio v. Roberts*,[198] the 1980 landmark that announced a framework for judging the admissibility of hearsay under the Confrontation Clause. Paradigmatically reformationist, *Roberts* affirmed the confrontation right's symbolic reach but weakened its practical grasp by subordinating it to the search-for-truth principle popularized in the reformation cases.[199] It was just this paradigmatic reformationism that earned *Roberts* a two-count indictment from the *Crawford* Court. The Court found that the subordination maneuver itself was objectionable, for "[b]y replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design."[200] The license extended to judges was objectionable as well, for "[v]ague standard are manipulable"[201] and vest "too much discretion in judicial hands,"[202] which in the run of things will yield judgments that deny the full measure of constitutional protection.[203] Chief Justice Rehnquist and Justice O'Connor parted with the majority and would have let *Roberts* stand.[204]

These overrulings are not the only challenges to reformation ways. As criminal justice followers well know, the aforementioned *Ring* is part of a major

195. *Ring*, 536 U.S. at 610–13 (Scalia, J., concurring). Justice Scalia confessed that his initial hope that the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), might be limited so as to not affect capital sentencing could not withstand analysis. He admitted that he regarded the case as presenting him with a strategic choice: whether to stand by the principle of *Apprendi*—but thereby inadvertently promote the Court's Eighth Amendment jurisprudence to which he is opposed—or compromise *Apprendi*'s principles in order to continue his battle against the Court's capital punishment jurisprudence. He concluded that it was more important strategically to throw weight behind *Apprendi* in light of political resistance to its principles.

196. *Ring*, 536 U.S. at 619.

197. 124 S. Ct. 1354 (2004).

198. 448 U.S. 56 (1980).

199. *See supra* note 81 and accompanying text.

200. *Crawford*, 124 S. Ct. at 1373.

201. *Id.*

202. *Id.*

203. *Id.* at 1371–73 (criticizing judicial decisions admitting evidence under the *Roberts* framework, while not questioning the "utmost good faith" of the courts that have so erred).

204. *Id.* at 1374–78 (Rehnquist, C.J., concurring in the judgment) (joined by O'Connor, J.) (dissenting from Court's decision to overrule *Roberts* but believing that the *Roberts* framework was erroneously applied to the defendant's detriment by lower courts).

turn of events brought on by *Apprendi v. New Jersey*,[205] handed down the same morning as *Dickerson*. *Apprendi* and its progeny, especially the provocative *Blakely v. Washington*,[206] invalidate the mandatory determinate sentencing regimes of several states and the mandatory federal sentencing guidelines as well.[207] These decisions usher in understandings about the roles of the jury, the legislature, and courts in the administration of substantive criminal law that are at odds with those advanced during the Rehnquist reformation. In its early days, the Burger Court flirted with due process restrictions on a legislature's ability to define crimes in ways that minimize the prosecution's burden of proof and, by extension, avoid other constitutional protections of the accused such as the right to trial by jury.[208] Those expansionist impulses were squelched by reformation decisions, *Patterson v. New York*[209] foremost among them, that stressed legislative primacy over the definition of the elements of crimes and reduced the constitutional limitations to a formal etiquette supplemented by an indeterminate judicial authority to intervene in cases of extreme abuse.[210] With *Apprendi*, *Patterson*'s reformationist gospel about the trustworthiness of the political process in matters of crime and punishment and the value of judicial self-restraint has yielded the pulpit. A new creed now preaches the right to trial by jury and scolds judges who are unwilling to defend it vigorously against erosion at the hand of legislators too easily stirred by tough-on-crime sentiments.[211] Again, Chief Justice Rehnquist has been in dissent.[212]

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205. 530 U.S. 466 (2000) (holding that the Sixth and Fourteenth Amendments require that a jury find beyond a reasonable doubt any fact, except the fact of prior conviction, that increases a sentence beyond the statutory maximum).

206. 124 S. Ct. 2531 (2004) (holding that when a judge imposes a sentence greater than that justified by the facts found by the jury, the Sixth Amendment is offended). In addition to *Blakely* and *Ring*, *Apprendi*'s progeny include *Harris v. United States*, 536 U.S. 545 (2002), *United States v. Cotton*, 535 U.S. 625 (2002), and the most recent *United States v. Booker*, 125 S. Ct. 738 (2005). Significant decisions on the road to *Apprendi* are *Jones v. United States*, 526 U.S. 227 (1999), and *Almendarez-Torres v. United States*, 523 U.S. 224 (1998).

207. *Booker*, 125 S. Ct. at 746.

208. *See In re* Winship, 397 U.S. 358, 364 (1970) (holding that due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"); *see also* Mullaney v. Wilbur, 421 U.S. 684, 697–99 (1975) (reasoning that *Winship* is concerned with substance rather than form and hence restricts at least some reallocations of the burden of proof done by the designation of an affirmative defense). In *Winship* and *Mullaney*, the respective roles of legislature, jury, and court converged on the issue of the burden of proof; the implications for the right to a trial by jury were not then in the forefront.

209. 432 U.S. 197 (1977).

210. *See* Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1304–15 (1998) (discussing *Patterson* and other related reformation decisions).

211. *See Blakely*, 124 S. Ct. at 2539 n.10 (questioning the efficacy of political checks against derogation of the jury's role).

212. *Id.* at 2543–50 (O'Connor, J., dissenting) (joined by Breyer, J., and in part by Rehnquist, C.J., and Kennedy, J.); Ring v. Arizona, 536 U.S. 584, 619 (2002) (O'Connor, J., dissenting) (joined

The Fourth Amendment has attracted considerable attention from the Justices recently and the leading decisions in that area similarly depart from the reformation path. In *City of Indianapolis v. Edmond*,[213] the Court moved to curb the use of roadblocks and checkpoints for criminal investigative purposes, holding that seizures of motorists at checkpoints established for the "primary purpose" of advancing the "general interest in crime control" are unconstitutional notwithstanding the presence of secondary purposes, such as highway safety, which standing alone might justify such seizures.[214] In *Ferguson v. City of Charleston*,[215] the Court similarly limited searches done under the "special needs" exception to the general requirement that individualized suspicion is essential to constitutional reasonableness, holding the exception inapplicable where an immediate objective of the search is the acquisition of evidence for law enforcement use, even though the principal and ultimate purpose of the search is to promote goals distinct from the criminal law.[216] As the dissents (authored or joined by the Chief Justice) reveal, these decisions complicate a favorite reformation method for relaxing Fourth Amendment restrictions—the recognition of an exception to the touchstone of individualized suspicion where a search or seizure is related only tangentially to law enforcement, followed by expansion of that

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by Rehnquist, C.J.); Apprendi v. New Jersey, 530 U.S. 466, 523 (2000) (O'Connor, J., dissenting) (joined by Rehnquist, C.J., and Kennedy and Breyer, JJ.); *id.* at 555 (Breyer, J., dissenting) (joined by Rehnquist, C.J.).

213. 531 U.S. 32 (2000).

214. *Id.* at 44 (invalidating vehicle checkpoint established for primary purpose of intercepting illegal drugs). The Court distinguished *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990), involving a roadblock to intercept drunk drivers, and *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), involving a checkpoint to intercept illegal immigrants. *Edmond*, 531 U.S. at 43–44.

Edmond was clarified in *Illinois v. Lidster*, 540 U.S. 419 (2004). The Court upheld a highway checkpoint to seek information on a hit-and-run accident, explaining that *Edmond*'s reference to "general interest in crime control" was not intended to reach and preclude an information-seeking checkpoint of the sort presented in *Lidster*, and that Fourth Amendment principles commend the distinction as well. *Id.* at 423–24.

215. 532 U.S. 67 (2001).

216. *Id.* at 84–86 (striking down program that called for drug testing of pregnant women, assumed for purposes of analysis to be nonconsensual, with positive results of such tests to be forwarded to law enforcement authorities in the event that the patient declined referral for treatment). The Court distinguished the four previous drug-testing cases it decided under the special needs doctrine—*Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 624–32 (1989), permitting suspicionless drug testing of railway employees involved in train accidents; *Treasury Employees v. Von Raab*, 489 U.S. 656, 667–77 (1989), permitting suspicionless drug testing of U.S. Custom Service employees seeking promotion to "sensitive" positions; *Vernonia School District 47J v. Acton*, 515 U.S. 646, 660–64 (1995), permitting random drug testing of student athletes; and *Chandler v. Miller*, 520 U.S. 305, 321–22 (1997), striking down a law requiring suspicionless drug testing of candidates for state office. *Ferguson*, 532 U.S. at 77–84.

exception in practice by ignoring police motivations and other institutional realities that might upset the notion that the relation is all that tangential.[217]

Discomfort with (and discomfiture of) the reformation's posture toward the Fourth Amendment was a leitmotif of the Court's 2000 Term. In addition to *Edmond* and *Ferguson*, the Court also decided *Kyllo v. United States*,[218] *Arkansas v. Sullivan*,[219] and *Atwater v. City of Lago Vista*.[220] *Kyllo* held that government use of a device—there, a thermal imager—"to explore details of [a] home that would previously have been unknowable without physical intrusion" is a "search" within the meaning of the Fourth Amendment and is "presumptively unreasonable without a warrant," at least in the case of "a device that is not in general public use."[221] During the reformation years, among the ways the Justices limited Fourth Amendment regulation was to place formalistic glosses on the familiar "reasonable expectation of privacy" test drawn from the Warren Court's decision in *Katz v. United States*,[222] thereby defining various forms of surveillance and information gathering as not "searches" subject to the Amendment's oversight.[223] The government's straightforward reliance upon those formalisms impressed the dissenters in *Kyllo*, an unusual foursome of Chief Justice Rehnquist and Justices Stevens, O'Connor, and Kennedy.[224] Justice

217. The dissents in both cases rested their arguments on that reformationist ground. *Edmond*, 531 U.S. at 49–56 (Rehnquist, C.J., dissenting) (arguing that roadblock seizures should be governed by a balancing test that avoids inquiry into subjective police motivations and disregards ulterior law enforcement purposes as inconsequential); *Ferguson*, 532 U.S. at 98–103 (Scalia, J., dissenting) (arguing that an additional law enforcement-related purpose should not destroy the applicability of the "special needs" doctrine where there is a legitimate "special needs" purpose present).

218. 533 U.S. 27 (2001).

219. 532 U.S. 769 (2001) (per curiam).

220. 532 U.S. 318 (2001).

221. *Kyllo*, 533 U.S. at 40.

222. 389 U.S. 347, 353 (1967) (holding that government eavesdropping with a listening device placed on the outside of a phone booth constituted a "search" under the Fourth Amendment because it invaded the privacy upon which Katz "justifiably relied"); *see also id.* at 361 (Harlan, J., concurring) (stating that a search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable).

223. Among the formalistic glosses on *Katz* were the Court's holdings that observations aided by sensory enhancement devices are akin to observations of items revealed to the public. *See, e.g.*, Florida v. Riley, 488 U.S. 445, 451–52 (1989) (holding that aerial surveillance of a residential greenhouse from an altitude of 400 feet is not a "search"); California v. Greenwood, 486 U.S. 35, 39–44 (1988) (determining that trash placed outside the home for collection is tantamount to abandoned property in which an individual enjoys no expectation of privacy); California v. Ciraolo, 476 U.S. 207, 211–15 (1986) (holding that aerial surveillance of a fenced backyard from an altitude of 1000 feet is not a "search"); Smith v. Maryland, 442 U.S. 735, 741–46 (1979) (concluding that the numbers dialed from a home telephone are analogous to information voluntarily shared with the outside world and thus trigger no reasonable expectation of privacy).

224. Relying upon cases such as *Greenwood*, *Riley*, and *Ciraolo*, the government argued that the thermal imaging device was not collecting information from the interior of Kyllo's home but was

Scalia's opinion for the majority, however, rejected their application as a "mechanical interpretation" of the Amendment insensitive to the privacy of homeowners and antithetical to *Katz*.[225] The case casts three reformation decisions in doubt and registers an appetite for privacy protection under the Fourth Amendment not displayed by a majority of the Court in many years.[226]

Unlike *Kyllo*, *Sullivan* and *Atwater* reached pro-prosecution results. Nevertheless, it is the content of the opinions that taxes reformation sensibilities. The backdrop is another reformation method for curtailing Fourth Amendment regulation, which we may call the "*Whren*" approach, after the unanimous 1996 decision *Whren v. United States*[227] that grounded it in Fourth Amendment law. Under the *Whren* approach, objections to the reasonableness of an arrest based on a claim of impermissible or pretextual motivations are precluded so long as the law enforcement activity is objectively supportable by probable cause.[228] Whatever the wisdom of avoiding case-by-case inquiries into a particular officer's actual mindset, critics believe the *Whren* approach leaves serious problems of police abuse unsolved and breeds a climate conducive to further abuse.[229] It is said that the approach masks and thereby encourages racial profiling, a practice that earned increasingly widespread attention and public disapproval in the years prior to the September 11 attacks.[230] Given the proliferation of minor offenses available to substantiate

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merely detecting "heat radiating from the external surface of the house." *Kyllo*, 533 U.S. at 35 (quoting Brief for the United States at 26). Justice Stevens's dissenting opinion, joined by Chief Justice Rehnquist and Justices O'Connor and Kennedy, looked with favor on the argument. *Id.* at 42–44 (Stevens, J., dissenting).

225. *Id.* at 35. For a discussion of how *Kyllo* hearkens to *Katz* and offers a more well-rounded originalism, see David A. Sklansky, *Back to the Future:* Kyllo, Katz, *and Common Law*, 72 MISS. L.J. 143 (2002).

226. The cases thrown into question are *Riley*, *Ciraolo*, and *Smith*.

227. 517 U.S. 806 (1996).

228. *Id.* at 813.

229. *See* Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 1032–43 (2002) (criticizing the Court's failure to squarely face the racial dimension of the police activity at issue in *Whren*); David A. Harris, *"Driving While Black" and (All) Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997); Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Board*, 28 COLUM. HUM. RTS. L. REV. 551 (1997); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998); *see also* Albert J. Meehan & Michael C. Ponder, *Race and Place: The Ecology of Racial Profiling African American Motorists*, 19 JUST. Q. 399 (2002) (reporting data showing disproportionate surveillance and stops of African American motorists).

230. *See* Harriet Barovick, *DWB: Driving While Black*, TIME, June 15, 1998, at 35; Henry Louis Gates, *Thirteen Ways of Looking at a Black Man*, NEW YORKER, Oct. 23, 1995, at 56; Tracey Maclin, *Can a Traffic Offense Be DWB (Driving While Black)?*, L.A. TIMES, Mar. 9, 1997, at M2. The issue gained enough prominence that it was the subject of comment during debates between the presidential and vice-presidential candidates in the 2000 election. *See* Lars-Erik Nelson, *Changing the Profile at Customs, Former NYPD Commissioner Ray Kelly Has Ended Racial Profiling, and Drug Seizures Have Gone Up*,

objectively a seizure or search, the *Whren* approach also is faulted for inviting intrusions on liberty and privacy that are disproportionate to the substantive criminal law interests that society might legitimately have at stake. The weight of the foregoing criticism wore on the Court in both of the cases in question.

Sullivan was an unremarkable drug case until the Arkansas Supreme Court took the attacks on *Whren* to heart and refused to apply its teachings to similar facts.[231] More noteworthy than the United States Supreme Court's summary reversal was Justice Ginsburg's separate concurring opinion joined by Justices Stevens, O'Connor, and Breyer.[232] The concurring Justices sympathized with the Arkansas court's concerns with the "disturbing discretion to intrude on individuals' liberty and privacy" that the law now affords and they announced their willingness to reconsider the law in the area if experience demonstrates that police are abusing the discretion the law grants them.[233] With this, *Sullivan* deepened cracks in the *Whren* approach that came to light five weeks earlier in the *Atwater* case. A five-Justice majority there upheld Gail Atwater's full custodial arrest—replete with handcuffing, booking, mugging, a search at the station house, and jailing—for minor traffic offenses that could subject her only to a small fine, ruling that warrantless custodial arrests are per se reasonable when based on probable cause even if the offense in question is minor and carries no prospective jail time.[234] The four Justices

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DAILY NEWS (New York), Oct. 15, 2000, at 43 (noting that both Al Gore and George W. Bush condemned racial profiling); James Ragland, *The Reality of Racial Profiling*, DALLAS MORNING NEWS, Oct. 13, 2000, at 1C (noting the discussion of racial profiling during the vice-presidential debates).

In the wake of the tragedies of September 11, discussions about racial profiling took a turn as its use in the prevention of terrorist attacks came under consideration. Some scholars have explored the arguments supporting limited racial or ethnic profiling. *See, e.g.*, Sherry Colb, *Profiling With Apologies*, 1 OHIO ST. J. CRIM. L. 611 (2004); Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413 (2002); Stuntz, *Local Policing*, *supra* note 34. Others have remained critical of profiling even in such limited circumstances. *See, e.g.*, Sharon L. Davies, *Profiling Terror*, 1 OHIO ST. J. CRIM. L. 45 (2003).

231. State v. Sullivan, 16 S.W.3d 551 (Ark. 2000) (opinion on petition for rehearing). In *Whren*, the defendant was stopped in his vehicle ostensibly so that officers could issue him a warning for traffic violations they had observed. In the course of that stop, evidence of drug violations was observed. *Whren*, 517 U.S. at 808–10. In *Sullivan*, the defendant similarly was stopped in his vehicle upon probable cause of a traffic violation. Sullivan was arrested and an inventory search of his vehicle subsequent to the arrest turned up evidence of drug violations. Arkansas v. Sullivan, 532 U.S. 769, 769–70 (2001) (per curiam).

232. *Sullivan*, 532 U.S. at 772–73 (Ginsburg, J., concurring).

233. *Id.*

234. Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) (holding that "the standard of probable cause 'applie[s] to all arrests, without the need to 'balance' the interests and circumstances involved in particular situations'" and that, accordingly, "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender" (quoting Dunaway v. New York, 442 U.S. 200, 208 (1979))).

who concurred specially in *Sullivan* were in dissent in *Atwater*, asserting that full-strength application of the *Whren* approach, without auxiliary checks on police discretion, is more than the Fourth Amendment can bear when the offense is small. It is one thing to leave officers unfettered discretion to stop and issue citations to offenders so long as probable cause is objectively present, they argued, but quite another to let officers also decide for themselves whether to escalate the event into a full custodial arrest with all of its added intrusions and indignities.[235] The latter, they concluded, defies the Amendment's sense of proportion and reason and is prone to police abuses of just the sort that the public clamor over racial profiling has decried.[236] Interestingly, Justice Souter's opinion for the majority took a small turn of its own against *Whren* and its reformationist spirit by registering a disagreement with the dissenters that was more empirical than philosophical. Not unlike the dissenters, Justice Souter identified room in the Fourth Amendment for deviations from the *Whren* approach when the benefits (in terms of checking real, rather than merely hypothesized, abuses) outweigh the costs. Atwater's challenge, for Souter, ultimately failed on the facts; he saw "no evidence of widespread abuse of minor-offense authority"[237] that would justify adoption of what likely would be a cumbersome new constitutional rule of doubtful effectiveness at the margins.[238]

The Court acknowledged a small exception—where the arrest is made in an "extraordinary manner, unusually harmful to . . . privacy or . . . physical interests." *Id.* (quoting *Whren*, 517 U.S. at 818).

235. *Id.* at 368 (O'Connor, J., dissenting) (joined by Stevens, Ginsburg, and Breyer, JJ.).

236. *Id.* at 372 (O'Connor, J., dissenting). Justice O'Connor wrote:

> Such unbounded discretion carries with it grave potential for abuse. The majority takes comfort in the lack of evidence of "an epidemic of unnecessary minor-offense arrests." But the relatively small number of published cases dealing with such arrests proves little and should provide little solace. Indeed, as the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual. After today, the arsenal available to any officer extends to a full arrest and the searches permissible concomitant to that arrest. An officer's subjective motivations for making a traffic stop are not relevant considerations in determining the reasonableness of the stop. But it is precisely because these motivations are beyond our purview that we must vigilantly ensure that officers' post-stop actions—which are properly within our reach—comport with the Fourth Amendment's guarantee of reasonableness.

Id. (citations omitted).

237. *Id.* at 354 n.25.

238. *Id.* at 347–54. To the extent that Justice Souter's calculus rested heavily on the premise that legal history favored the reasonableness of police discretion in this area, it bears mention that his assessment of that history has been criticized. *See* Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in* Atwater v. Lago Vista, 37 WAKE FOREST L. REV. 239 (2002).

Earlier during the same term, Justice Breyer authored a majority opinion in *Illinois v. McArthur*, 531 U.S. 326 (2001), that similarly reserved the possibility of Fourth Amendment limits on police activity in cases where the offense under investigation is minor. The Court

The Court's most notable recent decisions concerning the Fifth Amendment's privilege against self-incrimination parallel what we just saw in the Fourth Amendment. This past Term in *Missouri v. Seibert*,[239] the Court took action against a clever interrogation technique calculated to secure a confession by exploiting the letter of the reformation's *Oregon v. Elstad*[240] to circumvent *Miranda*'s spirit.[241] The Court refused to let its reformation precedent serve as a license to evade limits imposed on liberty's behalf and, just as in *Edmond* and *Ferguson*, it grafted a new restriction onto the law to head off police abuse (despite uncertainty among the five-Justice majority as to the precise form the restriction ought to take).[242] Chief Justice Rehnquist again was in the minority, joining a dissent authored by Justice O'Connor.[243] In *United States v. Patane*,[244] decided on the same day as *Seibert*, the question was whether a failure to administer the *Miranda* warnings requires not only exclusion of a resulting confession but also physical evidence discovered as a consequence. As in *Atwater* and *Sullivan*, the pro-prosecution answer seemed to follow easily from reformation precedents, and a five-Justice Court held that the evidence indeed was admissible. Yet only three Justices gave the reformation syllogism a vote of full confidence.[245] Four dissenters went the other way entirely and

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upheld an officer's refusal to allow the defendant to enter his own residence unaccompanied by a police officer while a search warrant was being procured. The government's interest—preserving evidence of a jailable offense—was held sufficient to justify the restriction. Justice Breyer explicitly reserved judgment on "whether the circumstances before us would have justified a greater restriction for this type of offense or the same restriction were only a 'nonjailable' offense at issue." *Id.* at 336; *see also* United States v. Knights, 534 U.S. 112, 122–23 (2001) (Souter, J., concurring) (questioning whether the *Whren* approach should apply to police activity controlled by *Terry v. Ohio*, 391 U.S. 1 (1968), and its progeny).

239. 124 S. Ct. 2601 (2004).

240. 470 U.S. 298 (1985) (holding that the exclusionary rule does not apply to a voluntary confession preceded by *Miranda* warnings that follows a voluntary, but unwarned, confession).

241. Following departmental advisories, the police officer began questioning Seibert without reading her *Miranda* rights. After obtaining a confession, the officer promptly advised her of her rights, confronted her with her previous, unwarned statement, and got her to repeat the confession she just had made. *Seibert*, 124 S. Ct. at 2605–06.

242. Justice Souter, writing for the plurality, adopted a test that asks whether the intervening *Miranda* warnings, when considered in the context of the entire police encounter, are effective in advising the suspect of her rights. *Id.* at 2611–12. Justice Kennedy would have adopted a narrower test, deviating from the *Elstad* rule only when the police deliberately use the two-step interrogation technique employed in this case. *Id.* at 2614–16 (Kennedy, J., concurring in the judgment).

243. *Id.* at 2616 (O'Connor, J., dissenting) (joined by Rehnquist, C.J., and Scalia and Thomas, JJ.).

244. 124 S. Ct. 2620 (2004).

245. Justice Thomas, in a plurality opinion joined by Chief Justice Rehnquist and Justice Scalia, argued that because the defendant's constitutional rights are not violated until the prosecution seeks to introduce the illegally obtained statements at trial, and because a failure to advise the defendant of his *Miranda* rights is not in itself a constitutional violation, there is no reason to fashion a "fruit of the poisonous tree" doctrine to deter police from interrogating a suspect before reading his *Miranda* rights. *Id.* at 2625–29 (Thomas, J.).

would have suppressed the evidence by applying the "fruit of the poisonous tree" doctrine.[246] Justices Kennedy and O'Connor joined the Court's judgment on narrower grounds, distancing themselves from the stronger anti-*Miranda* implications of the plurality opinion and leaving open the exclusionary rule's potential application in cases that present a greater risk to *Miranda*'s core concern that coerced incriminating statements not be admitted at trial.[247]

Chavez v. Martinez,[248] the 2002 Term's major *Miranda* decision, at first blush seems High Reformation in result and style. The Court held that no damages action lies for a plaintiff who was interrogated in violation of *Miranda* but who did not suffer the use of his statement at a criminal trial, thereby apparently endorsing the reformation postulate that the Fifth Amendment privilege is merely a trial right and hence indifferent to coercive police interrogation unless it produces an incriminating statement that is offered at trial.[249] On closer reading, however, the case looks increasingly like a Fifth Amendment reincarnation of *Atwater*, revealing a Court with significant reservations about the reformation's stratagem for curtailing the privilege. Justice Kennedy's separate opinion delivered as robust a reading of the Fifth Amendment as has been seen in a long time. For Justice Kennedy, and Justices Stevens and Ginsburg who joined him, the privilege against self-incrimination is not merely an evidentiary rule but a substantive constraint on governmental conduct; it protects us and our liberty at the moment of compulsion and its guarantee is fully violated at the moment compulsion is brought to bear on the individual.[250] Significantly, two other members of the Court—Justice Souter, joined by Justice Breyer—also rejected the reformation position that the Fifth

246. *Id.* at 2631–32 (Souter, J., dissenting) (joined by Stevens and Ginsburg, JJ.); *id.* at 2632 (Breyer, J., dissenting).

247. *Id.* at 2630–31 (Kennedy, J., concurring in the judgment) (joined by O'Connor, J.). Their position would seem to leave open, for instance, the case of a deliberate avoidance of *Miranda* in order to acquire a confession that might be used to impeach under *Harris v. New York*, 401 U.S. 222 (1971), which held that the defendant's voluntary statement obtained in violation of *Miranda* may be used to impeach the defendant's testimony at trial.

248. 538 U.S. 760 (2003).

249. *Id.* at 770–71. In *Michigan v. Tucker*, for instance, the Court noted that *Miranda*'s procedural safeguards are not constitutional rights in themselves but serve merely to insure that the right against self-incrimination at trial is protected. Michigan v. Tucker, 417 U.S. 433, 444–46 (1974) (holding that the testimony of the witness was admissible notwithstanding the fact that the witness's identity became known to authorities through the defendant's voluntary confession obtained in violation of *Miranda*). For a development of the arguments from reformationist premises for limiting the consequences of a failure to provide *Miranda* warnings, see Steven D. Clymer, *Are Police Free to Disregard* Miranda?, 112 YALE L.J. 447 (2002). For criticism of the characterization of the privilege as a "trial right," see Thomas Y. Davies, *Farther and Farther From the Original Fifth Amendment: The Recharacterization of the Right Against Self-Incrimination as a "Trial Right" in* Chavez v. Martinez, 70 TENN. L. REV. 987 (2003).

250. *Chavez*, 538 U.S. at 789–99 (Kennedy, J., concurring in part and dissenting in part).

Amendment privilege, properly interpreted, is nothing but a trial right. Justice Souter openly accepted a role for the Court to expand the privilege's protection where it is "clearly shown to be [a] desirable means to protect the basic right against the invasive pressures of contemporary society."[251] Echoing his opinion in *Awater*, Justice Souter saw the question as a pragmatic and empirical one: whether extending the privilege "to the point of civil liability" is justified by a powerful showing of its necessity and supported by a "realistic assessment of costs and risks."[252] Martinez's claim for a civil cause of action to buttress the privilege failed not perforce the reformation's narrow interpretive postulate; indeed, that position failed to command a majority. The claim failed for want of a record demonstrating its worth as a means to remedy some systematic deficiency in the law's protection of the privilege and its values.[253]

Many of the Court's other criminal justice decisions still appear to track the reformation path. The Court remains reluctant to get into the business of proportionality review in noncapital cases under the Eighth Amendment while equally reticent to disclaim the power to do so.[254] It still is partial to its distinction between police encounters and Fourth Amendment seizures,[255] and it remains sympathetic to the police officer who

251. *Id.* at 777 (Souter, J., concurring in the judgment).

252. *Id.* at 778.

253. *Id.* Even then, Martinez's civil suit was permitted to go forward on a claim that the coercive questioning violated substantive due process—a standard that the Court did not fully flesh out but that plainly requires a more severe showing of government abuse of power than would a claim brought under the Fifth Amendment privilege. *Id.* at 780 (Souter, J.). Justice Souter's opinion for the Court, joined by Justices Stevens, Kennedy, Ginsburg, and Breyer, was one sentence long: "Whether Martinez may pursue a claim of liability for a substantive due process violation is thus an issue that should be addressed on remand, along with the scope and merits of any such action that may be found open to him." Justice Thomas filed an opinion arguing that the case fell short of a substantive due process violation. *Id.* at 776 (Thomas, J.) (joined by Rehnquist, C.J., and Scalia, J.). Justice Scalia filed an opinion agreeing with Justice Thomas that the substantive due process claim lacked merit, but added that the claim also had been forfeited by Martinez in the proceedings below. *Id.* at 783 (Scalia, J., concurring in the judgment in part). Justice O'Connor joined none of the foregoing opinions on the substantive due process question and took no position on the issue.

For a discussion of *Chavez*, with an exploration of the possible paths that substantive due process review of coercive interrogations might take, see Carolyn J. Frantz, Chavez v. Martinez's *Constitutional Division of Labor*, 2003 SUP. CT. REV. 269, 291–300.

254. In *Lockyer v. Andrade*, 538 U.S. 63, 73–74 (2003), and *Ewing v. California*, 538 U.S. 11, 20–23 (2003), the Court left open the possibility that the Eighth Amendment's "gross disproportionality" principle might require the invalidation of punishments less severe than execution, but upheld the severe sentences in the two cases imposed under California's "Three Strikes and You're Out" law.

255. *See, e.g.*, United States v. Drayton, 536 U.S. 194, 201, 207–08 (2002) (applying the approach set forth in *Florida v. Bostick*, 501 U.S. 429 (1991), and finding that no seizure of passengers occurred when officers boarded a bus).

is engaged in an authorized stop[256] or an arrest.[257] The Court appears fairly settled into its nonretroactivity doctrine[258] and reasonably satisfied with its approach to the Sixth Amendment's implications for police investigations[259] and the dependence of the Fifth Amendment privilege on the risk of criminal exposure.[260] It likewise seems content with the general framework of its

256. *See, e.g.*, Hiibel v. Sixth Judicial Dist. Ct. of Nev., 124 S. Ct. 2451, 2458–60 (2004) (upholding "stop and identify" statutes but tying the legitimacy of the questioning to the basis for investigation that legitimates the stop under the Fourth Amendment in the first instance). The tougher wrinkle in the case is whether such statutes implicate Fifth Amendment rights; the Court noted that requiring a suspect to identify himself or herself generally will not offend the Fifth Amendment because it is highly unlikely such information would be incriminating, but the Court also observed that there would be occasions to the contrary. *Id.* at 2460–61; *see also* United States v. Flores-Montano, 124 S. Ct. 1582, 1587 (2004) (upholding a border search of the gas tank of a vehicle; leaving open a possibility that some searches at the border might be so destructive as to be unreasonable); United States v. Arvizu, 534 U.S. 266, 277–78 (2002) (upholding the admission of evidence discovered in an investigatory stop because the circumstances of the encounter as a whole raised reasonable suspicion).

257. *See, e.g.*, Thornton v. United States, 124 S. Ct. 2127, 2129 (2004) (holding that the rule established in *New York v. Belton*, 453 U.S. 454 (1981), permitting the search of a vehicle compartment upon arrest of an occupant, "governs even when an officer does not make contact until the person arrested has left the vehicle") (for more on *Thornton*, see *infra* note 262); Maryland v. Pringle, 540 U.S. 366 (2003) (holding that probable cause to arrest the driver and passengers in a vehicle existed when cocaine was found in the back seat and money was found in the glove box); United States v. Banks, 540 U.S. 31 (2003) (finding no violation of the Fourth Amendment "knock-and-announce" requirement when officers entered some fifteen to twenty seconds after announcing their presence); *see also* Kirk v. Louisiana, 536 U.S. 635 (2002) (per curiam) (reversing the lower court and holding that warrantless entry of the home to arrest the defendant violated the Fourth Amendment under the clear authority of *Payton v. New York*, 445 U.S. 573 (1980)).

258. *See, e.g.*, Schriro v. Summerlin, 124 S. Ct. 2519, 2522–23 (2004) (applying *Teague v. Lane*, 489 U.S. 288 (1989), in a straightforward manner); Beard v. Banks, 124 S. Ct. 2504, 2515 (2004) (same).

259. *See, e.g.*, Fellers v. United States, 124 S. Ct. 1019, 1022–23 (2004). In *Fellers*, the Court found error in the lower court's analysis of whether an incriminating statement should be admitted when it followed an earlier statement elicited from the defendant in violation of Sixth Amendment standards forbidding the "deliberate elicitation" of incriminating information from the defendant outside the presence of counsel. The Court remanded for consideration of whether the fact that the second statement was obtained at a different location after *Miranda* warnings and a waiver of Sixth Amendment rights rendered it admissible despite the preceding deliberate elicitation. *See also* Texas v. Cobb, 532 U.S. 162, 168 (2001) (reversing lower court's decision excluding statements made to the police concerning a murder where the defendant has been indicted only for burglary; reaffirming that the Sixth Amendment right attaches only to the crimes with which the accused has been formally charged).

260. *See, e.g.*, *Hiibel*, 124 S. Ct. at 2460–61 (holding that a requirement that the suspect identify himself does not generally implicate the Fifth Amendment because it is highly unlikely that such information could be used against him); McKune v. Lile, 536 U.S. 24, 48 (2002) (rejecting a Fifth Amendment challenge to a prison sex offender's program in which the participants were required to admit their guilt or be transferred to a prison with less favorable conditions); Ohio v. Reiner, 532 U.S. 17, 21–22 (2001) (per curiam) (holding that a denial of all guilt does not negate the privilege against self-incrimination).

jurisprudence on the right to counsel,[261] the due process obligations of the prosecution,[262] and the procedural regulation of capital punishment under the Eighth and Fourteenth Amendments.[263] Some division is of course inevitable, but activity in these areas for the moment appears to lie within the standard deviation.

Yet still, one can sense a distinct change in atmosphere in these decisions. The opinions lack the deep antagonism toward liberal jurisprudence and the determination to displace it that we have come to expect from reformation cases. One is far more likely these days to encounter a misgiving about reformationist thinking[264]—or a holding that puts out the word that reformation precedents are no longer, if they ever were, invitations to dispatch the liberty interests of suspects and defendants.[265]

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261. *See, e.g.*, Iowa v. Tovar, 124 S. Ct. 1379, 1383 (2004) (holding that the Sixth Amendment does not require courts to advise pro se defendants who plead guilty of the benefits an attorney could provide); Alabama v. Shelton, 535 U.S. 654 (2002) (holding that the Sixth Amendment forbids, in the absence of counsel, the imposition upon an indigent defendant of a suspended sentence that may result in the actual deprivation of the defendant's liberty).

262. *See, e.g.*, Illinois v. Fisher, 124 S. Ct. 1200, 1200–03 (2004) (holding that where the government in good faith and according to standard procedures destroyed potentially useful evidence while the defendant was a fugitive, the defendant was not denied due process).

263. *See, e.g.*, Kelly v. South Carolina, 534 U.S. 246, 257–58 (2002) (declaring *Simmons v. South Carolina*, 512 U.S. 154 (1994), applicable where the jury's only sentencing options are execution and life without parole, and holding unconstitutional under the circumstances an instruction that the defendant would be eligible for parole under a life sentence); Penry v. Johnson, 532 U.S. 782, 803–04 (2001) (*Penry II*) (holding unconstitutional instructions that failed to adequately instruct the jury on the role of mitigating evidence in a capital sentencing proceeding); Shafer v. South Carolina, 532 U.S. 36, 48 (2001) (holding that where death and life imprisonment are the only two sentencing options, a failure to instruct that parole was unavailable for life imprisonment constituted a denial of due process).

264. *See, e.g.*, Thornton v. United States, 124 S. Ct. 2127, 2133–38 (2004) (Scalia, J., concurring in the judgment) (joined by Ginsburg, J.) (criticizing as strained the reasoning of the majority and its approach to searches of vehicles incident to the arrest of an occupant under *New York v. Belton*, 453 U.S. 454 (1981), and proposing an alternative approach that would permit such searches when justified on evidence-seeking grounds); *id.* at 2133 (O'Connor, J., concurring in part) (seeing the Court's opinion as a logical extension of *Belton* but expressing dissatisfaction with the state of the law in the area, believing that searches of a vehicle incident to an occupant's arrest are now being seen as a police "entitlement" rather than as an exception, and indicating some agreement with the position advanced by Justice Scalia); *id.* at 2138–40 (Stevens, J., dissenting) (joined by Souter, J.) (criticizing the *Belton* rule as unnecessarily lenient toward the police and erroneously extended by the majority).

265. *See, e.g.*, Smith v. Texas, 125 S. Ct. 400 (2004) (per curiam) (rejecting the Texas Court of Criminal Appeal's narrow interpretation of *Penry II*, 532 U.S. 782); Tennard v. Dretke, 124 S. Ct. 2562, 2572–73 (2004) (rejecting the Fifth Circuit's interpretation of *Penry II* for being too narrow); Groh v. Ramirez, 124 S. Ct. 1284, 1290–94 (2004) (finding a search warrant plainly invalid for failing to meet the Fourth Amendment's particularity requirement, and holding that the officer was not entitled to qualified immunity in relying on the warrant); Banks v. Dretke, 540 U.S. 665 (2004) (holding that the defendant did not receive a fair trial when the prosecution concealed evidence that its key witness was a paid informant and that the arrest was a setup); Wiggins v. Smith, 539 U.S. 510, 534–38 (2003) (finding ineffective assistance of counsel where the capital defendant's attorney failed to look further than the presentence report for mitigating evidence); Kaupp v. Texas, 538 U.S. 626, 626–33

B. The Post-Reformation Turn

It is hard to characterize these recent cases as a faithful continuation of the Rehnquist reformation. Reformation decisions are being overruled. Reformation strategies are being challenged and countered. Reformation jurisprudence is being resisted as normatively malnourished and unresponsive to contemporary law enforcement threats to liberty. There is increasingly vocal skepticism of the system's fairness and justness. Curtailment of constitutional rights and remedies thought to be unduly broad is no longer the first instinct nor even a strong motivation. There is new warmth toward individual rights. Expansion is occurring, and even when declined, its possibility is entertained freely. If this is the Rehnquist reformation, why is its leader—his wide-ranging successes so broadly recognized—now so often in dissent?

A better take, which is to say one more conducive to constructive analysis, is to recognize that we are witnessing the birth of a new period. Post-reformation criminal justice has begun.

A deeper look confirms the turn that has been taken. Examine the cases and you will see that the distinctive reformation discourse that once ruled the field (and now imbues other areas of constitutional law) has faded. The ingredients that gave the Rehnquist reformation its verve—a clear reform vision drawn from critical conservative sentiments in American politics, reflected in a deeply embedded antagonism toward liberal criminal justice that is buffered by a strategic moderation—are now scarcely detectible. Similarly, the doctrinal techniques that reformation discourse employed to keep its project on message are plainly relaxing their grip. Dichotomies are softening. Ideological postulates are easing their hold. Brackets are being released. There is a palpable sense of broadened amenability to inquiry and lessened resistance to the prospect of an expansion of right or remedy.

(2003) (per curiam) (reversing lower court and holding a confession inadmissible as the fruit of an illegal arrest where the police, without probable cause, took the defendant from his home during the early morning hours and took him to the police station for interrogation); Massaro v. United States, 538 U.S. 500, 502, 509 (2003) (holding that the defendant's failure to raise his ineffective assistance claim on direct appeal did not bar him from raising it on collateral appeal); Miller-El v. Cockrell, 537 U.S. 322, 346–48 (2003) (stating that the lower courts failed to give full consideration to the substantial evidence that the defendant presented in support of his claim that peremptory challenges were used in a racially discriminatory fashion); Lee v. Kemna, 534 U.S. 362, 387 (2002) (rejecting an especially strict state procedural bar rule); *Penry II*, 532 U.S. at 803–04 (holding unconstitutional jury instructions that failed adequately to instruct the jury on the role of mitigating evidence in the capital sentencing phase); *Shafer*, 532 U.S. at 48–49 (holding that where death and life imprisonment are the only two sentencing options, a failure to instruct that parole was unavailable for life imprisonment constituted a denial of due process); Williams v. Taylor, 529 U.S. 362, 398–99 (2000) (holding that a capital defendant was denied his right to effective assistance of counsel where his lawyers failed to investigate and present to the jury substantial mitigating evidence).

The dissolution of reformation discourse in criminal justice really ought not surprise us. Success can breed obsolescence. Three decades of reformation decisionmaking have not been for nothing, and the social, cultural, and political forces that summoned and sustained it through the years have been satisfied and have dissipated. Though the old vision surfaces occasionally,[266] no one can claim credibly that its continued vindication is still backed by weighty popular sentiments in contemporary politics and culture. If anything, the fairer statement is that crime—as opposed to terrorism—no longer occupies a prominent place on the formal national political agenda. The parties and their politicians have little of substance to say and certainly do not espouse comprehensive narratives about law and order and crime and punishment that beckon either a voter's or a justice's serious attention.[267]

Relieved of its reformation assignment and unburdened by any new politically galvanized charge, criminal justice faces a more temperate climate, which in turn presents new challenges for the Court. Once the principal job was to contain liberal aspirational jurisprudence during times of mounting anxiety about crime; today, the task is to maintain criminal justice's legitimacy in a post-reformation environment that is driven by neither an overriding fear of crime nor a strong demand for further reform. In this altered climate, other forces flow more freely and form a steady current that is redirecting criminal justice.[268] These forces fall into three general categories.

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266. *See, e.g.*, United States v. Patane, 124 S. Ct. 2620, 2626–29 (2004) (Thomas, J.) (joined by Rehnquist, C.J. and Scalia, J.) (arguing against any extension of *Miranda* by judge-made rule without the "closest possible fit"); *Groh*, 124 S. Ct. at 1295–98 (Kennedy, J., concurring) (advocating extension of the good faith exception to Fourth Amendment exclusionary rule); Texas v. Cobb, 532 U.S. 162, 174–77 (2001) (Kennedy, J., concurring) (criticizing the wisdom of the prophylactic safeguard established in *Michigan v. Jackson*, 475 U.S. 625 (1986)); *see also* Clymer, *supra* note 249 (advocating reformationist approach to curtailing *Miranda*'s implications); Smith, *Activism as Restraint*, *supra* note 36 (advocating reformationist approaches to criminal procedure as responsible reactions to Warren Court excesses).

267. *See, e.g.*, Ted Gest, *The Evolution of Crime and Politics in America*, 33 MCGEORGE L. REV. 759, 764–65 (2002) (arguing that the issue of crime has fallen from the national agenda for three reasons: (1) a precipitous drop in the crime rate, (2) the depolarization of the issue along party lines, and (3) a general focal shift from street crime to terrorism); *see also* Markus Dirk Dubber, *Criminal Justice Process and War on Crime*, *in* THE BLACKWELL COMPANION TO CRIMINOLOGY 49, 64–65 (Colin Sumner ed., 2004) (arguing that the war on crime has lost steam and noting that sentences in some states have begun to decrease after years of increase). For statistics showing the decline in the crime rate, see U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIME FACTS AT A GLANCE (2002), *at* http://www.ojp.usdoj.gov/bjs/glance.htm#crime (indicating that crime rates have fallen significantly between 1993 and 2002). For information on the decline in prison populations, see U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2000 (2001), *at* http://www.ojp.usdoj.gov/bjs/abstract/p00.htm (noting the first decline in decades in prison populations).

268. Some commentators rightly have noted that the events of September 11, 2001, and the nation's resulting war against terrorism, have the potential to affect criminal procedure thinking more generally (not to mention the national mood with respect to crime). *See* sources cited *supra* note 230. To date, however, there is little indication that the tendency (we might even call it the desire) to

The first set includes forces that are pragmatic, systemic, and critical in their orientation, expressing dismay with some of the criminal justice system's consequences when measured against elementary notions of fairness, equality, and justice. The death penalty moratorium movement, which has gained adherents at many different levels of our political, legal, and cultural orders, is one manifestation.[269] The widespread disapproval of racial profiling is another.[270] Both of these critiques enjoy a popular and even grassroots following, and the signs are clear that each now has some purchase on the Court's actions.[271] Deliberate police manipulation and circumvention of the *Miranda* rules cannot claim the same degree of popular opprobrium given their lower visibility, but proof of the smoking gun variety has made objections to these practices difficult for the Court to ignore.[272] Excessive severity in sentencing and racially disproportionate incarceration have proved tougher nuts to crack, yet criticisms of both have begun to register.[273]

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conceptualize terrorism as a problem separate and distinct from day-to-day law and order is failing in its bracketing capacity. If anything, the Supreme Court's decisions this past Term in *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004), *Rasul v. Bush*, 124 S. Ct. 2686 (2004), and *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), invite speculation that the new climate in criminal justice has been having a positive effect in checking the impulses that the fear of terrorism can spark. *See supra* note 230 and accompanying text.

269. For discussions of the death penalty moratorium movement, see Louis D. Bilionis, *The Unusualness of Capital Punishment*, 26 OHIO N.U. L. REV. 601 (2000) (discussing the public constitutional discourse that the movement is fashioning); Symposium, *The ABA's Proposed Moratorium on the Death Penalty*, LAW & CONTEMP. PROBS., Autumn 1988, at 1. *See also* George Ryan, Moratorium on Death Row Executions Address at the Gillis Long Poverty Law Center at Loyola University New Orleans (Mar. 31, 2003), *in* 5 LOY. J. PUB. INT. L. 1 (2003).

270. *See* sources cited *supra* note 230.

271. *See infra* note 273 and accompanying text.

272. *See* Missouri v. Seibert, 124 S. Ct. 2601, 2613 (2004) (holding a warned confession inadmissible when the police intentionally elicited an unwarned confession first). For examinations of police practices calculated to circumvent *Miranda*, see Richard A. Leo, Miranda's *Revenge: Police Interrogation as a Confidence Game*, 30 LAW & SOC'Y REV. 259 (1996), analyzing the post-*Miranda* interrogation practices of several police departments and concluding that police now rely primarily on deceit and manipulation; Richard A. Leo & Welsh S. White, *Adapting to* Miranda: *Modern Interrogators' Strategies for Dealing With the Obstacles Posed by* Miranda, 84 MINN. L. REV. 397 (1999), cataloging law enforcement strategies designed to obtain *Miranda* waivers; Thomas & Leo, *supra* note 66, at 232–53; and Charles D. Weisselberg, *In the Stationhouse after* Dickerson, 99 MICH. L. REV. 1121, 1135–62 (2001).

273. *See* Michael Cooper, *New York State Votes to Reduce Drug Sentences*, N.Y TIMES, Dec. 8, 2004, at A1 (reporting that the New York legislature voted to reduce mandatory prison sentences given to people convicted of drug crimes, and noting developments in Michigan and Pennsylvania emphasizing treatment over prison). In a speech to the American Bar Association, Justice Anthony M. Kennedy expressed concern over the severity of sentences and the percentage of black males who are incarcerated. Anthony M. Kennedy, Speech to the American Bar Association (Aug. 9, 2003), http://www.supremecourtsus.gov/publicinfo/speeches/sp_08-09-03.html. The ABA created the "Kennedy Commission" to study the problems raised in Justice Kennedy's speech. In August 2005, the Commission reported its findings, recommending the repeal of mandatory minimum sentences and serious consideration of treatment programs. The reports are available at http://www.manningmedia.net/Clients/ABA/ABA288/. *See also*

While this first cluster of forces criticizes the quality of criminal justice's outputs and inequities in their distribution, the second set takes issue with the quality of its pronouncements. These forces reflect concerns in diverse quarters that the Court's criminal justice jurisprudence—its holdings, its rules and standards, its rationales, and its explications of principle—displays a normative malnourishment that is unbefitting the constitutional law of a nation that extols liberty. When Justice Scalia faults reformation precedents for their impoverished accounts of privacy in the home, the principle of confrontation, or the jury, he expresses a basic American appetite for normative robustness in constitutional law that conservatives (particularly but not exclusively) believe is grounded in the creeds of textualism and originalism.[274] When Justices Stevens and Breyer assert the merits of comparative constitutionalism and the relevance of foreign and international norms to the question of capital punishment, they tap the same rudimentary desire for normative robustness in terms with which liberals (particularly but not exclusively) identify.[275] When Justice Kennedy insists on a broader calling for the Self-Incrimination Clause, he echoes the self-same want in a libertarian idiom spoken by denominations of almost any stripe.[276]

John Gibeaut, *Opening Sentences*, 90 A.B.A. J. 54 (2004) (noting that even while recent congressional action has tightened the federal sentencing guidelines, many states are mitigating their own determinate sentencing systems in response to growing criticism that sentences are too strict); Fox Butterfield, *Racial Disparities Seen as Pervasive in Juvenile Justice*, N.Y. TIMES, Apr. 26, 2000, at A1 (reporting the findings of the Department of Justice concerning racial disparities).

274. *See* Blakely v. Washington, 124 S. Ct. 2531, 2538 (2004) (asserting that "[o]ur commitment to *Apprendi* . . . reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of a jury trial"); Crawford v. Washington, 124 S. Ct. 1354, 1375 (2004) (criticizing the Court for its "failure . . . to interpret the Constitution in a way that secures its intended constraint on judicial discretion" in criminal prosecutions); Kyllo v. United States, 533 U.S. 27, 38–40 (2001) (criticizing an argument from precedents that would limit Fourth Amendment protection, noting that it fails to draw the "firm but also bright" line needed to protect a homeowner's privacy in our society); *see also* Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2661–63 (Scalia, J., dissenting) (arguing for essentiality of restrictions on detention imposed by the executive as the paradigm function of the writ of habeas corpus to prohibit such detentions).

275. *See* Atkins v. Virginia, 536 U.S. 304, 317 n.21 (2002) (citing a brief filed by the European Union in support of a claim that execution of the mentally retarded has become cruel and unusual); *see also* Foster v. Florida, 537 U.S. 990 (2002) (Breyer J., dissenting from denial of certiorari) (citing court decisions of the U.K. Privy Council and the European Court of Human Rights in support of a claim that too much delay between imposition of a death sentence and actual execution is inhumane and cruel); Knight v. Florida, 528 U.S. 990 (1999) (Breyer, J., dissenting from denial of certiorari) (citing court decisions from Zimbabwe and India on the same issue, and discussing the applicability of the Convention Against Torture). For a strong rebuke of efforts to bring international human rights norms and the decisions of foreign tribunals to bear on the interpretation of the Constitution, see ROBERT BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES (2003).

276. *See* Chavez v. Martinez, 538 U.S. 760, 789–90 (2003) (Kennedy, J., concurring in part and dissenting in part) (arguing strongly for a Fifth Amendment prohibition against torturous methods as violative of fundamental values of liberty, positing that "[a] constitutional right is traduced the moment

It is in the nature of things that the foregoing two sets of forces eventually would rise to the fore. American constitutional law is much about, if not essentially about, dialectics between inextinguishable hopes and fears that beckon us to generate narratives that are honest to the hopes and fears alike.[277] In criminal justice, the hopes of liberty now find greater cultural space to assert themselves as the countervailing fears that animated the reformation recede. The reformation's own contribution to the situation, moreover, should not be ignored. By diluting the meaning of rights, deferring their greater possibilities, and deflecting attention from systemic woes, reformation discourse incurred a deficit on liberty's side of the ledger. Debts come due.

We may extend the metaphor of borrowing and leverage. Remember that the reformation was able to run up this debt not solely on the strength of its statement of the problems it sought to address. It enlisted the credit of politics and administration as its guarantor, stressing that those institutions manage choices between order and liberty effectively and produce reasoned, if not always finely articulated, elaborations of the dialectic.[278] But every elected lawmaker and anyone who has lobbied for or against the rights of suspects or defendants knows intuitively what Professor William Stuntz has carefully detailed for academic and judicial audiences: Structural pathologies in the interplay between elected officials, prosecutors, and law enforcement produce a heavy bias in favor of greater criminalization and greater severity toward the offender.[279] This brings us to the third set of forces in the current environment, which are structural, institutional, and process based in their orientation. They involve a growing willingness to question the capacity of the political process to represent the hopes as well as the fears that go into criminal justice—in short, the creditworthiness of law-and-order politics. The reformation's trusting appeals to legislative primacy were never so much empirical assertions as they were ideological postulates, and their counterfactual nature is much harder to ignore now that the ideological imperatives have subsided. You can see the evidence in Supreme Court opinions authored by Justices not thought to be of like mind on the question of when politics can and cannot be trusted. In *Atkins v. Virginia*, Justice Stevens's opinion for a

torture or its close equivalents are brought to bear" and that "[c]onstitutional protection for a tortured suspect is not held in abeyance until some later criminal proceeding takes place").

277. *See, e.g.*, AMSTERDAM & BRUNER, *supra* note 126, at 259–85 (discussing the cultural dialectic between American Creed and American Caution that shapes constitutional law, focusing on aspirations for inclusiveness that compete with impulses toward exclusivity, and also discussing the legal dialectic between continuity and change that the Supreme Court confronts).

278. *See supra* note 195 and accompanying text.

279. Stuntz, *Pathological Politics*, *supra* note 36, at 527–58; *see also* Dripps, *supra* note 36, at 45–46 (identifying dismay with law and order politics and the absence of legislative consideration).

six-Justice majority cited the "well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime" as a reason to give greater weight to a legislative trend in the states against imposing the death penalty on mentally retarded offenders.[280] Justice Scalia rarely passes up a chance to champion democracy, which makes his candid acknowledgment of politics' weaknesses in the law-and-order area all the more indicative of a change in the air. In *Ring v. Arizona*, he argued that an emphatic judicial endorsement of the jury's prerogatives was essential—even if it meant further indulgence of the Court's Eighth Amendment death-is-different jurisprudence that he so steadfastly opposes—precisely because law-and-order politics consistently slights the jury's liberty-protecting role.[281] Both Justices close in on the same point: Constitutional principles that serve liberty can suffer a deep systematic discount in political debate.

Such are the main forces redirecting criminal justice. Though distinct enough to allow separate categorization, they have much important in common. They accept that the established legal backdrop today is criminal justice jurisprudence *as reformed*; it is the law of the Rehnquist reformation, rather than the law of the Warren Court, that now serves as the primary referent for talk about crime and the Constitution.[282] They do not quarrel directly with the general validity of the reformation jurisprudence and hence do not strike the kind of sharply antagonistic posture that the reformation took toward Warren Court ways. They do, however, criticize. They target shortcomings and limitations of the reformation jurisprudence that the logic of the reformation itself cannot refute, as it never denied their possibility but instead suppressed them and deferred their consideration. They cite criminal justice for deficiencies according to standards internal and external to the law. While concerned for individual rights and their remedies, they widen the focus by questioning systemic consequences and meanings. They press for greater recognition of liberty in plainspoken words that can attract and build coalitions of Justices with differing ideological and interpretive inclinations.[283]

280. *Atkins*, 536 U.S. at 315 (noting that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change").

281. Ring v. Arizona, 536 U.S. 584, 610–13 (2002) (Scalia, J., concurring); *see also supra* note 195 (discussing Justice Scalia's opinion in *Ring*).

282. Justice Scalia's dissent in *Dickerson* is an excellent example of how reformationist jurisprudence is accepted implicitly as the status quo ante. Upon close reading one can see that Justice Scalia's criticism of *Miranda* is targeted principally at *Miranda* as it has been recharacterized by reformationist decisions, and not at *Miranda* as it appeared the day it was decided. *See* Dickerson v. United States, 530 U.S. 428, 444–65 (2000) (Scalia, J., dissenting).

283. Consider, for example, the lineups of the pro-defendant majorities in *Blakely*, *Crawford*, and *Kyllo*. Blakely v. Washington, 124 S. Ct. 2531 (2004) (Scalia, J.) (joined by Stevens, Souter, Thomas, and Ginsburg, JJ.); Crawford v. Washington, 124 S. Ct. 1354 (2004) (Scalia, J.) (joined by

All of which is to say that they call for the legitimation of criminal justice on broader terms made possible by our post-reformation environment.

These forces necessarily call for judicial initiative. In the absence of guidance from electoral politics, they also call for some judicial creativity. Their timing is felicitous, as they ask for change from a Supreme Court that is not beset by self-doubt as to its capacities. Still, a Court with fortitude also needs a discourse that is up to the task. Reformation discourse, by definition, is not.

C. Popularization: A Post-Reformation Discourse

And so the Justices must find a new discourse. If it is to succeed, this discourse must be responsive to the cultural shift, helpful to the Court in meeting its new legitimation challenges, and compatible with the prior commitments of Justices who have sat long enough to have voiced their share. To judge from the cases since 2000 that we reviewed in the preceding pages, the Justices are on their way to developing just such a discourse. It is a discourse of *popularization*. It is still too early to detail that discourse ornately, but not too soon to recognize its emergence and draw a preliminary sketch of it to guide interested readers.

The single most striking feature of criminal justice discourse in the Supreme Court since 2000 is how consistently the Justices seek to leaven their account of ordered liberty with more liberty affirming content, attitude, and tone. This property pervades the cases we reviewed. It is embedded in their interior—the holdings, arguments, readings of precedent, and rhetoric. It is projected by the exterior of their sum as a body of work more cognizant of the rights of the accused and more sensitive to systemic woes than we have come to expect. It is, for the moment at least, foundational: It is the Court's basic response to the forces that pick at criminal justice's legitimacy shortcomings in these post-reformation days.

To call this characteristic "popularization" gets us to the social, cultural, political, legal, and strategic crux as well as any label that comes to mind. Forces from the left, the right, and points in between are free to question criminal justice in ways not seen since the 1960s. Diverse in origin and focus, they are as one in their popularly phrased concerns for fallibilities in the system and their appeals to judicial responsibility—in short, in their advocacy of liberty's station in ordered liberty. The Court cannot hope to satisfy them with the tight-fisted discourse that developed to suppress just these kinds of

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Stevens, Kennedy, Souter, Thomas, Ginsburg, and Breyer, JJ.); Kyllo v. United States, 533 U.S. 27 (2001) (Scalia, J.) (joined by Souter, Thomas, Ginsburg, and Breyer, JJ.).

forces in favor of the demands for order that dominated the 1970s, 1980s, and 1990s. Indeed, persistence in such reformationist ways would place both the Court and its elaboration of ordered liberty at further odds with popular forces. That is a not a desirable result in the abstract, nor is it necessitated by any current countervailing political, social, or cultural factors. Furthermore, it would ill serve the preferences of most of the Justices who, as we have seen, have reasons to question various dimensions of criminal justice today (though not always the same reasons or the same dimensions at the same time). The Court consequently is turning to a more responsive discourse that is capable—and appears capable—of giving emergent forces fair due. To achieve that quality, the discourse takes on additional attributes that reinforce the impression that constitutional law is striving to popularize itself. It aspires to greater inclusiveness. It is less doctrinaire, both to free itself from the reformation's pro-prosecution dispositions and to ensure its accessibility and intelligibility in the social and cultural vernacular of the moment. At the same time, it vindicates the Court, its past work, and the not insubstantial warrants that produced the reformation jurisprudence that all take as the status quo. It finds space in the jurisprudence for new forces to speak and generate doctrinal features that synthesize the old and the new.

Three particular features consort to bring about this desired popularization. They round out the new discourse.

1. An Open Recognition of Fallibility in the System and a Cautious Recognition of Judicial Responsibility to Regulate

Reformation discourse, we saw, postulates an ideology of trust in the criminal justice system and espouses antipathy for the liberal ideal of active judicial regulation of that system. The new discourse relinquishes those positions, introducing in their stead an open recognition of the system's fallibility and a corresponding cautious recognition of judicial responsibility to regulate. Let me be clear: "open" and "cautious" are operative words here. The Supreme Court's opinions hand up no radical indictments of the system, nor do they show zeal for sweeping judicial interventions. What they evince is an increase in the Court's willingness to encounter the system's troubling propensities and to entertain judicial options for redressing them. To call this development an increase actually might fail to do it justice. When compared with the reformation at its most ideological, the change is pronounced enough to qualify as a difference of kind rather than degree.

Consider how the political system's chief fallibility when dealing with issues of crime—its structural bias against liberty interests in favor of order—is

now handled in the discussions. Post-reformation discourse consciously acknowledges this bias as a dysfunctional attribute that the Court should offset when it can. Whereas a conservative reformationist might point to a national trend in sentencing legislation as the kind of quintessential policy experimentation that constitutional law should accommodate notwithstanding its diminution of the criminal jury's role,[284] today's post-reformation discourse discounts the legislative trend for the likely effects of bias and counters it with a forceful lesson from the Court on the values of the Sixth Amendment.[285] Bias can be offset by a premium as well as a discount. A pattern of legislation exempting mentally retarded offenders from the death penalty might fall short of decisive Eighth Amendment weight by some people's standards, for instance, but post-reformation discourse instructs us to read it even more suggestively to account for the bias that must be overcome to enact such legislation.[286]

The new discourse adopts a similar posture toward the fallibility of law enforcement. As the Court's recent Fourth Amendment and *Miranda* forays reveal, the potential for police abuse of the rules now gets an open airing, and the possibility of "newly minted" rules to guard against such transgressions is seriously explored. *Edmund*, *Ferguson*, and *Seibert* assumed that posture and went on to announce new restrictions on law enforcement. The result does not always go so far. Some Justices have a higher threshold for action than others, asking for a stronger empirical showing of need and utility before endorsing more regulation of the police. This evidently spelled the difference between victory and defeat for the petitioner in the *Atwater* case.[287] But this

284. *See, e.g.*, *Blakely*, 124 S. Ct. at 2443–50 (O'Connor, J., dissenting) (joined by Rehnquist, C.J.) (lauding the efforts put into determinate sentencing systems across the nation and forecasting the "disasters" that *Blakely* will wreak upon them).

285. *See, e.g.*, *id.* at 2538–39 (Scalia, J.) (asserting that "[o]ur commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right to a jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure."); *see also* Ring v. Arizona, 536 U.S. 584, 611–12 (2002) (Scalia, J., concurring). Justice Scalia stated:

> my observing over the past 12 years the accelerating propensity of both state and federal legislatures to adopt "sentencing factors" determined by judges . . . and my witnessing the belief of a near majority of my colleagues that this novel practice is perfectly OK . . . cause me to believe that our people's traditional belief in the right of trial by jury is in perilous decline.

Id.

286. *See* Atkins v. Virginia, 536 U.S. 304, 315–16 (2002) (noting that the number of states that have outlawed executing the mentally retarded is not as significant as the consistency of the change for Eighth Amendment purposes given the fact that legislatures are biased in favor of anticrime legislation).

287. *See* Atwater v. City of Lago Vista, 532 U.S. 318, 353–54 (2001) (reasoning that the fact that "the country is not confronting anything like an epidemic of unnecessary minor-offense arrests . . . caps the reasons for rejecting Atwater's request for the development of a new and distinct body of constitutional law"). The same observation might be said with respect to the decision in

only underscores the important turn that the discourse has taken. Fallibility is now treated as a subject meriting candid, sincere, and pragmatic examination. The reformation's ideology of trust—stressing law enforcement's good intentions, accepting objective signs of plausible justification, and adopting an atomistic approach to regulation of the police rather than systemic regulation—no longer suffices to close off discussion. In the new post-reformation environment, legitimation requires broad and open inquiry.

The attentiveness to fallibility also extends to the shortcomings of the courts. Doctrinal tests that ask judges to factor the probability of a defendant's guilt (read: "truth") into the equation before finding a constitutional violation or granting relief are staples of reformation jurisprudence. So are tests that call for judicial assessment of what a reasonable jury might do or think under a set of questioned circumstances. Any experienced criminal defense lawyer will tell you that the U.S. Supreme Court ordinarily is a far superior forum for the application of such tests to the facts of his or her case. That is another way of saying that lower courts apply those tests by favoring order over liberty more than the law requires. It is hard to resist the conclusion that several of the Court's recent cases made it to the docket precisely so they might serve as corrective object lessons for the lower courts—occasions for strategic reminders that context-sensitive tests are not mere licenses to affirm convictions and sentences.[288] That these messages bolster rights, the degradation of which in death penalty cases has been the source of mounting concern—the right to effective assistance of counsel,[289] the right to disclosure of exculpatory evidence,[290] the right to a jury selected free from

Chavez v. Martinez, 538 U.S. 760, 777 (2003) (Souter, J.) (joined by Breyer, J.) (concluding that absent a showing of need under current societal conditions, there is no occasion to make coercive police action that would render a confession inadmissible under the Fifth Amendment privilege against self-incrimination also actionable for damages).

288. *See, e.g.*, Banks v. Dretke, 124 S. Ct. 1256, 1279–80 (2004) (rebuking the Fifth Circuit for holding that the defendant received a fair trial when the prosecution concealed that its key witness was a paid informant); Groh v. Ramirez, 540 U.S. 551 (2004) (finding a search warrant plainly invalid for failing to meet the Fourth Amendment's particularity requirement, and holding that the officer was not entitled to qualified immunity in relying on the warrant); *see also* cases cited *supra* note 265.

289. *See, e.g.*, Wiggins v. Smith, 539 U.S. 510, 537–38 (2003) (finding ineffective assistance of counsel where the capital defendant's attorney failed to look further than the presentence report for mitigating evidence); Massaro v. United States, 538 U.S. 500, 509 (2003) (holding that the noncapital defendant's failure to raise his ineffective assistance claim on direct appeal did not bar him from raising it on collateral appeal); Williams v. Taylor, 529 U.S. 362, 398–99 (2000) (holding that a capital defendant was denied his right to effective assistance of counsel when his lawyers failed to investigate and present to the jury substantial mitigating evidence).

290. *See, e.g.*, *Banks*, 124 S. Ct. at 1279–81 (holding that the capital defendant had shown cause for the failure to raise his claim of wrongfully withheld exculpatory evidence where the prosecution conceded in post-conviction litigation that its key witness at trial was a paid informant and that the defendant's arrest was a setup).

racial discrimination,[291] the right to a jury properly instructed when life hangs in the balance[292]—hardly seems coincidental. Subtle responses like these to the cultural uneasiness with capital punishment of course will not allay all the concerns of death penalty abolitionists and moratorium proponents. All the same, they recognize and engage the uneasiness.

Not all of law's unreliability, however, has been treated that delicately. This past Term, the Court unloaded on the judicial fallibility inherent in two of the reformation era's better known open-textured standards. *Ohio v. Roberts*, the cornerstone of reformation Confrontation Clause law, was savaged for permitting the constitutionality of testimonial hearsay's use to turn on undependable case-by-case judicial appraisals of the evidence's reliability.[293] *Patterson v. New York*, a reformation linchpin on legislative power to define the elements of a crime and thereby modulate the prosecution's burden and the jury's role, was scorned for the vanity of its assurance that judges might guard meaningfully against legislative abuses armed with little more than their judicial commissions and their senses of injustice.[294]

These explorations into fallibility directly mirror the cultural forces that have risen to question the system's failings. One might wonder whether there is a glimpse of postmodernism reflected in the glass as well. Criminal justice, it seems, is learning how to speak more comfortably about the doubts that its practices entail.

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291. *See, e.g.*, Miller-El v. Cockrell, 537 U.S. 322, 346–48 (2003) (stating that the lower courts failed to give full consideration to the substantial evidence that the defendant presented in support of his claim of racially discriminatory use of peremptory challenges by the prosecution, and holding that the Fifth Circuit should have issued a certificate of appealability).

292. *See, e.g.*, Smith v. Texas, 125 S. Ct. 400 (2004) (per curiam) (rejecting the Texas Court of Criminal Appeal's narrow interpretation of *Penry II*, 532 U.S. 782 (2001)); Tennard v. Dretke, 124 S. Ct. 2562, 2573 (2004) (rejecting the Fifth Circuit's interpretation of *Penry II*, 532 U.S. 782, for being too narrow); Kelly v. South Carolina, 534 U.S. 246, 257–58 (2002) (declaring *Simmons v. South Carolina*, 512 U.S. 154 (1994), applicable where the jury's only sentencing options are execution and life without parole, and holding unconstitutional under the circumstances an instruction that the defendant would be eligible for parole under a life sentence); *Penry II*, 532 U.S. at 803–04 (holding unconstitutional instructions that failed adequately to instruct the jury on the role of mitigating evidence in a capital sentencing proceeding); Shafer v. South Carolina, 532 U.S. 36, 48 (2001) (holding that where death and life imprisonment are the only two sentencing options, a failure to instruct that parole was unavailable for life imprisonment constituted a denial of due process).

293. Crawford v. Washington, 124 S. Ct. 1354, 1370–72 (2004) (overruling *Ohio v. Roberts*, 448 U.S. 56 (1980), and noting that the *Roberts* "framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations").

294. Blakely v. Washington, 124 S. Ct. 2531, 2543 (2004).

2. A Nondoctrinaire Approach to Legal Doctrine

The new temperament toward fallibility shown by today's discourse is complemented by a nondoctrinaire approach to legal doctrine. The familiar reformation doctrine of core and periphery is still played out in lower-profile cases that do not touch the cultural nerve.[295] In the cases of greater cultural moment, however, tight logical deductions from reformation categorizations and dichotomies no longer purport to serve as the analysis that leads to result. The analytical function instead is turned over to an open, pragmatic exploration of the problem's multiple dimensions and the range of solutions available to the law—in other words, to an inquiry about constitutional policy. Doctrine is constitutional policy's servant in this discourse, not its master.

Recall the recent decisions that digress from the reformation road. Each easily could have produced an opinion for the Court setting out a syllogistic application of reformation categorizations and dichotomies toward the privileged ends of truth, federalism, or authority. Indeed, the dissents in some of those cases are illustrative exhibits of the point.[296] But each case declined the familiar road in favor of a path that transcends the reformation doctrine. Rising above the dichotomies and categorizations, the cases take analysis to a plane where the elaboration of liberty and order into ordered liberty is conducted with greater transparency and in a wider frame that allows systemic fallibilities and cultural concerns into the picture. In the work done on that plane, doctrine is a choice made functionally and pragmatically, and one that must be defended openly on those terms.

The chips, as it were, fall where they may. The choice might be to let policy lie within doctrinal forms already forged, as in *Atwater*[297] or *Hiibel v. Sixth Judicial District Court of Nevada.*[298] The choice might be to graft modifications

295. *See, e.g.*, Texas v. Cobb, 532 U.S. 162, 172–74 (2001) (holding that, even though the offenses were factually related, the Sixth Amendment did not require the police to get defense counsel's permission to interrogate defendant about the crime with which he was not actually charged). The Court's most recent cases implementing *Teague*'s non-retroactivity doctrine also fit neatly into the reformationist paradigm. Schriro v. Summerlin, 124 S. Ct. 2519 (2004); Beard v. Banks, 124 S. Ct. 2504 (2004).

296. *See, e.g.*, Missouri v. Seibert, 124 S. Ct. 2601, 2616–20 (2004) (O'Connor, J., dissenting); Atkins v. Virginia, 536 U.S. 304, 321–28 (2002) (Rehnquist, C.J., dissenting); *id.* at 337–54 (Scalia, J., dissenting); Ferguson v. City of Charleston, 532 U.S. 67, 91 (2001) (Scalia, J., dissenting); City of Indianapolis v. Edmond, 531 U.S. 32, 48–56 (2000) (Rehnquist, C.J., dissenting).

297. Atwater v. City of Lago Vista, 532 U.S. 318, 354–55 (2001) (declining to disturb the rule that the Fourth Amendment permits full arrest for any crime absent extraordinary circumstances).

298. Hiibel v. Sixth Judicial Dist. Ct. of Nev., 124 S. Ct. 2451, 2458–60 (2004) (holding a state statute that requires suspects to identify themselves during a stop permitted under *Terry v. Ohio*, 391 U.S. 1 (1968), to be compatible with the Fourth Amendment).

onto the old doctrine, as occurred in *Edmond*[299] and *Ferguson*,[300] even with significant uncertainty on the Court as to what form that graft ought to take, as was the case in *Seibert*.[301] The choice might be to restate doctrine in less constrained terms that permit the reflection of emergent cultural forces, as happened in *Atkins*[302] and *Kyllo*.[303] The choice might be to jettison existing doctrine altogether in favor of new structures, as occurred in *Apprendi*,[304] *Blakely*,[305] and *Crawford*.[306]

Permit the political scientists to smile here. They have long maintained that precedent and doctrine do not dictate Supreme Court outcomes, and the picture offered here supports that view.[307] As it is, the lawyers among us can safely acknowledge the new discourse's nondoctrinaire sensibilities as well. Behind every criminal justice doctrinal ingredient lies any number of choices about liberty and order's rightful accommodation, located at shallower or deeper levels of consciousness. So it is now, and so it certainly was for the

299. *Edmond*, 531 U.S. at 44 (distinguishing the roadblocks upheld in *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990), and *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), on the ground that the *Edmonds* stop was for general crime control and thus required individualized suspicion); *see also supra* note 214 and accompanying text.

300. *Ferguson*, 532 U.S. at 81–86 (distinguishing *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989), and finding an unreasonable search when a hospital turned over to the police the results of urine tests without the patients' consent); *see supra* note 216 and accompanying text.

301. Justices Souter, Stevens, and Ginsburg chose to make the inquiry turn on the effectiveness of the *Miranda* warnings when officers question first and warn later—a fact-based approach that asks whether it would be reasonable to find that the warnings could function "'effectively' as *Miranda* requires." *Seibert*, 124 S. Ct. at 2610. Justice Breyer would apply a "simple rule" that courts "should exclude the 'fruits' of the initial unwarned questioning unless the failure to warn was in good faith." *Id.* at 2613 (Breyer, J., concurring). Justice Kennedy favored a "narrower test" than Justice Souter's that generally would exclude statements when the two-stage interrogation technique was used deliberately. *Id.* at 2616 (Kennedy, J., concurring in the judgment).

302. Atkins v. Virginia, 536 U.S. 304, 313–17 (2002) (relying on the views of diverse communities to bolster the objective inquiry into evolved standards of decency and taking account of difficulty in passing pro-defendant legislation when assessing the strength of legislative consensus).

303. Kyllo v. United States, 533 U.S. 27 (2001) (affirming the sanctity of the home for Fourth Amendment purposes and cutting free from existing legal formalisms to provide protection of privacy against new technologies that enable surveillance of details about a home that would not be discoverable otherwise without physical intrusion).

304. Apprendi v. New Jersey, 530 U.S. 466, 494–98 (2000) (abandoning the dichotomy between elements of an offense and "sentencing factors" established in *McMillan v. Pennsylvania*, 477 U.S. 79 (1981), and holding that any fact that increases the punishment beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt).

305. Blakely v. Washington, 124 S. Ct. 2531, 2538 (2004) (extending the *Apprendi* principle to invalidate a state determinate sentencing scheme).

306. Crawford v. Washington, 124 S. Ct. 1354, 1374 (2004) (replacing the reliability framework established by *Ohio v. Roberts*, 448 U.S. 56 (1980), for determining whether the admission of hearsay satisfies the Confrontation Clause with one based on whether the declarant is unavailable and whether the hearsay is testimonial).

307. *See generally* sources cited *supra* note 60.

reformation, which made its choices with cognizance of the social and cultural forces of its time and ingrained them in the features of its discourse. By the reformation's own standards, making choices anew in recognition of changing times and forces can hardly be considered objectionable. To strike them in the foreground, however, may spoil law's ability to present itself to the masses as a mystical trove of foreordained commands.[308] Even were we to count that as a loss (hardly an uncontestable proposition), it proves only that popularization—like everything else—has its price.

3. The Enhancement of Liberty's Normative Resources

The features discussed thus far position criminal justice discourse to be more responsive to contemporary cultural and political conditions. But transparent, pragmatic encounters with criminal justice fallibilities cannot address today's challenges adequately without a normative vocabulary that speaks to the times. Three decades of conservative law reform have bequeathed a well-developed language of truth, federalism, and authority to carry order's side of the arguments. During those years, liberty's resources were not similarly nurtured in the opinions that set the rules of engagement, yielding a state of normative impoverishment that we have seen is a cause of unease for persons of diverse perspectives.[309] The new discourse attends to this deficiency. With little fanfare, it is authorizing resort to a wider range of sources to inform liberty's content and amplify its voice.

When the Supreme Court drew on international sources to enrich its vision of constitutional liberty in *Lawrence v. Texas*, and made generative use of *Roe v. Wade* and its forebears to strengthen the picture,[310] many eyebrows arched. So, too, when the Court embellished its vision of constitutional equality in *Grutter v. Bollinger* by crediting the views of American business, military, and educational leaders as well as international judgments.[311]

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308. *See* Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 589 (1990) (stating that he "never thought Oliver Wendell Holmes and the legal realists did us a favor by pointing out that all these legal fictions were fictions: Those judges wise enough to be trusted with the secret already knew it."); *see also* FARBER & SHERRY, *supra* note 181, at 43 (interpreting Justice Scalia's writings as relying on a myth of judging and law and accusing him of adopting that stance knowing that it "is simplistic if not misleading, so as to foster the right attitude toward legal issues"); Gordon S. Wood, *Comment*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 49, 63 (Amy Gutmann et al. eds., 1997) (arguing that "[t]he real source of the judicial problem that troubles Justice Scalia lies in our demystification of the law").

309. *See supra* notes 274–277 and accompanying text.

310. Lawrence v. Texas, 539 U.S. 558, 576–77 (2003) (citing decisions from other nations); *id.* at 564–66 (warmly citing *Roe* and its forebears).

311. Grutter v. Bollinger, 539 U.S. 306, 330–31 (2003).

Readers familiar with recent developments in criminal justice see nothing remarkable in these moves. The new criminal justice discourse has been reaching out to enhance liberty's normative resources in just such ways, only more so. The development is not formal or systematic in any hornbook sense, nor would I suggest that it is a groundswell. What we see is a slow, steady turn toward external communities of interpretation and once-dormant legal authority to flesh out criminal justice's responsibilities to liberty in its various guises—justice, equality, human dignity, personal security, proportionality, and the nonarbitrary exercise of power.

Judicial discussions about the American capital punishment system's obligations to justice and human dignity increasingly are informed by references to the norms of other nations and the international community. The Court explicitly incorporated international views on the morality and justice of executing mentally retarded offenders into its decision in *Atkins v. Virginia*,[312] and Justices Stevens and Breyer are actively working to bring the lessons of foreign courts and international legal authorities to bear more generally on the death penalty's administration in this country.[313] In America's cities and

312. 536 U.S. 304, 317 n.21 (2002) (citing brief filed by the European Union in support of the claim that execution of the mentally retarded has become cruel and unusual). *Atkins*'s incorporation of international views is in sharp contrast to the reformation effort to block resort to such external communities of interpretation. *See, e.g.*, Stanford v. Kentucky, 492 U.S. 361, 369 n.1 (1989) (noting that "[w]e emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention . . . that the sentencing practices of other countries are relevant").

The Court in *Atkins* also expanded liberty's resources by crediting the views of a "broader social and professional consensus" (including the views of professionals in the field of mental health) and the views of "widely diverse religious communities in the United States, reflecting Christian, Jewish, Muslim, and Buddhist traditions." *Atkins*, 536 U.S. at 316 n.21.

Even more emphatic in its reliance on international norms is the Court's recent decision in *Roper v. Simmons*, No. 03-633 (U.S. Mar. 1, 2005). Justice Kennedy wrote for the majority:

> It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty . . . . The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions. . . .
>
> . . . It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.

Id., slip op. at 24–25.

313. *See* Foster v. Florida, 537 U.S. 990, 992–93 (2002) (Breyer, J., dissenting from denial of certiorari) (citing court decisions from the U.K. Privy Council and the European Court of Human Rights in support of the claim that lengthy delay awaiting execution is inhumane and cruel); Patterson v. Texas, 536 U.S. 984, 984 (2002) (Stevens, J., dissenting from denial of stay of execution) (noting the debate in other countries concerning the execution of juveniles); Knight v. Florida, 528 U.S. 990, 995–97 (1999) (Breyer, J., dissenting from denial of certiorari) (same; also citing court decisions from Zimbabwe and India as well as the Convention Against Torture and U.S. Senate's reservations to it); Elledge v. Florida, 525 U.S. 944, 945 (2003) (Breyer, J., dissenting from denial of certiorari) (same); Lackey v. Texas, 514 U.S. 1045 (1995) (Stevens, J., dissenting from denial of certiorari) (same).

towns, the death penalty moratorium movement—an informal community of lawyers, political and civic leaders, and concerned citizens including organized people of faith—has been generating a sharpening conception of the fundamental requisites of a sound capital punishment system, insisting that morality and justice alike demand more legal and procedural rectitude than the nation's courts have been showing.[314] In a string of recent decisions that aim to redirect the lower courts, the Court has been obliquely instating elements of that conception into the discourse of criminal justice.[315] This willingness to integrate perspectives on liberty from external communities also is seen in some of the Court's Fourth and Fifth Amendment ventures. A number of recent Fourth Amendment opinions have acknowledged the importance of safeguards to ensure evenhandedness, nonarbitrariness, and proportionality in police practices in a way not seen in some time, alluding to the widespread public objection to racial profiling captured in the sobriquet "Driving While Black" as a source of supporting content.[316] Even *Dickerson*, lest we forget, made much of the views of external communities. *Miranda*'s embrace by the nation's popular culture, as well as the country's law enforcement ranks, were offered as testimonials to the decision's core wisdom and staying power.[317]

314. *See supra* note 269.

315. Tennard v. Dretke, 124 S. Ct. 2562, 2573 (2004) (rejecting the Fifth Circuit's interpretation of *Penry II*, 532 U.S. 782 (2001), for being too narrow); Banks v. Dretke, 124 S. Ct. 1256, 1279–81 (2004) (holding that the defendant did not receive a fair trial when the prosecution concealed evidence that its key witness was a paid informant and that the arrest was a setup); Wiggins v. Smith, 539 U.S. 510, 538–39 (2003) (finding ineffective assistance of counsel where the capital defendant's attorney failed to look further than the presentence report for mitigating evidence); Massaro v. United States, 538 U.S. 500, 509 (2003) (holding that the noncapital defendant's failure to raise his ineffective assistance claim on direct appeal did not bar him from raising it on collateral appeal); Miller-El v. Cockrell, 537 U.S. 322, 348 (2003) (stating that the lower courts failed to give full consideration to the substantial evidence that the defendant presented in support of his claim that peremptory challenges were used in a racially discriminatory fashion); Shafer v. South Carolina, 532 U.S. 36, 48 (2001) (holding that where death and life imprisonment are the only two sentencing options, a failure to instruct that parole was unavailable for life imprisonment constituted a denial of due process); Williams v. Taylor, 529 U.S. 362, 398–99 (2000) (holding that a capital defendant was denied his right to effective assistance of counsel where his lawyers failed to investigate and present to the jury substantial mitigating evidence).

316. Arkansas v. Sullivan, 532 U.S. 769, 772–73 (2001) (per curiam) (Ginsburg, J., concurring) (expressing concern that the Court's rule that an officer's subjective motivations are irrelevant for Fourth Amendment purposes presents grave potential for abuse); Atwater v. City of Lago Vista, 532 U.S. 318, 372 (2001) (O'Connor, J., dissenting) (noting that "the recent debate over racial profiling demonstrates all too clearly [that] a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual"). Although inexplicit on the point, the decision in *Edmond* summons the same content. City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000) (forbidding roadblocks designed for general crime control purposes, in part because of the unbridled discretion they confer upon law enforcement officials).

317. Dickerson v. United States, 530 U.S. 428, 443 (2000) ("*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.").

The supplementation of liberty's resources also involves the revival of older legal authorities that lay fallow in the reformation. When *Apprendi* and *Blakely* portrayed one dimension of liberty as protection from the powerful combine of the zealous prosecutor and the pliant judge, they awakened legal lore about the jury as freedom's ally that has hibernated since *Duncan v. Louisiana*.[318] In *Kyllo*, the home—liberty's traditional great refuge—was elevated to a position of dominance over any latter-day reformation doctrinal abstractions that might allow its subversion. In so doing, the Court did not merely enlist the originalist's arsenal of common law and eighteenth-century teachings, but also recalled the distinctly modern and distinctly liberal *Katz v. United States* into active service.[319] This past Term in *Seibert*, the Court treated liberal criminal justice decisions in the *Miranda* line—including *Miranda* itself—as serious sources of continued relevance in fashioning new protection again wayward police.[320] In *Chavez v. Martinez* the Term before, a group of dissenters led by Justice Anthony Kennedy did the same for a number of Fifth Amendment precedents that had receded into the background during the reformation years.[321]

These consultations with external communities and revived legal authorities expand the discussion, enhance the dialectical possibilities, and invite the forging of new syntheses. To date, they are far from coalescing into anything as crisp and powerful as the reformation trinity of truth, federalism, and authority. Small wonder: Unlike its predecessor, the new discourse is not responding to a set of dominant cultural and political forces that has served up a crystallized vision ready for legal translation. In today's post-reformation environment, society experiences the freedom to express its doubts about criminal justice, but in diffuse critiques that a national politics of polarized parties and pro-order structural bias is at present ill-equipped to harness and

318. 391 U.S. 145 (1968) (holding that the jury is fundamental to the American scheme of ordered liberty and that the right as established under the Sixth Amendment is applicable against the states under the Fourteenth Amendment); *see also* Blakely v. Washington, 124 S. Ct. 2531, 2538–40 (2004) (declaring the necessity of a rule robustly protecting the integrity of the jury against the government); Apprendi v. New Jersey, 530 U.S. 466, 498 (2000) (Scalia, J., concurring) (criticizing Justice Breyer's dissent for naively placing too much trust in the government to treat criminal defendants fairly).

319. Kyllo v. United States, 533 U.S. 27, 32–35 (2001) (citing favorably and reasoning from *Katz v. United States*, 389 U.S. 347 (1967), and contending that the Court's conclusion was truer to *Katz*'s rejection of "a mechanical interpretation of the Fourth Amendment").

320. Missouri v. Seibert, 124 S. Ct. 2601 (2004) (limiting the reformationist *Oregon v. Elstad*, 470 U.S. 298 (1985), and fashioning a rule to protect a criminal defendant from police tactics designed to subvert *Miranda*'s protections by focusing on *Miranda* itself and the efficacy of the warnings given to the suspect under the circumstances).

321. Chavez v. Martinez, 538 U.S. 760, 789–99 (2003) (Kennedy, J., concurring in part and dissenting in part).

internalize. The business of legitimating the continued elaboration of ordered liberty must go on nonetheless and cannot afford to ignore those doubts and critiques. The Court has little choice but to assume something of the moderator's responsibility, maintaining a discourse of popularization that seeks meanings from those fragmented sources of critique and gradually melds them, case by case.

These consultations have contributed to some important liberty affirming decisions and informed several more arguments and cautionary opinions to the same end—leaving, as it were, points in legal space that invite connection in the future. Given the Court's role as synthesizer of cultural messages, it should not surprise us that the picture of liberty that is intimated bears the imprint of the Court as an institution of established American power and privilege. It is a picture of liberty framed less from the perspective of the downtrodden, the underclass, or even the criminally accused than from the point of view of America's governing institutions and the people who identify a moral stake in their operation and what they signify. The accent is on systemic legitimacy—on what criminal justice professes and expresses by its actions and its words, and on the limitations and responsibilities it is willing to place upon itself.

CONCLUSION

America has been living in times of conservative constitutional reformation. Reading the Supreme Court's criminal justice decisions as constitutional law—as an integral component with influence on and lessons for the whole—helps to illuminate that fact. An identifiable dynamic of constitutional development, embodied in the distinctive discourse of conservative reformation, came of age in criminal justice during the last third of the twentieth century. It has fanned out across the constitutional landscape as the rise of conservative cultural, social, and political forces has permitted, sustaining the transformative activity we now witness in federalism, national power, race, fundamental rights, and religion.

If ours is the new order of chastened constitutional aspiration that Mark Tushnet has described,[322] the predominance of conservative law reform discourse certainly can account for the chastening that has consumed so much popular and academic attention since the Rehnquist Court's recomposition

322. TUSHNET, *supra* note 25, at 34; *see also* Mark Tushnet, *The Supreme Court 1998 Term Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 33 (1999).

in the early 1990s. Yet what are we to make of the rather aspiring (and even inspiring) opinions that this same group of Justices has filed lately? The 2003 Term's cases arising from the war on terrorism—*Hamdi v. Rumsfeld*,[323] *Rumsfeld v. Padilla*,[324] and *Rasul v. Bush*[325]—feature tributes to liberty and to the Court's obligation to protect it that are relatively uninhibited even by Warren Court standards. The Court followed those opinions the very next day with *Sosa v. Alvarez-Machain*,[326] a cautious piece whose affirmation of federal common law's capacity to absorb international human rights norms nonetheless drew a stiff dissent precisely because of its potential for expansion in the years to come.[327] And there is always Justice Kennedy's landmark opinion for the Court in *Lawrence v. Texas*.[328]

The explanation often heard is that the Justices cannot resist asserting the Court's prerogatives against the other departments of government and aligning (or ingratiating) the Court with the cultural elite.[329] Introduce criminal justice into the mix and a more sympathetic and balanced picture comes into view. Since the year 2000, criminal justice in the Supreme Court has not been reformationist in the conservative vein. Nor has it been a farrago. No longer moved by a cogent law-and-order agenda from culture and politics, the Court has dropped the curtain on the conservative reformation of criminal justice and turned away from the law reform discourse that once dominated the

323. 124 S. Ct. 2633, 2647 (2004) (stating that "[w]e reaffirm today the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law"); *id.* at 2650 (observing that "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens" and that the separation of powers contemplates a judicial role in the protection of those rights).

324. 124 S. Ct. 2711, 2733 (2004) (Stevens, J., dissenting) (arguing forcefully that the Court should hear the case on the merits because the government's actions in response to terrorism "have created a unique and unprecedented threat to the freedom of every American citizen").

325. 124 S. Ct. 2686 (2004) (affirming the rights of aliens held at Guantanamo Bay to challenge in federal court the legality of their indefinite detentions).

326. 124 S. Ct. 2739 (2004).

327. *Id.* at 2764–67 (discussing the standard for recognizing a cause of action under the Alien Tort Statute based on the law of nations); *id.* at 2776 (Scalia, J., concurring in part and concurring in the judgment) (charging that "[t]his Court seems incapable of admitting that some matters—*any* matters—are none of its business" and is engaging in a "Never Say Never Jurisprudence").

328. 539 U.S. 558, 562 (2003) (noting that "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct"); *id.* at 579 (asserting that "[a]s the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom").

329. *See, e.g.*, *id.* at 602 (Scalia, J., dissenting) (noting that "[t]oday's opinion is a product of a Court, which is the product of a law professors culture, that has largely signed on to the so-called homosexual agenda"); *Sosa*, 124 S. Ct. at 2776 (Scalia, J., concurring in part and concurring in the judgment) (arguing that the notion that customary international law constrains a government's treatment of its own citizens in its own territory is a "20th-century invention of international law professors and human-rights advocates"); *see also supra* notes 62–64 and accompanying text.

field. To legitimate the continued elaboration of ordered liberty in this changed climate, the Court has been fashioning an altogether different discourse—one that seeks to popularize constitutional interpretation by incorporating diverse and diffuse forces that have risen to challenge criminal justice's fairness and its appreciation of liberty. The upshot is no revival of freewheeling liberal jurisprudence, but it is liberty affirming in ways that defy chastened expectations. Four years' worth of cases attest to it.

Almost two generations ago criminal justice was in the constitutional vanguard, the place where conservative law reform found its voice. Today criminal justice may well be in the vanguard once more. It is the place where the Court again is finding a distinguishing voice. This time it is a voice that can engage concerns for liberty that have achieved appreciable public expression but have been glossed or dodged—though not reliably overridden—by a politics of polarized parties, empty sound bytes, and systematic slant. Identifying the presence of those conditions is no precise operation. It involves the cultural and political alchemy and the Court's imperfect estimation of it. But when the conditions are likely present, the Court's failure to respond with an open ear, inclusive language, and an amenability to reasoned redress throws into question its own allegiance to liberty and the legitimacy of its dispositions. The conditions exist in criminal justice today: The Court has answered with a popularizing discourse that enriches liberty's resources, invites new dialectics, takes a less doctrinaire approach to legal doctrine, and openly and pragmatically explores the possibilities for creative but cautious judicial correctives. This project of popularizing constitutional interpretation is being undertaken comprehensively and with earnest in criminal justice, but there is no reason to think it cannot emanate to other areas that present the need. Indeed, with *Lawrence*, *Hamdi*, *Padilla*, *Rasul*, and *Sosa*, we are right to wonder whether that process already has begun.

The Rehnquist Court rightly will be remembered for its projects in the conservative reformation of constitutional law. Like them or not, they are major accomplishments. The Court also will be remembered for *Bush v. Gore*[330] and the competing meanings that singular case invites. Whether the Rehnquist Court will further be remembered for setting the course for popularizing projects that augment constitutional liberty remains to be seen. If that proves to be the Court's legacy as well, constitutional law will have criminal justice to thank once again.

330. 531 U.S. 98 (2000).