PROSECUTION NOTES

CENTER ON THE ADMINISTRATION OF CRIMINAL LAW

The Center on the Administration of Criminal Law is pleased to present Prosecution Notes. *This edition recounts some of the Center's activities over the last year, offers a look back at 50 years of practicing criminal law by expert and experienced practitioner Charles A. Stillman '62, and summarizes all criminal law decisions from the 2010-11 Supreme Court Term.*

In This Edition:

NEWS FROM THE CENTER

By Anthony S. Barkow, Executive Director

In the past year, the Center achieved success across its various areas of activity: academia, the courts, and public policy. This article recounts some of those successes and describes some ongoing Center projects.

CONVICTION INTEGRITY PROJECT

This fall, the Center launches the Conviction Integrity Project. The Project seeks to spark a national conversation regarding the establishment of conviction integrity programs across the country, to refine and improve those programs that already exist, and to develop a best practices template for offices that wish to implement or improve such programs. The Project has two primary goals: (1) to track the development of the Conviction Integrity Program in the New York County District Attorney's Office (the "Manhattan DA"), and (2) to compile best practices and innovations in the field on the issue of conviction integrity and wrongful convictions within district attorneys' offices into a report that will be available to policymakers and district attorneys considering the establishment of a conviction integrity program and seeking a template for doing so.

The Project will interface with the Manhattan DA to track the implementation of its Conviction Integrity Program, which New York County District Attorney Cyrus R. Vance Jr., established in March 2010. The Center's Project will chronicle that program's launch, the problems it sought to address, and the challenges it confronted, as well as the solutions the office developed in response. (The Center's faculty director, Professor Rachel E. Barkow, was appointed to and serves on the District Attorney's Conviction Integrity Program Policy Advisory Panel, which is composed of leading criminal justice experts and advises the Office on national best practices and evolving issues in the area of wrongful convictions.)

The Project will also involve a private, two-part roundtable discussion. The first part of the roundtable will involve national law enforcement leaders, including prosecutors and police officials. The second, shorter part of the roundtable will be opened to national leaders in the area of wrongful convictions, including leading scholars, defense lawyers, Innocence Project affiliates, and criminal justice policy experts.

The goal of the roundtable will be for the Project to emerge from its discussions in a position to develop the best practices template in the form of a report. This component will collect and develop best practices guidance on establishing and administering a conviction integrity program, including templates of checklists, training materials, and other operational materials. Ultimately, the best practices guidance and these templates will be assembled in a report that will set forth the argument for establishing a conviction integrity program in a district attorney's office, and offer guidance and best practices on how to do so. A future goal will be to publicize and disseminate the report and template through various means, possibly including a dedicated website, webcast, and podcasts, and face-to-face meetings and seminars held nationwide. The work product will

be scalable and adaptable to other jurisdictions around the country. Ultimately, the Center aspires to lay the groundwork for the possible creation of a clearinghouse of information regarding how to establish and operate such programs, in an effort to persuade other district attorneys' offices to implement conviction integrity programs.

The Project is funded by a grant from the Public Welfare Foundation.

THE CALIFORNIA PRISONS PROJECT

One of the briefs the Center filed in the last year was its *amicus* brief in *Brown v. Plata et al*. In *Plata*, a panel of three federal judges ruled that California's overcrowded prison population must be reduced in stages over two years to 137.5% of design capacity in order to relieve the overcrowding that has caused unconstitutionally inadequate medical and mental health care. California appealed, and the Supreme Court granted *certiorari*. The Center, joined by 30 leading criminologists who do empirical work on the degree of connection between incarceration rates and crime rates, filed an *amicus* brief arguing that empirical data show that California and other states have implemented prison population reduction programs without adversely affecting public safety. The brief was filed in partnership with the law firm Kellogg, Huber, Hansen, Todd, Evans & Figel, LLP. On May 23, 2011, the Supreme Court sided with the Center and affirmed the lower court order. After the Supreme Court's decision, the Center worked with one of the leading experts in the case proceedings in his work to prepare a report of recommendations on how the state should implement the Court's order. As part of that effort, the Center recruited a group of leading national experts on penology, prisons, and crime to "moot" the court expert's draft report and recommendations.

OTHER CENTER NEWS

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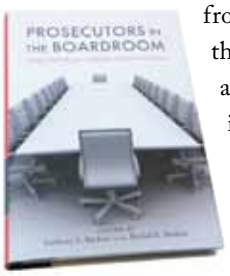
This spring, the Center published a book entitled *Prosecutors in the Boardroom: Using Criminal Law to Regulate Corporate Conduct* (NYU Press, 2011). The book is the collection of contributions by prominent scholars who participated in the Center's first major annual conference, "Regulation by Prosecutors." The book asks the questions "Who should police corporate misconduct?" and "How should it be policed?" In recent years, the Department of Justice has resolved investigations of dozens of Fortune 500 companies via deferred prosecution agreements and non-prosecution agreements where, instead of facing criminal charges, these companies become regulated by outside agencies. Increasingly, the threat of prosecution and such prosecution agreements are being used to regulate corporate behavior. The practice has been criticized on numerous fronts: Agreements are too lenient, there is too little oversight of these agreements, and, perhaps most important, the criminal prosecutors doing the regulating are not subject to the same checks and balances that civil regulatory agencies are. *Prosecutors in the Boardroom* explores the questions raised by this practice by compiling the insights of the leading lights in the field. The essays in this volume move beyond criticisms of the practice to closely examine exactly how regulation by prosecutors works. Broadly, the contributors consider who should police corporate misconduct and how it should be policed, and, in conclusion, offer a policy blueprint of best practices for federal and state prosecution. The book can be purchased via Amazon.com or Barnesandnoble.com, or directly from NYU Press.



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In February, the Center's faculty director, Professor Rachel E. Barkow, published "Federalism and Criminal Law: What the Feds Can Learn from the States," 109 *Michigan Law Review* 519 (February 2011). The article addresses the critical question in criminal law of how to allocate enforcement authority among different levels of government and particularly how much enforcement authority should rest with local officials as opposed to centralized actors at the state or federal level. It is the first comprehensive empirical survey of how criminal law enforcement responsibility is allocated in the states and includes a review of state codes and case law as well as interviews with state prosecutors. The study reveals remarkable similarity among the states about the degree of local control that is desirable. The states are virtually unanimous in their deference to local prosecutors, the small number of categories they identify for centralized authority in a state-level actor, and their support of local prosecution efforts with resources instead of direct intervention or case appropriation. The state experience thus provides an alternative model of central/local cooperation to the one currently used at the federal level.

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The Center held its third major annual conference, "Policing, Regulating, and Prosecuting Corruption," on March 25, 2011. The two keynote speakers were Anne Milgram '96, the former Attorney General of the State of New Jersey, and Neil Barofsky '95, the first Special Inspector General of the Troubled Asset Relief Program. Both Milgram and Barofsky are senior fellows at the Center: Milgram joined the Center in 2010 and Barofsky earlier this year. The event was extremely well attended and involved vigorous discussion of the subject of political and corporate corruption. C-SPAN recorded the conference and broadcast most of its parts. The Center co-sponsored the event with a student journal, the NYU *Annual Survey of American Law*, and several of the scholars who participated in the event wrote articles for publication in the *Annual Survey*'s symposium issue.

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Additionally, the Center was once again cited in a Supreme Court opinion. John Thompson, the respondent in *Connick v. Thompson*, 131 S. Ct. 1350 (2011), was exonerated just weeks before his scheduled execution after 18 years of wrongful imprisonment. Thompson won a jury verdict in a federal section 1983 action for violation of his civil rights due to the New Orleans District Attorney's Office's deliberately indifferent failure to train, monitor, and supervise the prosecutors in that office. The Center filed two *amicus* briefs in support of Thompson, one in a Fifth Circuit *en banc* proceeding and one in the Supreme Court. The Center's briefs highlighted the importance of training prosecutors on their constitutional obligations pursuant to *Brady v. Maryland*. Although the Fifth Circuit agreed with the Center in a *per curiam, en banc* opinion, the Supreme Court reversed. In her dissenting opinion, Justice Ginsburg cited the Center's brief. Both of the Center's briefs were filed in partnership with the Law Offices of Martin J. Siegel, and the Supreme Court brief was filed on behalf of a group of centers at leading law schools committed to the study of criminal law and procedure, the institutional administration of criminal justice, and legal ethics, including the Center, the Criminal Justice Institute at the University of Houston Law Center, the Jacob Burns Ethic Center in the Practice of Law at the Benjamin N. Cardozo School of Law, the Louis Stein Center for Law and Ethics at Fordham University School of Law, and the Stanford Criminal Justice Center at Stanford Law School.

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Finally, since the release of the last edition of *Prosecution Notes*, the Ford Foundation awarded the Center a two-year general support grant. This is the second general support grant to the Center by the Ford Foundation, which also gave the Center a general support grant soon after the Center was established.

50 YEARS PRACTICING CRIMINAL LAW: A LOOK BACK

By Charles A. Stillman '62 with Zachary Margulis-Ohnuma '99

Charles A. Stillman is a founding partner of Stillman & Friedman, P.C.
Zachary Margulis-Ohnuma is the principal attorney of the Law Office of Zachary Margulis-Ohnuma.

In 1959, Russell Bufalino and 19 other defendants with nicknames like "Black Jim" Colletti and "The Guv" Guarnieri stood trial before Judge Irving Kaufman of the Southern District of New York. The charges stemmed from the notorious Apalachin Meeting—the huge gathering of mobsters at a quiet farm in upstate New York disrupted by eagle-eyed state troopers suspicious of the dozens of flashy cars with out-of-state licenses visiting the tiny hamlet.

I was still in law school, having transferred to the night division at New York University so that I could live with my new bride rather than accept a Pomeroy grant that would have required me to live in the dorms—then, men only. But I also had the good fortune of serving Judge Kaufman as his bailiff—a courtroom job that combined the function of manservant to a federal judge, assisting the law clerk (in those days there was only one law clerk) and, by being in Court, observing the cream of the criminal bar in action.[1]

More than 50 years later, there are no bailiffs and NYU no longer has a night division. The Mafia is not what it once was, few convictions are overturned, and there are thousands of new substantive federal crimes.[2] When I first started practicing law, *Miranda v. Arizona*,[3] *Gideon v. Wainwright*,[4] the Racketeering Influenced and Corrupt Organizations (RICO) Act,[5] the Criminal Justice Act,[6] and the present courthouses for the Eastern and Southern Districts of New York were all still to come. Most important, the U.S. Sentencing Guidelines were a quarter-century away. Federal judges had unfettered discretion in fashioning a sentence within the proscribed statutory maximum.

The government still seeks to put people in prison for committing crimes, but just about everything else about criminal law has changed. It would be impossible to summarize the changes in federal criminal law over the last 50 or so years in a short article like this. Nonetheless, with the benefit of perhaps more hindsight than many, I will try to highlight some of the essential developments that have made the practice of criminal law so different now from how it was then—and that have kept my colleagues and me so deeply engaged for all these years.

THE EXPLOSION OF PROCEDURAL RIGHTS

I left the U.S. Attorney's Office for the Southern District of New York in 1966 after trying more than 30 cases in just four years. Trials were more common then, at least in part because there were no Sentencing Guidelines and the statutory maximum sentence for most federal crimes was just five years. In the meantime—i.e., from 1962 to the early 1970s—the procedural rights of criminal defendants increased exponentially, at least on paper. The attorneys and agents I worked with as a prosecutor were, for the most part, professional, honorable, and ethical; nonetheless, it was not unheard of for a defendant in a drug case or a Hobbs Act case to complain of mistreatment at arraignment in Room 318 of the Foley Square courthouse.

[1] The 20 men on trial were convicted and sentenced to terms ranging from three to five years for conspiracy to lie about what they were doing at the obscure farm, but the convictions were later overturned. See *U.S. v. Bufalino*, 285 F.2d 408 (2d Cir. 1960). Nonetheless, the Bufalino trial is still widely considered the first major assault on organized crime.
[2] See generally, American Bar Association, Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law* (1998).
[3] 384 U.S. 436 (1966) (defendants in police custody must be informed of right to counsel and right against self-incrimination).
[4] 372 U.S. 335 (1963) (courts are required under the Sixth Amendment to provide counsel in criminal cases for indigent defendants).
[5] 18 U.S.C. § 1961 *et seq*.
[6] 18 U.S.C. § 3006A *et seq*.

But after *Miranda*, *Mapp v. Ohio*,[7] and *U.S. v. Wade*,[8] pretrial hearings became routine. A crafty agent might still extract a confession from a suspect in custody, but he could not escape the scrutiny of a good defense lawyer and a fair-minded judge. Still, it is a constant of criminal defense practice, then and now, that defendants ignore their attorneys' advice not to make statements to law enforcement, ignore the *Miranda* warnings, and hang themselves on their own words, even with *Miranda* firmly in place.

Perhaps the most important new procedural protection was the advent of *Gideon*, which guaranteed a lawyer to any defendant who could not afford one. The Criminal Justice Act of 1964 implemented *Gideon* in the federal courts. When I started out in practice in New York City, indigent defense was a haphazard process. There was one public defender, assigned to the Southern District: Bernard Moldow, of the Legal Aid Society. He was an extremely able lawyer (later appointed a New York State Criminal Court judge)—but he was only one person. If more than one indigent defendant was charged, the arraignment judge would buttonhole the nearest attorney in the court that day and "ask" him to take on the case pro bono. Such requests were seldom turned down, and most defendants in the Southern District got competent representation even when it was unpaid. We lawyers did very well as a rule and considered it a duty to give back by accepting occasional unpaid assignments; even today, many firms do not submit claims for reimbursement under the Criminal Justice Act because they see indigent defense as a public duty.

Of course, standards varied from court to court around the country and criminal cases frequently proceeded without attorneys or with attorneys who were so incompetent they could not prevent almost routine miscarriages of justice. *Gideon* went halfway to changing that: It guaranteed an attorney with a law license, but that was it. It was not until 1984 that the United States Supreme Court established the constitutional right not just to a lawyer but also to an *effective* lawyer, in *Strickland v. Washington*.[9]

The Criminal Justice Act became effective in 1964 and I was asked to sit on the committee drafting the CJA guidelines for the Southern District of New York. Now, the district enjoys a proud tradition of first-rate attorneys on the CJA Panel who provide effective defenses to all defendants. And the lonely efforts of Bernard Moldow have been replaced by an outstanding group of lawyers in the Office of the Federal Defender.

[7] 367 U.S. 643 (1961) (evidence obtained in violation of the Fourth Amendment may not be used in state or federal courts).
[8] 388 U.S. 218 (1967) (criminal defendant has a Sixth Amendment right to counsel during identification proceedings).
[9] 466 U.S. 668 (1984).

WHAT IS ILLEGAL, ANYWAY?

The substance of federal criminal law has changed as much as or more than the procedure, but in a different direction. Counting the number of distinct crimes on the books is notoriously difficult. By one estimate, 40% of all federal crimes enacted since the Civil War have been created since 1970.[10] There was always (or at least since the 1930s) a broad securities fraud law, but now we defend a mind-boggling array of other financial and business crimes like illegal money transmitting, structuring financial transactions, violating other countries' environmental laws, and, in the more egregious cases, RICO as applied to organizations that have little in common with the fellows that met in Apalachin in 1957. The breadth of these statutes and others more than compensate prosecutors for the procedural gains achieved by defendants over the years. All the procedures in the world provide superficial protection if the criminal law is ever expanding.

THE RISE AND FALL OF THE MANDATORY SENTENCING GUIDELINES

For the convicted, the most important aspect of a criminal prosecution is sentencing. Nowhere have we seen more change over the years. Starting in the late 1960s—as expanded procedural protections were coming into effect and the number of federal crimes was multiplying—statutory maximum sentences became longer and longer. Judges did their best to be fair and evenhanded, but they enjoyed no guidance as to where on a scale of zero to 20 or more years a sentence should fall. Judge shopping was essential: In those days, if a defendant in the SDNY pleaded guilty at arraignment on the indictment, the arraignment judge sitting during that two-week rotation would impose sentence. Otherwise, the case would be randomly assigned ("wheeled out," as it was aptly described) to another judge. If you could control the timing of the arraignment—and you often could ("I have a very important brief to write next week; let's just do it the following week")—you could pick your judge. So long as your client understood what was going on, you could urge him to plead guilty at arraignment, thereby assuring a potentially better result at sentencing.

[10] American Bar Association, Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law* (1998) at 7. See also John S. Baker Jr., *Revisiting the Explosive Growth of Federal Crimes*, LEGAL MEMORANDUM (June 16, 2008); John S. Baker Jr. and Dale E. Bennett, *Measuring the Explosive Growth of Federal Crime Legislation*, THE FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES (2004).

SAVE THE DATES

FEBRUARY 7, 2012

Conversation on Urban Crime

CYRUS VANCE JR.
New York County District Attorney

APRIL 17, 2012

FOURTH ANNUAL CONFERENCE

New Frontiers in Race and Criminal Justice

KEYNOTE SPEAKER:
MICHELLE ALEXANDER, author
The New Jim Crow: Mass Incarceration in the Age of Colorblindness

Greenberg Lounge, Vanderbilt Hall
40 Washington Square South

Invitations to follow

The change in the assignment system after the Federal Magistrates Act of 1968, along with the Sentencing Guidelines, dramatically altered the picture. A magistrate judge—using the same wooden wheel used back then—chooses a district judge at random. But it does not matter what day your client is arraigned or who is sitting; the sentencing judge will always be chosen by "chance." And, until just a few years ago, that judge would have been bound by the mandatory U.S. Sentencing Guidelines.

The Sentencing Reform Act of 1986 that created the Guidelines was intended to add uniformity and consistency to sentencing. But it also had the effect of increasing sentences, as judges were forced to focus on the defendant's criminal conduct and record, with little or no regard for personal history and characteristics. The result was stifling: Single mothers with small children involved in fraud were sentenced to the same terms of imprisonment as men without families. And, with President Reagan's War on Drugs in full swing and a deadly new form of cocaine called crack inspiring previously unheard-of levels of street violence, sentences became harsher and harsher. By 1992, the average time in prison had more than doubled, from 26 months in 1986 to 59 months.[11]

The sentencing tide started to turn, albeit very slowly, with *Koon v. U.S.*,[12] in which the U.S. Supreme Court upheld a more liberal view of downward departures under the Guidelines to justify a lower sentence for the policeman who led the videotaped beating of Rodney King. Another series of cases, starting with *Apprendi v. New Jersey*[13] and climaxing with *U.S. v. Booker*,[14] first questioned, then "excised" on Sixth Amendment right-to-jury trial grounds, the mandatory sentencing scheme. We are not back where we were in 1986: Courts still calculate the Guidelines, the Guidelines are still harsh, and sentencing judges can be overturned for getting it wrong. But *Booker* now at least permits judges to fulfill their statutory duty under 18 U.S.C. § 3553(a) to consider the defendant as a complete person. Average sentences are down to 44.3 months.

White-collar cases, though, are an exception to these trends. When first enacted, the Guidelines left room in appropriate cases for the existing practice of granting probation or home confinement to most low-level fraud defendants. That changed with the drumbeat of huge corporate scandals like Enron, Adelphia, and WorldCom, which inspired the Sentencing Commission to add more and more upward adjustments. Average sentences for fraud, though, actually dropped after the Guidelines were enacted, and then were remarkably steady from about 1989 until *Booker*, at around 15 months.[15] One reason for this trend was that the Guidelines, to promote deterrence, sought to make prison more likely for economic crimes, but initially reduced sentence length.[16] Fraud sentences, however, began rising briskly starting in 2006 (to 18.6 months, up from 14.9 months the year before), the year after *Booker*, climbing to an average of 23.2 months last year according to Commission statistics.[17] And of course today's headline cases, like Madoff and others convicted of serious fraud crimes, although meted out in months result in decades of incarceration.

CONCLUSION

There is no question we have come a long way from the days of the Bufalino trial. A harder question is whether lawyers and their clients are better off now than they were before. Some injustice has been added to the system, but much has also been removed by judges, lawyers, and, frankly, politicians working in good faith to impose rules that achieve just results. The practice of criminal law is every bit as interesting, frustrating, and ultimately rewarding as it was in 1959. And there is no expectation that creating new crimes is at an end. The truth is that there will always be crime and as long as there is crime there will be plenty of disagreement on how to punish it. That will keep future generations of prosecutors and defense lawyers as busy and engaged as the last.

In the final analysis, regardless of all that has changed, three fundamental principles remain inviolate: the duty of the prosecution to pursue allegations of crime vigorously and fairly; the defense to effectively represent the accused as the last bulwark in a free society against an oppressive and overreaching prosecution; and finally, the Court to make sure that both sides follow the rules so that in the end, true justice is realized.

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11 United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing* (2004) ("*15 Year Report*") at 46.
12 518 U.S. 81 (1996).
13 530 U.S. 466 (2000) (Sixth Amendment prohibits judges from enhancing criminal sentences beyond statutory maximums based on facts not admitted or decided by a jury beyond a reasonable doubt).
14 543 U.S. 220 (2005) (holding the U.S. Sentencing Guidelines are not mandatory).
15 See *15 Year Report* at 59–60.
16 *Id.* at 59 ("For example, average time served for embezzlement has decreased from preguidelines levels, but nearly twice the proportion of embezzlers are going to prison. As more embezzlers were given short periods of imprisonment, the average length of imprisonment among all embezzlers declined as the new offenders were included in the average.").
17 United States Sentencing Commission.

SCOTUS

Read summaries of all 27 decisions from the 2010-11 Supreme Court Term in the area of criminal law; these rulings decided questions relating to Sentencing, Evidence, Fourth Amendment, Fifth Amendment, Sixth Amendment, Habeas Corpus, Statutory Interpretation, and Due Process.

1. SENTENCING

ABBOTT V. UNITED STATES

131 S. Ct. 18 | Decided November 15, 2010
By Sean David Childers '13

In an 8-to-0 opinion written by Justice Ginsburg, the Court upheld additional prison terms for criminal defendants convicted of 18 U.S.C. § 924(c), a statute that prohibits using, carrying, or possessing a deadly weapon in connection with "any crime of violence or drug trafficking crime."

The statute at issue triggers increasing mandatory minimum sentences of either five, seven, or 10 years, depending on whether the firearm in connection with the crime was possessed, brandished, or discharged. Petitioner Abbott, along with consolidated petitioner Gould, argued that an "except clause" in § 924(c) was triggered by their other convictions and should have limited their prison terms.

Abbott was convicted of two predicate drug trafficking offenses and being a felon in possession of a firearm; the possession conviction triggered a 15-year mandatory sentence under the Armed Career Criminal Act. Along with the 15-year sentence came the additional mandatory five-year sentence under § 924(c) for possessing a firearm in relation to a trafficking crime, for a total of a 20-year sentence. Prefacing § 924(c)(1)(A), however, is an "except clause" that reads that the five years shall be imposed as a consecutive sentence "[e]xcept to the extent that a greater minimum is otherwise provided by…any other provision of law."

The petitioners argued that this except clause, purportedly triggered in Abbott's case by the Armed Career Criminal conviction, meant that the additional five years for firearm possession could not be tacked on to the 15-year sentence. The Court, pointing primarily to Congressional purpose, disagreed. The Court first noted that the petitioners' argument was inconsistent with the most logical reading of the statute, which was an insistence that judges impose additional punishment in instances of § 924(c) violations. Second, the Court pointed to the absurd outcome that would result from petitioners' reading of the statute. For example, asserted the Court, imagine two separate criminals in possession of different amounts of drugs who then brandish firearms. If the first criminal's quantity subjected him to an underlying drug sentence of five years, then he would get an additional seven years for brandishing a firearm under 924(c), leading to a total of a 12-year sentence. But if the second criminal's greater quantity subjected him to a sentence of 10 years for the underlying drug charge, and the petitioners' reading of the except clause were accepted, then the sentencing judge would be precluded from tacking on the additional years for brandishing a firearm. In essence, argued the court, the criminal who possessed more would walk away with the lesser sentence.

> Additional prison terms for criminal defendants convicted of 18 U.S.C. § 924(c), a statute which prohibits using, carrying, or possessing a deadly weapon in connection with "any crime of violence or drug trafficking crime," are upheld.

Justice Kagan did not participate in the consideration of the case.

FREEMAN V. UNITED STATES

131 S. Ct. 2685 | Decided June 23, 2011

By Mark Bulliet '13

In *Freeman v. United States*, the Court reversed the Sixth Circuit's holding that a defendant who entered a Rule 11(c)(1)(C) plea agreement in which the parties agreed the appropriate sentence was within the applicable guideline range was ineligible for a sentence reduction under 18 U.S.C. 3582(c)(2) following a retroactive amendment that lowered the range.

William Freeman was sentenced to 106 months incarceration for various offenses including possession of crack cocaine with intent to distribute and possession of a firearm during the course of that offense. In the plea agreement, the parties agreed that he would receive the minimum available sentence within the applicable range. Three years later, the Sentencing Commission retroactively amended the Guidelines to reduce the disparity between the penalties for crack and powder cocaine. Freeman moved to have his sentence reduced to reflect the amendment.

Defendants can avail themselves of retroactive amendments to the Sentencing Guidelines that reduced the disparity between the penalties for crack and powder cocaine.

Justice Kennedy's plurality opinion concluded that Freeman could avail himself of the retroactive amendment, reasoning that the original sentence was "based on" the Guidelines, even though it arose out of a Rule 11(c)(1)(C) agreement.

Justice Sotomayor, concurring in the judgment, provided the fifth vote for reversal. She concluded that petitioner was entitled to retroactive relief only because his plea agreement expressly provided that his sentence was based on the Guidelines. She stated, however, that in future cases the government could secure from defendants waivers of the right to seek sentencing reductions.

Chief Justice Roberts dissented for four Justices, arguing that Rule 11(c)(1)(C) agreements are enforceable bargains to which defendants should be held.

PEPPER V. UNITED STATES

131 S. Ct. 1229 | Decided March 2, 2011

By Luke Berg '13

In a majority opinion authored by Justice Sotomayor, the Court held that a resentencing court may consider post-sentencing rehabilitation in granting a downward departure from the Federal Sentencing Guidelines. The Court analyzed various statutes related to sentencing and focused on statutory language prompting courts to consider, without limitation, any information concerning the defendant. The majority also emphasized the need to fit the punishment to the person, rather than the crime. The goal of a sentencing court, the majority wrote, is to "sentence the defendant as he stands before the court on the day of sentencing."

The majority rejected two arguments that post-sentencing rehabilitation should not be considered. First, a section of sentencing law, 18 U.S.C. § 3742(g)(2), disallows a resentencing court from departing from the Sentencing Guidelines for any reason not included in the initial sentencing decision. The Court agreed that this would on its face preclude post-sentence rehabilitation as a consideration, but extended its holding in *United States v. Booker* and invalidated the section as unconstitutional. According to the majority, a contrary ruling would lead to an anomalous result by effectively making the Sentencing Guidelines mandatory in some resentencing situations but not in others.

Second, the Sentencing Commission had written a policy statement that specifically prohibited resentencing courts from considering interim rehabilitation. The Commission feared that allowing such considerations would lead to disparity by giving an advantage to those who happened to receive a de novo rehearing. In response, the Court first noted that such policy statements are not binding post-*Booker*. Next, the majority disagreed that such disparities were the kind Congress intended to prevent. Each case has its own procedural opportunities, they reasoned, but this is not the result of judges' arbitrary or inconsistent views. The Court also noted that the defendant's behavior could move a new sentence up or down, so it was just as likely to be a disadvantage as an advantage. Either way, consideration of all factors would better align sentences with the purposes of punishment.

Justice Breyer, in a concurrence, said he would have taken the opportunity to explain more fully when it is appropriate for a court to depart from federal sentencing

guidelines. He would ask appellate courts to review deviations from the Guidelines more strictly, but grant additional deference when a deviation is based on unique circumstances the Guidelines had not contemplated.

Justice Alito also wrote a partial dissent/concurrence wherein he agreed with Justice Breyer's formulation and criticized what he saw as the majority's move back toward the pre–Sentencing Guideline days of complete discretion for judges.

Justice Thomas filed a dissent that chastised the Court's *Booker* line of precedent. He would not have made the Sentencing Guidelines advisory, he wrote, but would have left them mandatory unless their application actually violated the Sixth Amendment. Accordingly, he would have upheld the Commission's rule barring consideration of post-sentencing rehabilitation.

TAPIA V. UNITED STATES

131 S. Ct. 2382 | Decided June 16, 2011
By Sean David Childers '13

The Court unanimously held that the Sentencing Reform Act of 1984 (SRA) precluded sentencing judges from both imposing and lengthening a prison term based on rehabilitation goals.

Defendant and petitioner Alejandra Tapia was convicted of, among other things, smuggling unauthorized aliens into the United States. The District Court judge imposed a 51-month prison term, at least in part, so that Tapia could serve enough time to qualify for a drug abuse program. The Court reversed the Ninth Circuit, which had held that considering rehabilitative needs was inappropriate in deciding whether to impose a prison sentence, but appropriate when deciding the length of the term once imprisonment was chosen.

Justice Kagan, writing for the Court, held that standard rules of grammar indicate that consideration of rehabilitation was inappropriate in determining both whether to imprison and the length of the sentence's term. The Court also pointed to another provision of the SRA, echoing the same theme, that bars the Sentencing Commission from recommending imprisonment based on a defendant's rehabilitative needs. Finally, the Court pointed to sections of the SRA that explicitly grant judges freedom to consider treatment programs when imposing probation or supervised release as evidence that Congress knew how to give such latitude to sentencing judges when it so desired.

2. EVIDENCE

BULLCOMING V. NEW MEXICO

131 S. Ct. 2705 | Decided June 23, 2011
By Luke Berg '13

By a vote of 5 to 4, the Supreme Court held that in order for a forensic lab report to be admitted into evidence, it must be accompanied by the testimony of an analyst who observed or participated in the production of that report. Justice Ginsburg, writing for the majority, was joined in full by Justice Scalia and in part by Justices Thomas, Kagan, and Sotomayor. The report in question was a blood alcohol test in a standard DUI prosecution. The analyst who performed the test and signed the report was on leave, so the prosecution called another technician who did not have any involvement with the test but had supervised others.

The state tried to argue that a surrogate witness was adequate because the report was primarily machine-generated. Disagreeing, the majority pointed out that the report also contained statements about following proper procedure—human events to which the substitute witness could not speak. Without the ability to cross-examine someone who at least observed the test, reasoned Justice Ginsburg, the defendant could not challenge the competence or integrity of the certifier, nor assess whether mistakes were made in the process of generating the report. Ultimately, however, the majority rested on the formalism required by the Confrontation Clause—a clause that, according to the majority, does not permit exceptions based on its underlying values.

The Confrontation Clause requires that, in order for a forensic lab report to be admitted into evidence, it must be accompanied by the testimony of an analyst who observed or participated in the production of that report.

In dissent, Justice Kennedy, joined by Justices Roberts, Alito, and Breyer, argued that the majority did significant damage to the efficiency of the criminal justice system by sticking to a "wooden formalism." It pointed out that the defendant had the right to call the analyst as a witness if it wished to challenge the report, and that free retesting was available upon request. Furthermore, it noted that multiple employees often generate reports, so the majority's rule did not provide the protections it claimed to. Finally, the dissent pointed to the "chaos" that would result from the increased time in court for New Mexico's lab analysts.

Justice Ginsburg defended some of the dissent's criticisms in the section of the majority opinion joined only by Justice Scalia. She argued that the dissent's alarmism was dubious at best. Because most cases never make it to trial, and because the prosecution often wants to bring analysts to the stand, the effect on state labs should be minimal. Furthermore, notice and demand laws that allow defendants to forgo their right to confront help ameliorate the situation.

Justice Sotomayor also filed a solo concurring opinion in which she emphasized the limited reach of the Court's holding and observed a number of situations that had not been decided.

DAVIS V. UNITED STATES

131 S. Ct. 2419 | Decided June 16, 2011
By Luke Berg '13

Affirming the decision of the Eleventh Circuit Court of Appeals, the Supreme Court held that the exclusionary rule does not apply when police rely on a binding appellate precedent that is later overturned. In compliance with a well-settled Eleventh Circuit precedent, Davis' car was searched after he was arrested and handcuffed in a police vehicle. Two years later, in *Arizona v. Gant*, the Supreme Court found such searches to be unconstitutional. On appeal, Davis argued that the gun found during the search of his vehicle and used to convict him should be excluded because of the subsequent change in law.

Writing for a 7-2 majority, Justice Alito explained that the sole purpose of the exclusionary rule is to deter Fourth Amendment violations and that its application is not guaranteed every time a violation occurs. Because the exclusionary rule is a judicial creation not mandated by the Constitution, argued the majority, the Court is free to refuse to apply it when its prudential justifications are not met. In this case, the police did not act in bad faith and therefore, reasoned Justice Alito, there could be no deterrence to justify the harsh penalty of exclusion.

The exclusionary rule does not apply when police rely on a binding appellate precedent that is later overturned.

Davis argued that even though the police behavior was not culpable, the exclusionary rule should nevertheless apply. Justice Breyer, in a dissent joined by Justice Ginsburg, agreed. The dissent focused on the Court's retroactivity doctrine that requires application of a new rule to all pending cases. The majority acknowledged that the rule applied retroactively, but distinguished the choice of remedy from the application of the rule. This distinction did not satisfy the dissenters, who felt that a rule without a remedy was unjust. Furthermore, reasoned the dissent, because the exclusionary rule is often the only remedy to Fourth Amendment violations, defendants would have no reason to challenge bad precedent without the possibility of a remedy, leading to ossification.

The dissent also worried that extending the majority's logic would erode the Fourth Amendment because the rule's limit was uncertain. Justice Sotomayor filed a concurrence arguing that the majority's opinion was narrower than the dissenters feared and that it left open the questions they were concerned about.

KENTUCKY V. KING

131 S. Ct. 1849 | Decided May 16, 2011
By Luke Berg '13

In an 8-to-1 decision written by Justice Alito, the Supreme Court resolved a split over a nuance of the exigent circumstances exception to the Fourth Amendment. While the Fourth Amendment generally requires a warrant prior to search, certain circumstances—in this case the destruction of evidence—justify warrantless searches. Lower courts had created a variety of tests to determine whether exigencies caused by police behavior should qualify. The Court held that the appropriate test was whether the police behavior giving rise to the exigent circumstances violated or threatened to violate Fourth Amendment protections. If it did not, the majority found, a warrantless search was justified. The opinion first systematically discussed and rejected various proposed tests, then announced its rule and applied it to the facts.

In this case, the police had followed a suspected drug dealer into an apartment complex but did not see which unit he entered. They smelled marijuana coming from a door on the left, so they knocked and announced their presence. Upon receiving no response, but hearing what sounded like drug-related evidence being destroyed, the police broke into the apartment and discovered the defendant and two others with marijuana and cocaine in plain sight. The initial suspect, however, was not in the apartment but in the unit across the hall.

The Kentucky Supreme Court invalidated the search, reasoning that the police could have foreseen that

knocking would cause the defendant to destroy evidence, thus creating the exigency. The Supreme Court, however, disagreed that this fact was relevant. Since the base inquiry of the Fourth Amendment is reasonableness, the opinion argued, the rule should likewise depend on the reasonableness of police behavior. Any citizen, police or otherwise, can knock on a door, and the occupant has no obligation to respond. King chose to destroy evidence rather than to simply refuse the police entry. Therefore, reasoned the majority, the police behavior prior to the intrusion was consistent with the Fourth Amendment and the intrusion was justified, assuming the noises were sufficient to count as exigent circumstances. However, since the lower opinion had not answered that question, the Supreme Court remanded to the Kentucky Court.

In a lone dissent, Justice Ginsburg wrote that she would have chosen the rule that the exigency must have existed apart from police behavior. She feared that the Court's ruling would create an exploitable loophole to Fourth Amendment protections.

MICHIGAN V. BRYANT
131 S. Ct. 1143 | Decided February 28, 2011
By Luke Berg '13

In a 6-to-2 decision authored by Justice Sotomayor, with Justice Kagan recused, the Court held that the statements of a dying victim to police were non-testimonial and therefore not barred from trial by the Confrontation Clause. The opinion emphasized that the test, originally laid out in *Crawford v. Washington*, requires an objective determination of the "primary purpose of the interrogation" when assessing whether statements are testimonial. The Court explained that the goal of the Confrontation Clause is to prevent the state from generating trial testimony out of court. A secondary question addressed by the case was whether an ongoing emergency existed so as to indicate that the purpose of the statements were non-testimonial. According to the Court, the existence of an emergency is determined by evaluating "the circumstances in which the encounter occurs and the statements and actions of the parties."

Covington, the victim, had been shot by Bryant and had driven himself to a gas station where the police found him. Even though the immediate danger to Covington had passed, the majority nevertheless found that the primary purpose of police questions was to deal with a potential ongoing emergency, rather than to aid with an investigation or prosecution. Of particular importance was the continuing threat posed by the use of a gun, the informality and content of the questions, and the victim's injured state. According to the Court, because statements made in such a situation are so unlikely to be fabricated, the confrontation requirement can safely be relaxed.

In a brief concurrence, Justice Thomas wrote that rather than inquiring about the primary purpose of an interrogation, he would focus on the formality and solemnity of the statements and their similarity to practices

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"Treasury's mismanagement of TARP and its disregard for TARP's Main Street goals—whether born of incompetence, timidity in the face of a crisis, or a mindset too closely aligned with the banks it was supposed to rein in—may have so damaged the credibility of the government as a whole that future policy makers may be politically unable to take the necessary steps to save the system the next time a crisis arises. This avoidable political reality might just be TARP's most lasting, and unfortunate, legacy."

Senior Fellow Neil M. Barofsky '95, "Where the Bailout Went Wrong," *The New York Times*, March 29, 2011, http://www.nytimes.com/2011/03/30/opinion/30barofsky.html?_r=2&ref=opinion

the Confrontation Clause was designed to prevent.

Justice Scalia wrote a scathing dissent, lamenting that the decision left the Court's Confrontation Clause jurisprudence in shambles. He criticized the majority's test for inviting a discussion of both parties to the interaction. He would have limited the test to the subjective intent of the declarant and in this case thought it abundantly clear the statements were intended to be testimonial.

Justice Ginsburg, in a short dissent, agreed with Justice Scalia and pointed out that the statements might have been allowed under a dying declaration exception, but that question was not before the court.

3. FOURTH AMENDMENT

CAMRETA V. GREENE

131 S. Ct. 2020 | Decided May 26, 2011
By Sarah M. Nissel '08

In a 7-to-2 decision written by Justice Kagan, the majority held that the Supreme Court may review a lower court's ruling on a constitutional question upon the request of a prevailing party so long as the appeal satisfies Article III's "case or controversy" requirement. The Court, however, found the case to be moot because although the petitioners maintained a stake in the outcome, the plaintiff did not. Because petitioners' ability to challenge the Ninth Circuit's constitutional holding was frustrated due to mootness, the Court vacated that portion of the Ninth Circuit's decision.

Petitioner Camreta, a state child protective services worker, and petitioner Alford, a county deputy sheriff, interviewed S.G., a minor, at her elementary school upon suspicion that her father had sexually abused her. The minor's mother subsequently sued for damages in federal court on S.G.'s behalf, arguing that the child's Fourth Amendment rights had been violated when she was interviewed absent a warrant, exigency, parental consent, or a court order. The courts below ruled that the defendants' actions had in fact violated the child's constitutional rights, but that because the law at the time was not clearly established, the government officials—Camreta and Alford—were entitled to qualified immunity.

Petitioners, despite having prevailed below, sought review by the Court to reassess the Ninth Circuit's determination that their conduct had violated the Fourth Amendment. The majority first found that Camreta satisfied Article III's "case or controversy" requirement because he maintained a "personal stake" in the case and had suffered "injury in fact" that was redressable by the Court: As a government official, the lower court's decision affects his future job conduct. The majority next explained that while, generally, its "prudential practice" is to not hear appeals by winning parties, important policy reasons, such as the future effects on the parties and their co-workers, place "qualified immunity cases in a special category."

Finally, although the Court held it may review such a case and that Camreta satisfied Article III's "case or controversy" requirement, it found that because S.G. no longer had a stake in the outcome as she had moved across the country and was months away from reaching the age of majority, the case was moot. Because of this mootness, Justice Kagan argued, the Court needed to vacate the portion of the Ninth Circuit's opinion addressing constitutional issues.

The majority specifically limited its holding to: (1) a finding of only its own authority to review such cases brought by prevailing parties—it did not make a finding as to the authority of appellate courts to do so; and (2) a determination of the cases it may review, as opposed to what it must consider.

Justice Sotomayor, joined by Justice Breyer, concurred, and Justice Scalia filed a brief, separate concurring opinion.

In a dissenting opinion, Justice Kennedy, joined by Justice Thomas, argued that Camreta lacked standing. Justice Kennedy viewed Camreta's injury as merely potential—injury by the action of some as-yet-unknown party. Justice Kennedy characterized the Court's ruling as an advisory opinion that violated Article III's "case or controversy" requirement because it merely vacated a portion of the Ninth Circuit's decision rather than its entire judgment.

ASHCROFT V. AL-KIDD

131 S. Ct. 2074 | Decided May 31, 2011
By Luke Berg '13

Federal prosecutors arrested Abdullah al-Kidd after obtaining a warrant under the material witness statute. However, al-Kidd was never called as a witness and was later released. He sued, claiming that then–Attorney General John Ashcroft had used the warrant as a pretext for his arrest and that his Fourth Amendment rights had therefore been violated. Ashcroft moved to dismiss on the

basis of qualified immunity but was denied by both the district court and Ninth circuit court. By a vote of 8 to 0 with Justice Kagan recused, the Supreme Court reversed the Ninth Circuit, holding that Ashcroft was entitled to qualified immunity and that the case should have been dismissed.

Justice Scalia, writing for the Court, addressed both prongs of the qualified immunity test. First, the majority held that a pretextual arrest based on a valid warrant is not a constitutional violation. Since the Fourth Amendment proscribes objectively unreasonable searches and seizures, subjective intent is usually not a legitimate consideration. The Court relied on substantial precedent and distinguished the few Fourth Amendment cases that do allow subjective considerations. Second, the majority held that regardless of the answer to the constitutional question, the issue was not "clearly established law," and so Ashcroft was immune. Justice Scalia pointed to the lack of any precedent establishing that a pretextual motive could render an otherwise valid arrest unconstitutional. Finally, the opinion noted that although addressing either prong would resolve the case, the Ninth Circuit had improperly addressed both and the mistakes needed to be corrected.

Justice Kennedy, in a concurrence joined in part by Justices Breyer, Ginsburg, and Sotomayor, pointed out that the Court was not ruling on the merits of the government's use of the material witness statute but on the narrower question of whether a pretextual motive was constitutionally barred. While the broader question was not before the Court, Justice Kennedy's concurrence indicated some skepticism toward the government's behavior.

Writing only for himself in the second half of his concurrence, Justice Kennedy argued for a high bar for overcoming qualified immunity. He emphasized the importance of insulating national figures from the most stringent rulings in the country.

Justice Ginsburg and Justice Sotomayor also wrote concurrences, both joined by each other and by Justice Breyer. Both concurrences agreed fully with the majority's ruling that Ashcroft was entitled to qualified immunity because the law was not clearly established on the issue. However, both criticized the unnecessary ruling on the constitutional question and attacked some of its premises—in particular, the assumed validity of the warrant.

4. FIFTH AMENDMENT

BROWN V. PLATA

131 S. Ct. 1910 | Decided May 23, 2011

By Luke Berg '13

By a vote of 5 to 4, the Supreme Court upheld a Ninth Circuit injunctive order that requires the state of California to reduce its prison population to 137.5% capacity within two years. The majority opinion, written by Justice Kennedy, enumerated the limitations on such orders under the Prison Litigation and Reform Act of 1995 (PLRA) and determined that all had been met.

First, the Court held that the Ninth Circuit appropriately allowed a three-judge panel to consider a

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"No one is arguing that any particular individual should be let out of prison. Ending juvenile life without parole merely leaves open the possibility that a child who commits a crime can petition for release later in life, if he can demonstrate that he is remorseful, has rehabilitated, and will not reoffend. As a society we can no longer afford to declare youth worthless and sentence them to die in prison without giving them an opportunity to have their sentence reviewed."

Executive Director Anthony S. Barkow, "Every Child Deserves a Second Chance," *The Huffington Post,* May 24, 2011, http://www.huffingtonpost.com/anthony-barkow/every-child-deserves-a-se_b_866501.html

population limit. Under the PLRA, the state must have first been given a less intrusive order that failed to remedy the situation in a reasonable amount of time. The Ninth Circuit had consolidated two similar class actions alleging Eighth Amendment violations of insufficient medical care.

The state of California must reduce its prison population to 137.5% of design capacity within two years in order to remedy unconstitutional conditions in the California prison system.

Both cases had resulted in remedial orders that had been in place for at least five years, and neither resolved the problem. Even though both remedial plans had new developments, the majority held that the amount of time required to allow compliance for the most recent orders depends on the history of the remedial program and that the ongoing violations gave enough reason to doubt that new efforts would be effective.

After reviewing the evidence, the Court found the next two requirements of the PLRA to have been met: that the evidence supported overcrowding as the primary cause of the violations, and that reducing the prison population was the only feasible solution. However, the Court noted that the PLRA does not require finding that overcrowding is the only cause, nor that reducing the population would entirely solve the problem.

The PLRA also requires that the injunction remedy be the "least intrusive means necessary" to correct the violation. The state and dissents argued that a population cap would affect large groups of prisoners outside the plaintiff classes and was thus overly broad. However, the majority responded that although most prisoners are currently healthy, many would enter the class when they became subject to the inadequate medical care resulting from overcrowding. Moreover, the majority argued that the systemwide nature of the order is a virtue in that it allows the state discretion in how best to comply, making it less intrusive than a more specific order.

Finally, the Court held that the Ninth Circuit panel had given "substantial weight to…public safety," the last requirement of the PLRA. The panel had consulted experts and statistics that showed that reducing overcrowding could be achieved without significant danger. Furthermore, the open-ended nature of the order allowed the state to comply in the safest way possible.

At the end of the opinion, the Court emphasized that any equitable remedy was subject to modification as the circumstances change and that the panel should give serious consideration to the state's opinions on how to deal with contingencies.

Justice Scalia wrote a dissent joined by Justice Thomas, where he argued that the order violated the PLRA because it was not limited to the actual violations that had occurred. He also critiqued the use of structural injunctions, writing that judges lacked not only the institutional capacity to run social institutions, but also the constitutional authority to make the necessary policy judgments. At the end of his dissent, Justice Scalia expressed his disdain for the majority's "bizarre coda" that detailed how the state might request modification of the order. He characterized the section as an attempt by the Court to either exceed its authority or wash its hands of the consequences.

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"[H]e was presented with a credible accusation by a victim. He proceeded quickly, which was understandable because of the seriousness of the charges and the flight risk, and then, when information emerged about the accuser's lack of credibility, he agreed to change the bail conditions and disclose everything to the defense. That's how we'd want a prosecutor to act."

Executive Director Anthony S. Barkow, praising Manhattan District Attorney Cyrus Vance Jr.'s decisionmaking in the Dominique Strauss-Kahn case in "When a DA's Case Is About to Crumble," NBC New York, July 6, 2011, http://www.nbcnewyork.com/news/local/When-a-DAs-Case-is-About-to-Crumble-125030169.html

Justice Alito, joined by Chief Justice Roberts, also dissented and primarily found implausible the idea that a massive release of prisoners was narrowly tailored to the violations. He pointed out that the panel had not distinguished constitutional violations from sub-optimal conditions and that the order may not even fix the violations since the state could comply by only releasing healthy prisoners. Finally, he complained that the Court had not adequately considered public safety.

J.D.B. V. NORTH CAROLINA

131 S. Ct. 2394 | Decided March 23, 2011
By Luke Berg '13

In a 5-to-4 decision written by Justice Sotomayor, the Court held that a child's age can be considered in *Miranda*'s custody analysis provided the police knew or reasonably should have known the child's age. The warnings required under *Miranda*, the Court explained, only apply if a reasonable person in the circumstances would not have felt free to leave. Since it is common sense that children perceive situations differently from adults, it would be absurd for the law to equate the reasonable child with the reasonable adult.

J.D.B., the child in this case, was a 13-year-old seventh-grader suspected of burglary. During the school day, a uniformed police officer interrupted class and brought J.D.B. to the vice principal's office, where he was questioned about the crime. The majority emphasized that it would be nonsensical to consider whether a reasonable adult would feel free to leave in this situation. The authority of a vice principal and dynamics of being taken to her office are not applicable to adults.

Justice Alito, in dissent, focused on the clarifying goal of *Miranda*'s simple objective test. Allowing age to be a complicating factor would be counterproductive, he argued, and would shift the test closer to the ambiguous voluntariness test that *Miranda* aimed to fix. According to the dissenters, the holding also opens the floodgates to considering other personal characteristics. The majority's ruling, they assert, provides no clear principle to distinguish between age and such factors like intelligence, education, or background—factors that may be far more relevant to whether a similarly situated person would feel pressured by police questioning.

The majority acknowledged, in response to these criticisms, that clarity is a primary advantage of the *Miranda* rule. They argued, however, that allowing age in the custody analysis does not sacrifice clarity, because unlike most characteristics of individuals, it is clearly visible to police officers. Moreover, children are almost always less likely than adults to feel free to leave. Other personal characteristics, even if obvious, may affect a person's perception in either direction. In arguing that considering age would not diminish the objective nature of the analysis, the majority also pointed out that many areas of the law that require reasonableness tests contemplate age—in particular, negligence in civil tort claims.

The dissent also argued that the majority's ruling was unnecessary. They noted that a defendant still has the option of arguing that the Constitution's voluntariness requirement has been violated and that *Miranda* is just a supplemental rule intended to provide clarity. The dissenters instead would have weighed only the attributes of the interrogation itself: located in a school, with an authority figure present, etc. These, according to the dissent, would have been sufficient to answer the question.

5. SIXTH AMENDMENT

BOND V. UNITED STATES

131 S. Ct. 2355 | Decided June 16, 2011
By Tim Shepherd '13

In a unanimous decision authored by Justice Kennedy, the Court held that an individual has standing to challenge the constitutionality based on the Tenth Amendment of a statute under which he or she has been indicted. Arguing that 18 U.S.C. § 229 unconstitutionally encroached on state sovereignty, petitioner Bond sought to challenge its validity after she was indicted for violations relating to her use of strategically placed caustic substances to burn the mother of her husband's unborn child. Both the federal district court and the Third Circuit denied Bond's standing to bring such a challenge, citing *Tennessee Electric Power Co. v. TVA* for the proposition that Tenth Amendment challenges must be brought by states themselves. The Supreme Court reversed the decision of the Third Circuit and remanded the case to determine whether the statute was valid as necessary and proper for carrying into execution the President's Treaty Power.

The Court first clarified that since the incarceration constituted a concrete injury redressable by invalidation, there was no barrier to Bond's standing based on Article III's case or controversy requirement. Furthermore, the language cited in *Tennessee Electric* to suggest that

individuals lack standing in such matters absent some State action reflected the *Tennessee Electric* Court's imprecise and interchangeable use of "standing" and "cause of action." The Court posited that "standing" was properly read in this context to refer to "cause of action" and that any assertion that the "standing" of an individual is limited by this language was contradicted by subsequent case law. The opinion concluded that *Tennessee Electric* was therefore not controlling or instructive on the issue of standing.

While at the Supreme Court level, the government did not deny Bond's standing on this matter, it argued that such standing could only stem from arguments based on the enumerated powers of Congress, not on challenges rooted in state sovereignty. The Court rejected this distinction as artificial, reasoning that the issues of limited national powers and state sovereignty are necessarily intertwined. The Court similarly rejected arguments that Bond's challenge was invalid as it demonstrated no individual legal interest, but only the interests of a third party. It noted that federalism is not merely a boundary between institutions but in fact a deliberate and purposeful protector of certain specific individual liberties.

Justice Ginsburg wrote a concurrence joined by Justice Breyer offering a much broader principle than that outlined by the Court. She called into question the need for a specific finding of standing in cases where a defendant might be convicted under a constitutionally invalid law. She reasoned instead that a person's right not to be convicted under unconstitutional laws necessitates consideration and a decision on the merits of all such challenges.

HARRINGTON V. RICHTER

131 S. Ct. 770 | Decided January 19, 2011
By Sean David Childers '13

The Court held that an *en banc* Ninth Circuit incorrectly granted defendant Richter's petition for a writ of habeas corpus. Justice Kennedy, writing for seven members of the Court, argued that the Ninth Circuit failed in applying the correct standard of deference with regard to both the habeas review and the underlying claim of deficient counsel.

Following a 1994 altercation at a known drug dealer's home, Richter was convicted of murder, attempted murder, burglary, and robbery. The details of the crime scene and related testimony at trial provided the basis for Richter's habeas claim. After the defense surprised the prosecution in opening arguments by outlining a self-defense theory of the crime, the prosecution offered testimony from a serologist and an expert in blood pattern evidence. The prosecution's goal was to show that the forensic evidence was inconsistent with Richter's self-defense theory.

Richter filed a habeas petition with the California Supreme Court asserting a claim of ineffective assistance of counsel based on his defense attorney's failure to present counterevidence in serology and blood spatter patterns. Forensic affidavits accompanying the petition, Richter argued, supported the ineffective assistance claim. The California Supreme Court denied the petition in a one-sentence order.

As an initial matter, the Supreme Court, by employing ordinary meaning statutory analysis, held that the statute that limits the scope of habeas corpus relief for persons in state custody—the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)—still applies when a state court order (such as the California Supreme Court's order in this case) is unaccompanied by an explanation. The Court then turned to the high degree of deference that AEDPA is meant to afford state court decisions. Justice Kennedy wrote that the Ninth Circuit incorrectly applied a de novo standard of review to the California Supreme Court's denial of the writ when the correct question, under the AEDPA standard, is whether the state court's decision represents an unreasonable application of federal law. This standard, the Court wrote, was meant to be difficult and protects state sovereignty.

The Court also addressed the underlying claim of deficient counsel. According to the Court, the Ninth Circuit erroneously analyzed Richter's claim under the *Strickland* standard because introduction of defense testimony on forensic evidence may have harmed the defense as much as it might have helped. Furthermore, the failure of defense counsel to foresee a change in the prosecution's strategy also did not meet the *Strickland* standard of deficient counsel. In essence, the Court unequivocally affirmed a "doubly" deferential standard of review for habeas claims based on deficient counsel when those claims have been denied by a state court.

Justice Ginsburg wrote a concurrence in judgment, finding the deficiency in counsel claim valid but agreeing with the majority that it was not prejudicial enough to deprive Richter of a fair trial given the totality of the prosecution's evidence. Justice Kagan did not participate in the consideration of the case.

PREMO V. MOORE

131 S. Ct. 733 | Decided January 19, 2011

By Tim Shepherd '13

In an 8-to-0 opinion authored by Justice Kennedy—with Justice Kagan recused—the Supreme Court overturned a Ninth Circuit grant of habeas corpus relief. The case involved a question of inadequacy of counsel where a plea bargain was considered and accepted without counsel seeking first to suppress an improperly obtained confession by the defendant. *Strickland v. Washington* governs the standard for claims of inadequate counsel. The Court based its opinion on 28 U.S.C. § 2254(d), which allows federal habeas relief only when a state court's decision denying relief involves "an unreasonable application of clearly established Federal Law as determined by the Supreme Court."

Prior to trial, on advice of counsel, Moore pleaded no contest to felony murder in exchange for the minimum sentence but filed for post-conviction relief based on his claim that his attorney failed to file a motion to suppress his confession to the police. Moore and two accomplices had been charged for attacking a man and binding him with duct tape in the trunk of a car before driving into the countryside, where Moore shot the victim once, killing him. Moore and the other parties offered the same story to police that they had offered to two witnesses: that the killing was accidental and that their only intention had been to frighten the victim.

Based on his confessions to other witnesses and the severity of the abuse, both of which tended to suggest the prudence of accepting a plea offer, the Oregon state court denied Moore's claim of ineffective assistance of counsel. The Federal district court similarly denied Moore's petition for habeas corpus but was reversed by the Ninth Circuit.

The Supreme Court found that the Ninth Circuit's use of *Arizona v. Fulminante* to grant relief was improper. *Fulminante* required a finding of unconstitutionality in order to suppress a confession but said nothing about ineffectiveness of counsel. Nor did *Fulminante* establish some standard for a determination of prejudice, which was in this case unlikely. Furthermore, ineffective counsel claims require a finding of both prejudice and deficient performance. *Strickland* set a high bar for such review, noting that a determination of ineffectiveness of counsel requires attorney incompetence under prevailing professional norms, not a deviation from best practices. Here there is a doubly difficult bar, as the Supreme Court had to determine whether, under § 2254(d), the state court unreasonably applied *Strickland*.

The Court noted that in this case, suppression of the defendant's confession would serve little purpose in light of the evidence and was likely to fail. Furthermore, argued the Court, while the Ninth Circuit found that a motion to suppress would have succeeded, it did not address whether a competent attorney would have necessarily filed such a motion, nor did it consider the significance of such a suppression. Furthermore, held the Court, careful adherence to the *Strickland* standard is essential given the complex and nuanced nature of plea negotiations, in particular in cases such as this when pleas are entered early.

In a concurring opinion, Justice Ginsburg noted that Moore had at no point declared that he would have resisted a plea bargain given better counsel and that therefore, the prejudice requirement under *Strickland* was not met.

TURNER V. ROGERS

131 S. Ct. 2507 | Decided June 20, 2011

By Tim Shepherd '13

In a 5-to-4 decision, the Supreme Court held that when the recipient of child support payments is also unrepresented by counsel, the state has no obligation under the Fourteenth Amendment's Due Process Clause to provide counsel to the indigent supporting parent facing incarceration for civil contempt of court-ordered child support payments. However, the Court also found that although the state does not need to provide counsel, it must have in place alternative procedures to assure a fair determination of whether the supporting parent is actually able to comply with the order to make support payments.

When the recipient of child support payments is also unrepresented by counsel, the State has no obligation under the 14th Amendment's Due Process Cause to provide counsel to the indigent supporting parent facing incarceration for civil contempt of court-ordered child support payments.

After several findings of contempt and a stint in prison for failure to make child support payments to Rogers, Turner was found to be in willful contempt and was sentenced to 12 months of incarceration. Neither Turner nor Rogers was provided attorneys at the hearing, and the court

made no express finding as to Turner's ability to make support payments. Turner appealed to the South Carolina Supreme Court arguing that he was denied his federal constitutional right to counsel, but his appeal was rejected because the court found that civil contempt proceedings do not provide for the same constitutional safeguards as criminal proceedings.

Justice Breyer, writing for the majority, first responded to the respondent's argument that the case was moot because Turner had already completed his sentence. The Court held that the issue here was not moot, because Turner's matter was one that would often be of too short a duration to fully litigate and there was a reasonable possibility that the same contempt proceedings would be repeated. On the issue of Turner's constitutional claims, the Court reasoned that the Sixth Amendment does not govern civil cases, thus fewer procedural protections are afforded in these cases under the Fourteenth Amendment's Due Process Clause.

The Court applied the framework established in *Mathews v. Eldridge* to determine whether the procedures in the instant case violated due process by balancing the competing government and private interests as well as the risk of erroneous deprivation and costs of additional safeguards. Justice Breyer noted that Turner had a significant interest in counsel because of the liberty interest at stake, and that because of the high percentage of child support arrears befalling those persons who are unable to make such payments, the risk of incarcerating those who are unable to comply was high. However, the Court held that the Due Process Clause did not automatically require appointed counsel in such cases because: (1) the ability to show indigence did not require counsel, (2) the opposing parties in such proceedings were usually equally unrepresented, and (3) the notice to the defendant, use of standard forms, and opportunities for hearings before a court all constitute substantial procedural safeguards against erroneous deprivation. Nevertheless, the Court determined that Turner's due process rights were in fact violated because the state court did not provide him with the alternative procedures designed to determine his ability to make child support payments. The Court remanded the case for further proceedings.

Justice Thomas wrote a dissenting opinion joined in full by Justice Scalia. Justice Thomas reached the same conclusion as the majority on the issue of appointment of counsel but would have simply found that the original understanding of the Sixth Amendment applied only to criminal proceedings. Furthermore, Justice Thomas would not have engaged in a *Mathews* balancing analysis at all, since in this matter the competing interest was a second private party, not the government.

Joined additionally by Chief Justice Roberts and Justice Alito, Justice Thomas further noted that even under the modern interpretation of the Constitution, there is no due process right to appointed counsel outside of criminal proceedings because such a right would render the Sixth Amendment superfluous. The dissenters said they would also not have ruled on the issue of inadequate procedures since the issue was only raised by amicus curiae and not considered by the state courts.

6. HABEAS CORPUS

CULLEN V. PINHOLSTER

131 S. Ct. 1388 | Decided April 4, 2011
By Luke Berg '13

While committing a burglary, Pinholster stabbed and killed two men. Pinholster was convicted on two counts of first-degree murder and, during the penalty phase, was sentenced to death. Later, he filed for habeas relief in California, arguing that he had received ineffective representation at the penalty stage. His new lawyer supported this claim with an assortment of new mitigating evidence, which he claimed should have been presented at trial. After the state twice rejected his petitions, he filed in federal court. He was granted an evidentiary hearing, during which new evidence was presented. Based in part on the new evidence, a district court granted habeas relief and the Ninth Circuit affirmed.

Since the Ninth Circuit opinion was based on alternative holdings, the Supreme Court was presented with two issues. The relevant portion of federal habeas law, 28 U.S.C. 2254(d)(1), states that a federal court may only grant habeas relief on a claim already adjudicated in state court if the state's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law." The first question thus was whether a federal court making this determination had to limit itself to the evidence available to the state court. Second, the Court had to decide whether the state's denial was unreasonable.

Justice Thomas' majority opinion, which commanded a 7-2 vote on the first question, focused on the purpose behind the statutory scheme for federal habeas review. He wrote that a primary goal is to encourage prisoners

to adjudicate their claims fully in state court and that allowing new evidence at the federal level would frustrate that end. Furthermore, he argued, it would be absurd to hold that a state court was unreasonable in applying law to facts that were not before it.

In the first part of her lengthy dissent, Justice Sotomayor argued that the goal of pushing claimants to state court was achieved through section (e)(2) of 2254, the rules for determining whether an evidentiary hearing should be allowed at all. By attempting to force the same goal into the (d)(1) inquiry in the way the majority did, she feared that petitioners who were diligent in pursuing their claim before state court but were unable to fully develop the facts would be unfairly denied access to the "Great Writ." Justice Alito agreed with Justice Sotomayor's treatment of the first issue but in a brief concurrence stated that he would have found that the evidentiary hearing should not have occurred in the first place.

The Ninth Circuit's alternative holding had found the state denial of habeas relief unreasonable based solely on the evidence before the state court. This too the Supreme Court reversed, but on this second point, only Chief Justice Roberts and Justices Scalia, Alito, and Kennedy joined Justice Thomas' opinion. They first reiterated that the test under *Strickland v. Washington* for showing inadequate counsel sets a high bar and requires proving both deficient representation and prejudice caused by the deficiency. After a thorough recounting of the evidence before the state court, the majority argued that the defense counsel could have strategically chosen not to develop a stronger mitigation strategy, hoping to win either on a technical argument or by invoking sympathy through Pinholster's mother.

In dissent, Justice Sotomayor, along with Justices Ginsburg and Kagan, reviewed the evidence and came to the opposite conclusion. The dissent described the majority's hypothesized strategy as contrary to the evidence, which indicated a lack of effort on the part of defense counsel in following obvious leads. Furthermore, the dissent noted, the existence of a strategy does not make the lawyer's behavior reasonable. According to Justice Sotomayor, any competent lawyer would investigate the complete background of his client for use in mitigation. The majority responded that defense counsel does not always have to employ the strategy of humanizing his client.

The majority opinion also noted that the defendant was not prejudiced because most of the evidence subsequently discovered was simply corroborative of Pinholster's mother's account. The dissent, in contrast, emphasized how the prosecutor had discredited the mother's testimony and reasoned that any corroborating evidence could have helped.

In a brief concurrence/dissent, Justice Breyer argued that he would have sent the second question back to the court of appeals because he found the Ninth Circuit's analysis for its alternative holding insufficient.

SWARTHOUT V. COOKE

131 S. Ct. 859 | Decided January 24, 2011
By Tim Shepherd '13

In a *per curiam* decision, the Supreme Court reversed the Ninth Circuit's grant of federal habeas corpus petitions to Damon Cooke and Elijah Clay. The Ninth Circuit had based its grant on findings that the denials of parole were improper under the California standard of review. In California, reviews of parole are governed by a statute stating that release dates shall be set unless continued incarceration is necessary to protect public safety. Denials of parole, under California law, can be reviewed by state habeas petitions, the standard of review for which requires a showing that "some evidence" supported the conclusion that an inmate was not suited for parole. The Supreme Court found that the Ninth Circuit had determined either that federal habeas relief is available for errors of state law or that the state's "some evidence" standard is an element of federal due process. According to the Court, neither of these propositions is correct.

Damon Cooke was convicted in 1991 of attempted murder and sentenced to seven years to life. He was deemed unsuitable for parole in 2002 based on the severity of his offense, his lack of rehabilitation, and incidents of misconduct. Both of his petitions to California appellate courts were denied, as was his federal habeas petition under 28 U.S.C. § 2254. However, the Ninth Circuit reversed, finding a liberty interest created by the parole statute that was protected by the Due Process Clause. The Ninth Circuit reasoned that the state court had made an unreasonable determination of the facts in finding that Cooke would pose a threat to the public.

Elijah Clay was convicted of first-degree murder in 1978 and sentenced to seven years to life. Clay was found suitable for parole in 2003, but that determination was overruled by the governor, who cited the gravity of Clay's offense and criminal history, his lack of participation in self-help programs, and his likelihood of returning to a

life of crime. Clay's habeas petitions to the State Superior and Supreme courts were denied, but his federal petition was granted by a district court and affirmed by the Ninth Circuit. The federal courts found that the reliance on Clay's prior offenses violated his due process rights and that the governor's decision was an unreasonable application of the "some evidence" standard.

The Court held that federal habeas relief is available only when persons are in custody in violation of federal laws or the U.S. Constitution, not for errors in state law. As to due process arguments, while the California law *does* create a liberty interest in parole, argued the Court, that interest is a *state* interest. The Due Process Clause requires fair procedures for the protection of such a state interest, but the Court noted that those procedures are minimal in parole cases. Here, the Court found that Clay and Cooke had received adequate process through their opportunities to be heard and the provision of reasons for denial of their parole. The Court also noted that it is not of federal concern whether the "some evidence" rule was properly applied and that, therefore, the lower federal courts incorrectly overruled the state court decisions based on reviews of the merits.

Justice Ginsburg wrote a brief concurring opinion, noting that the Ninth Circuit had erred by relying on the incorrect controlling precedent in this matter.

WALKER V. MARTIN

131 S. Ct. 1120 | Decided February 23, 2011
By Luke Berg '13

In an opinion authored by Justice Ginsburg, a unanimous Supreme Court held that a California procedural rule barring Martin's petition for habeas review was an independent and adequate state law basis for a similar denial at the federal level. Martin had waited five years after his conviction at trial to apply for habeas relief on the grounds of inadequate counsel. California's rules require that the application be made without substantial delay, and accordingly the California Supreme Court denied the petition.

When a federal district court also denied Martin's petition by reference to the state decision, he appealed to the Ninth Circuit. According to prior Supreme Court cases, for a state rule to be considered adequate it must be both "firmly established and regularly followed." Martin argued that California's timeliness rule was neither because it was discretionary and based on a reasonableness test. When the Ninth Circuit agreed with Martin, the Supreme Court granted certiorari and reversed, affirming the district court's denial.

The Court explained that even though the indeterminate language "substantial delay" might not provide much clarity, the rule's application over time would. California's jurisprudence had a straightforward framework for analyzing the timeliness of a petition, and the history of cases made abundantly clear that five years was a substantial delay. The California Supreme Court entertained many habeas petitions and frequently rejected them on timeliness grounds, so it could hardly be said that the rule was not regularly followed.

Furthermore, the Court noted that the discretionary nature of the rule was a virtue, not a vice, as it allows courts to consider the unique circumstances of each case. Restricting discretion, argued the Court, would force states to adopt draconian rules that would do more damage to habeas petitioners than good. Also, since many federal rules are discretionary, it would be anomalous to hold the states to a different standard.

WALL V. KOHLI

131 S. Ct. 1278 | Decided March 7, 2011
By Luke Berg '13

Under the Antiterrorism and Effective Death Penalty Act of 1996, the time limit for filing a writ of habeas corpus is one year after direct review is exhausted. According to the Act, motions for collateral review in state court toll the one-year limit while they are pending. The question in this case was whether a motion to reduce a sentence under Rhode Island's Rule 35 was considered collateral review. In a unanimous opinion, the Court held that collateral review is any review that is not part of the direct review process and that Rhode Island's Rule 35 meets that definition. The holding affirmed the First Circuit Court of Appeals, which had reversed the district court's dismissal of the habeas motion as untimely.

Writing for the Court, Justice Alito focused on the ordinary meaning of collateral in defining the phrase "collateral review." He cited a number of dictionaries, which among other things defined collateral as "indirect." In analyzing Rhode Island's Rule 35, Justice Alito emphasized its substantial similarity to Federal Rule 35, then noted that the federal rule had been described in several places as collateral. Putting the pieces together, the Court thus had "little difficulty" reaching its conclusion.

The opinion also addressed the alternate definition offered by Rhode Island. The state argued that the phrase should be limited to challenges to the lawfulness of a sentence. It reasoned that the purpose of tolling the time limit was to encourage exhaustion of state alternatives to federal habeas relief, and that allowing a Rule 35 motion to toll wouldn't serve that purpose, since a federal habeas petition cannot question sentencing leniency. However, the Court responded that the purpose of tolling is to encourage exhaustion of *all* remedies available at the state level and that even those seemingly unrelated to the federal habeas petition may alleviate the need for federal relief. The Court also mentioned that the state's rule would be difficult for courts to implement since the line of what challenged the lawfulness of a sentence was too blurry.

Justice Scalia filed a very brief concurrence in which he refused to join a footnote in the opinion that he argued suffered from logical inconsistency by claiming not to be deciding whether Rhode Island's Rule 35 was part of the direct review process.

WILSON V. CORCORAN

131 S. Ct. 13 | Decided November 8, 2010
By Tim Shepherd '13

In a *per curiam* decision, the Supreme Court affirmed that federal courts may not issue habeas corpus writs when confinement of state prisoners is not in violation of federal law. The decision called for a vacation of the Seventh Circuit's judgment, which had granted Corcoran habeas relief, and for a remand to determine the merits of his habeas petition.

The respondent, Joseph Corcoran, was sentenced to death in Indiana for the 1997 murders of four men. The Indiana Supreme Court vacated his sentence based on statements made by the trial judge that suggested he had considered aggravating factors outside of the statutory scope permitted in Indiana when he sentenced Corcoran. On remand, the trial court clarified that the statements about the innocence of Corcoran's victims, the severity of his offenses, and his future dangerousness all provided context for the weight that the court gave to certain aggravators, but that the court had in fact only relied upon proven statutory aggravators. The sentence was thus affirmed by the Indiana Supreme Court on appeal.

Corcoran's petition for habeas relief was granted by the federal district court on grounds different from those asserted by the petitioner. While Corcoran had pointed to the trial court's reliance on non-statutory aggravators as a violation of the Eighth and Fourteenth amendments, the district court granted habeas relief based on a Sixth Amendment violation by the prosecutor who had offered to not pursue the death penalty in exchange for Corcoran's waiver of a jury trial. The Seventh Circuit initially reversed this decision on the same grounds, but after remand by the Supreme Court to consider the original claim by Corcoran, granted habeas relief. The Seventh Circuit was unsatisfied by the trial court's explanation of its use of non-statutory aggravating factors, and it concluded that the Indiana Supreme Court had made an "unreasonable determination of the facts" by accepting such an explanation, leading to a sentence in noncompliance with Indiana law.

Such a finding by the Circuit Court was in conflict with the federal habeas corpus statute, which allows a federal writ only for violations of the U.S. Constitution or federal law. The Supreme Court opinion noted that it was insufficient for Corcoran to assert a constitutional violation; the federal court would need to agree with such an assertion as well. Not only did the lower court's opinion make a determination regarding a matter of state law, argued the Court, but it also admitted that its decision did not prevent Indiana from changing its rules to permit the use of non-statutory aggravating factors in capital sentencing.

7. STATUTORY INTERPRETATION

FOWLER V. UNITED STATES

131 S. Ct. 2045 | Decided May 26, 2011
By Mark Bulliet '13

Petitioner Fowler was convicted of violating the federal witness tampering statute for shooting a police officer who discovered him during the planning of a bank robbery. On appeal before the Eleventh Circuit, Fowler argued that there was insufficient evidence to show that he had killed the police officer specifically to prevent him from communicating with a federal officer. The circuit court disagreed, holding that preventing a possible future communication to federal law enforcement satisfied the statute.

The Court granted certiorari to interpret how 18 U.S.C. § 1512(a)(1)(C) applies when a witness is killed to prevent his communicating with law enforcement officers in general, as opposed to with some specific

officer or officers. Witness tampering such as this, which takes place before the victim has even made contact with the authorities, may be both "more serious (and more effective)" than after the precise identity of the officer has been established, Justice Breyer wrote for the majority.

When a witness is killed to prevent his communicating with law enforcement officers in general, as opposed to with some specific officer or officers, the government must show a "reasonable likelihood" that, had the victim spoken to law enforcement, at least one relevant communication would have been with a federal officer.

The Court held that where the defendant does not have a particular officer in mind when he silences the witness, the government must show a "reasonable likelihood" that, had the victim spoken to law enforcement, at least one relevant communication would have been with a federal officer. The Court noted that this standard was lower than a reasonable doubt or "more likely than not" standard. The Court rejected the argument that the statute's intent requirement would be satisfied in any case where federal officials could "possibly" have been informed, citing federalism concerns: Since many state crimes are also federal crimes, the Court concluded that such a standard would federalize too many purely state crimes.

Justice Scalia concurred, calling for an even higher standard. Justice Scalia argued that both the rule of lenity and the plain text of the statute require the government to prove beyond a reasonable doubt that the hypothetical communication would have been with a federal officer. Justice Alito, joined by Justice Ginsburg, dissented.

DEPIERRE V. UNITED STATES

131 S. Ct. 2225 | Decided June 9, 2011
By Sean David Childers '13

In a unanimous opinion that resolved uncertainty among the Circuits, the Supreme Court held that heightened sentences for "cocaine base" offenses applied to convictions involving cocaine in any of its scientifically basic forms.

Petitioner DePierre argued that the heightened mandatory minimum sentence should apply only to the specific substance known as crack cocaine. The cocaine DePierre sold was in chemically basic form but lacked sodium bicarbonate, a necessary ingredient in order to classify the substance as crack cocaine.

The Anti-Drug Abuse Act of 1986 (ADDA), which penalizes drug offenses with specific mandatory minimum sentences, established a different drug quantity threshold for each minimum sentence depending on whether the substance is cocaine (in leaf, salt, or powder form) or "a mixture or substance" of cocaine "which contains cocaine base."

The Court interpreted the ADDA provision to most naturally read any type of "cocaine in its base form" and affirmed DePierre's conviction. While admitting that its interpretation was technically redundant and raised certain questions, the Court reasoned that Congress primarily used the term "cocaine base" in order to distinguish between cocaine-related mixtures in base form and other cocaine substances, including powder cocaine. The Court also rejected DePierre's arguments with respect to legislative purpose and history, finding that both were uncertain, as well as his rule of lenity attempt, reasoning that the statutory text was too clear for the rule to apply. Additionally, the Court refused to defer to the Sentencing Commission—which has defined cocaine base to mean crack for the purposes of the Federal Sentencing Guidelines—on the grounds that the Guidelines do not claim that they interpret the statutory text.

Justice Scalia declined to join the part of the opinion that discussed legislative history and, in his concurrence, wrote that the Court would have reached the same outcome no matter what the legislative history indicated.

MCNEILL V. UNITED STATES

131 S. Ct. 2218 | Decided June 6, 2011
By Jing-Li Yu (University of Chicago '10)

A unanimous Court, in an opinion by Justice Thomas, held that, under the Armed Career Criminal Act (ACCA), the "maximum term of imprisonment" for a defendant's prior state drug offense is the maximum sentence applicable to his offense when he was convicted of it.

McNeill was arrested while in possession of crack cocaine and a .38 caliber revolver. He subsequently pleaded guilty to unlawful possession of a firearm by a felon (§ 922(g)) and possession with intent to distribute cocaine base. At sentencing, the district court determined that McNeill qualified for ACCA's sentencing enhancement, which applied when someone convicted under § 922(g) "has three previous convictions…for a violent felony or a serious drug offense." A "serious drug

offense" is one where "a maximum term of imprisonment of ten years or more is prescribed by law." McNeill's six previous state drug trafficking convictions each had carried 10-year maximums when he was convicted but did not at the time of sentencing. McNeill argued that the current, shorter sentences should count as the "maximum term of imprisonment" because the statute uses the present tense ("is prescribed"). The district court, instead, determined that the relevant imprisonment terms were at the time of the previous convictions, and thus, the ACCA sentencing enhancement applied. The Court of Appeals affirmed on different grounds. The Supreme Court affirmed, agreeing with the district court's grounds.

The Court concluded that the "plain text" of the ACCA requires a sentencing court to look at the maximum sentence at the time of conviction because the text tells the sentencing court to consider the "previous conviction." The Court reasoned that this "backward-looking" question can only be answered by consulting "the law that applied at the time of that conviction." In addition, the Court considered the "broader context of the statute as a whole" by consulting a neighboring provision: what constitutes a "violent crime" for an ACCA sentencing enhancement. Although that provision also defined elements of a "violent crime" in the present tense, the Court noted that it had consistently looked at statutes at the time of conviction rather than at the time of sentencing to define "violent crime."

SYKES V. UNITED STATES

131 S. Ct. 2267 | Decided June 9, 2011
By Luke Berg '13

In a 6-to-3 opinion authored by Justice Kennedy, the Court held that an Indiana state law prohibiting vehicular flight from police qualifies as a violent felony under the Armed Career Criminal Act (ACCA). A portion of the ACCA first enumerates examples of violent felonies and then includes the residual clause: "or otherwise involves conduct that presents a serious potential risk of physical injury to another." The Court emphasized that the inquiry must focus on the crime as defined rather than the specific facts of the case, and that risk was the dispositive factor. Under this framework, the majority compared vehicular flight with burglary and arson, two of the enumerated crimes, and found that the degree of risk was greater in the case of vehicular flight. The Court observed that flight from police is always confrontational and often results in accidents or injury. The majority's opinion also noted that statistics, though not dispositive, confirmed their intuition that vehicular flight is more dangerous than burglary or arson.

A previous Supreme Court decision, *Begay v. United States*, had held that driving under the influence was not a violent felony because it was not "purposeful, violent, and aggressive." Sykes tried to argue that vehicular flight likewise did not meet this definition. The Court, however, rejected this argument, finding that risk is the ultimate inquiry. The majority noted that while the *Begay* test is sometimes a useful proxy, it is more appropriately applied to strict liability, negligence, or recklessness crimes.

In a concurrence, Justice Thomas disagreed with the Court's statement that the *Begay* test may still be applied in some circumstances. He would have rejected it outright, and instead concentrated on whether the crime in question was more risky than the least risky of the enumerated crimes. Through a lengthy discussion of the natures of the crimes and statistical reports, he determined that vehicular flight was more risky than either arson or burglary.

Justice Kagan wrote a dissent joined by Justice Ginsburg in which she focused on the statutory structure of Indiana's law by arguing that it creates four tiers of vehicular flight crimes. Because Sykes had only been charged with the "lowest" of these crimes, she thought it could not be considered to be a violent crime. However, the majority responded by pointing out that the bottom two were not actually separate tiers but adjacent sections of the same statute and carried the same penalty. Furthermore, the two with longer sentences required as an additional element that the flight actually resulted in death or injury.

Vehicular flight from police qualifies as a violent felony under the Armed Career Criminal Act.

Finally, Justice Scalia wrote a lone dissent in which he sharply criticized the Court's repeated attempts to define the residual clause of the ACCA. He argued that the residual clause was "shoddy draftsmanship" and should have been held void for vagueness. In support, he described the various tests the cases had offered and complained that the current holding further muddied things by employing multiple tests. He also criticized the Court's use of statistics, which he argued are prone to error and should be subject to fact-finding by a jury, not the Supreme Court.

8. DUE PROCESS

CONNICK V. THOMPSON

131 S. Ct. 1350 | Decided March 29, 2011
By Luke Berg '13

In a 5-to-4 majority, Justice Alito held that a single *Brady* violation is insufficient to support a claim under 42 U.S.C. § 1983. In the early 1980s, Thompson was charged with murder and later armed robbery. The prosecutors pursued the robbery charge first, hoping to use a conviction to discourage him from testifying in his murder trial. The strategy worked, and Thompson was convicted of murder and sentenced to death. However, in the armed robbery trial, the prosecutors had failed to turn over the results of a blood test to the defense, in violation of *Brady v. Maryland*. A month before Thompson's scheduled execution, an investigator discovered the evidence, and through additional testing learned that the perpetrator's blood type did not match Thompson's. Thompson was exonerated for the armed robbery and was retried for the murder charge, where he finally testified and was found not guilty. Thompson then sued Attorney General Connick under section 1983 for the 18 years he spent in prison.

A government agency's liability under 1983 is limited to actions the agency is directly responsible for, which does not include all the actions of its agents. Therefore, Thompson based his 1983 claim on Connick's failure to properly train his prosecutors regarding the nuances of the *Brady* doctrine, leading to the violation. According to the Court, such failure-to-train theories must pass a stringent test. Thompson needed to prove that Connick was deliberately indifferent to his constitutional rights, which ordinarily requires showing a history of violations and a failure to remedy them. However, the Supreme Court in a previous case had acknowledged an exception when constitutional violations were an obvious consequence of a failure to train, and Thompson argued that *Brady* violations fit within that exception.

In rejecting Thompson's argument, the Court focused on traditional legal training and standards. The opinion emphasized that lawyers, even recent graduates, are expected to understand and be able to apply legal rules. Even if they are unclear on a particular doctrine, they have the tools necessary to research and learn what the law requires. Therefore, the majority reasoned, it is not obvious that a failure to train will lead to *Brady* violations. In dissent, Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, disagreed that showing deliberate indifference requires a history of violations. She recounted the history of the trials and the "long-concealed prosecutorial transgressions involved." Although only a single *Brady* violation was acknowledged, the dissenters found plenty of evidence that Connick had disregarded *Brady*.

Justice Scalia agreed fully with the majority but wrote a brief concurrence to criticize the dissent. He complained that the dissent's lengthy discussion of the trial record was not relevant to the precise legal question with which the court was presented. Justice Scalia also pointed out that because the *Brady* violation was done willfully, Thompson could not prove causation on his failure-to-train theory, even if he could show deliberate indifference. Justice Scalia's concurrence was joined only by Justice Alito.

SKINNER V. SWITZER

131 S. Ct. 1289 | Decided March 7, 2011
By Luke Berg '13

Writing for a 6-to-3 majority, Justice Ginsburg addressed whether a convicted prisoner could file a claim for DNA testing under 42 U.S.C. § 1983, or whether such claims were limited to habeas petitions, which are subject to stricter limitations. After first dismissing a jurisdictional challenge, the majority held that 1983 is unavailable only when the result would necessarily invalidate a prisoner's conviction. Applying that rule, the majority found that because the results of the DNA test could implicate either his innocence or guilt, Skinner's claim was cognizable.

However, the Court outlined two limitations of its holding. First, it noted that because it was reviewing a dismissal of Skinner's claim it was not ruling on the merits of his particular claim but simply on whether such claims would be allowed. Second, and more important, it emphasized that 1983 claims are limited to procedural due process claims, because a previous Supreme Court ruling in *Osborne* had held that there is not a substantive due process right to DNA testing.

Justice Thomas wrote a dissent joined by Justices Kennedy and Alito, arguing for a simpler rule that would bar any 1983 claims that challenge procedures concerning the validity of a conviction. He underscored the limitations on federal habeas review, which, he asserted, are intended to protect state sovereignty. By allowing an end run around these limitations, he argued, the Court was undermining the principles of federalism and comity and encouraging re-litigation in federal courts.

Personnel

ANTHONY S. BARKOW, EXECUTIVE DIRECTOR

Anthony S. Barkow was a federal prosecutor for 12 years. From 2002 through 2008, he was an assistant United States attorney in the United States Attorney's Office for the Southern District of New York, where he prosecuted some of the most significant terrorism and white-collar criminal cases in the United States. In 2005, Barkow was given the Attorney General's Award for Exceptional Service, the highest award bestowed in the U.S. Department of Justice. From 1998 through 2002, he was an assistant United States attorney in the United States Attorney's Office for the District of Columbia, where he prosecuted local and federal cases involving homicides and other serious violent crimes, domestic violence assaults and sexual abuse, international narcotics trafficking, and drug and gun street crimes. For two years before that, Barkow was a trial attorney in the Attorney General's Honors Program in the Office of Consumer Litigation in the U.S. Department of Justice, where he prosecuted white-collar criminal and civil cases under various federal consumer protection statutes. During his tenure in the government, Barkow tried more than 40 cases and briefed and argued more than 10 cases on appeal. He previously served as adjunct clinical professor of law at New York University School of Law. Barkow is a frequent writer and commentator on criminal law issues, especially those involving prosecutors, and has appeared on various news channels and been quoted in a variety of print media. In 2009, he testified before Congress regarding proposed legislation that would prohibit former prosecutors from serving as or working for corporate monitors in matters on which they worked while in government service, and in 2010 he submitted testimony to the Pennsylvania House of Representatives recommending that the state end juvenile life without parole sentences. In 2008, he was a human rights observer of the military commission hearings in Guantánamo Bay, Cuba.

After graduating summa cum laude from the University of Michigan (A.B.'91) and teaching history at Saint Ann's School in Brooklyn Heights, New York, Barkow graduated cum laude from Harvard Law School (J.D.'95), where he was Notes Office co-chair and supervising editor of the *Harvard Law Review*. He served as law clerk to the Honorable Thomas P. Griesa when he was Chief Judge of the U.S. District Court for the Southern District of New York.

RACHEL E. BARKOW, FACULTY DIRECTOR

Rachel E. Barkow is professor of law at New York University School of Law. Her scholarship focuses on criminal law, and she is especially interested in applying the lessons and theory of administrative and constitutional law to the administration of criminal justice. She has written more than 20 articles that span a range of topics. She has written several articles on sentencing, including the relationship between modern sentencing laws and the constitutional role of the criminal jury; federalism and the politics of sentencing; the role of cost-benefit and risk-tradeoff analysis in sentencing policy; what institutional model works for designing agencies that regulate criminal punishment; the political factors that lead to guideline and commission formation; and the flawed bifurcation between capital and noncapital constitutional sentencing jurisprudence. Professor Barkow has also explored in numerous articles the role of prosecutors in the criminal justice system. For example, she has analyzed how the lessons of institutional design from administrative law could improve the way prosecutors' offices are structured; she has looked to organizational guidelines and compliance programs as a model for prosecutorial oversight; and she has considered the increasing role of prosecutors as regulators through the conditions they place on corporations. Professor Barkow has also explored larger structural questions

of how criminal justice is administered in the United States. In a series of major articles, she has explored the relationship between separation of powers and the criminal law, and the relationship between federalism and the criminal law. Barkow has also considered the role of mercy and clemency in criminal justice, paying particular attention to the relationship between administrative law's dominance and the increasing reluctance of scholars and experts to accept pockets of unreviewable discretion in criminal law.

Barkow has been invited to present her work in various settings. She has testified before the House Subcommittee on Commerce, Trade, and Consumer Protection regarding the proposed Consumer Financial Protection Agency; before the U.S. Sentencing Commission to make recommendations for reforming the federal sentencing system; and before the Senate Judiciary Committee at a hearing on the future of the federal Sentencing Guidelines. She has also presented her work on sentencing to the National Association of Sentencing Commissions Conference, the Federal Judicial Center's National Sentencing Policy Institute, and the Judicial Conference of the Courts of Appeals for the First and Seventh Circuits. In addition, she has presented papers at numerous law schools.

After graduating from Northwestern University (B.A. '93), Barkow attended Harvard Law School (J.D. '96), where she won the Sears Prize, awarded annually to the two students with the top overall grade averages in the first-year class. She served as a law clerk to Judge Laurence H. Silberman on the United States Court of Appeals for the District of Columbia Circuit and Justice Antonin Scalia on the Supreme Court of the United States. She was an associate at Kellogg, Huber, Hansen, Todd, Evans & Figel PLLC in Washington, D.C., from 1998 to 2002, where she focused on telecommunications and administrative law issues in proceedings before the FCC, state regulatory agencies, and federal and state courts. Barkow took a leave from the firm in 2001 to serve as the John M. Olin Fellow in Law at Georgetown University Law Center.

NEIL M. BAROFSKY '95, SENIOR FELLOW

Neil M. Barofsky '95 is a senior fellow at the Center. He is also an adjunct professor at the Law School, and is affiliated with the Mitchell Jacobsen Leadership Program in Law and Business.

Prior to joining NYU, Barofsky was the first special inspector general of the Troubled Asset Relief Program ("SIGTARP"). He was nominated to the position by the President and confirmed by the Senate in late 2008, and he was sworn into office on December 15, 2008.

As SIGTARP, Barofsky audited and investigated the purchase, management, and sale of assets under the $700 billion TARP program. Barofsky established the Office of the SIGTARP, and built it to a point where, at the time of his departure, it had 140 employees, had won criminal convictions of 18 people, helped keep $555 million in taxpayer funds from being lost to fraud, provided the Treasury with 68 recommendations to protect taxpayers from losses in programs, and was continuing to work on 153 pending civil and criminal investigations, including 74 involving executives and senior officers at financial institutions that received or applied for TARP money.

Prior to serving as SIGTARP, Barofsky was a federal prosecutor in the United States Attorney's Office for the Southern District of New York for more than eight years. In that office, Barofsky prosecuted some of the most significant cases in the United States. He rose to be a senior trial counsel who headed the Mortgage Fraud Group, which investigated and prosecuted all aspects of mortgage fraud, from retail mortgage fraud cases to investigations involving potential securities fraud with respect to collateralized debt obligations. Barofsky also had extensive experience as a line prosecutor leading white-collar prosecutions during his tenure as a member of the Securities and Commodities Fraud Unit, which included the case that led to the conviction of the former president of Refco Inc., Tone Grant, and the guilty plea of Phillip Bennett, Refco's former chief executive officer. Barofsky received the Attorney General's John Marshall Award for his work on the Refco matter. Barofsky also led the investigation that resulted in the indictment of

the top 50 leaders of the Revolutionary Armed Forces of Colombia (FARC) on narcotics charges, a case described by the then–Attorney General as the largest narcotics indictment filed in U.S. history.

Barofsky is a 1995 magna cum laude graduate of the New York University School of Law and a 1992 graduate of the Wharton School of Business at the University of Pennsylvania.

ANNE MILGRAM '96, SENIOR FELLOW

Anne Milgram '96 is a senior fellow at the Center. Prior to joining NYU, Milgram served as New Jersey's attorney general from June 2007 to January 2010, where she headed the 9,000-person Department of Law and Public Safety. Milgram became attorney general after serving from February 2006 to June 2007 as first assistant attorney general. As attorney general, Milgram supervised eight divisions and multiple commissions and boards, including the Division of Criminal Justice, the Division of Law, the Division of Consumer Affairs, the Bureau of Securities, the Division of Civil Rights, the Juvenile Justice Commission, the Division of Gaming Enforcement, the Division of Highway Traffic Safety, the Racing Commission, and the Division of Alcoholic Beverage Control. Milgram also supervised the Division of the New Jersey State Police and its 3,000 sworn members, and the Camden Police Department.

Milgram served as the state's chief law enforcement officer, overseeing and directing the 21 New Jersey county prosecutors and the approximately 30,000 state and local law enforcement officers. She spearheaded investigations into street gangs, public corruption, gun violence and trafficking, securities fraud, and mortgage fraud. She also implemented a statewide program to improve public safety through prevention of crime, criminal justice and law enforcement reform, and re-entry programs and services. As attorney general, Milgram oversaw affirmative and defensive civil litigation for the state, providing legal representation to all state departments and agencies in approximately 25,000 civil matters each year. She also served as a member of the U.S. Attorney General's Executive Working Group on Criminal Justice and as a co-chair of the National Association of Attorneys General Criminal Law Committee.

From May 2005 to January 2006, Milgram served as counsel to United States Senator Jon S. Corzine, briefing and advising the senator on issues of judicial nominations, criminal justice, homeland security, technology, law enforcement, and civil rights.

From January 2001 until May 2005, Milgram served as a federal prosecutor in the Criminal Section of the United States Department of Justice's Civil Rights Division, prosecuting complex international sex trafficking, forced labor, and domestic servitude human trafficking cases. She also prosecuted hate crimes and official misconduct cases nationwide. In 2004, Milgram was promoted to become the lead federal prosecutor in the country for human trafficking crimes. She was awarded the U.S. Department of Justice Special Commendation for Outstanding Service in December 2004 and the U.S. Department of Justice Director's Award in September 2006.

Milgram began her prosecution career as an assistant district attorney in the Manhattan District Attorney's office, where she served from September 1997 until January 2001. As an assistant district attorney, Milgram prosecuted felony and misdemeanor cases from investigation through indictment and trial. She handled violent crime, domestic violence, child abuse, narcotics, illegal gun possession, and white-collar cases.

Milgram graduated summa cum laude from Rutgers College in 1992 with a degree in English and political science, and received a master's of philosophy in social and political theory in 1993 from the University of Cambridge in England. She received her law degree from New York University School of Law in 1996 and clerked for United States District Court Judge Anne E. Thompson in Trenton, New Jersey, from 1996 to 1997.

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The Board of Advisors does not directly oversee the Center's activities, including its litigation decisions. The views taken by the Center, including those taken in litigation, are those of the Center and should not be attributed to any member of the board.

DOUGLAS A. BERMAN is William B. Saxbe Designated Professor of Law at Moritz College of Law at Ohio State University. One of the leading experts on sentencing in the country, he is co-author of the *Sentencing Law and Policy: Cases, Statutes and Guidelines* casebook (second edition, 2008), has authored publications on a wide variety of criminal law and sentencing topics, and is the creator and sole author of the widely read and cited blog *Sentencing Law and Policy*.

PAUL D. CLEMENT is a partner at Bancroff PLLC. He served as the 43rd solicitor general of the United States from June 2005 until June 2008, and spent nearly eight years in various leadership positions in the office. He also serves as an adjunct professor of law at both NYU and Georgetown. He has argued more than 50 cases before the Supreme Court and many of the government's most important cases in lower courts.

JAMES FORMAN JR. is professor of law at Yale Law School. He teaches and writes in the areas of criminal procedure and education law. He previously worked at the Public Defender Service in Washington, D.C., where he represented juveniles and adults in serious felony cases, and served as training director for new attorneys. He co-founded the Maya Angelou Public Charter School, which combines education, job training, counseling, mental health services, life skills, and dormitory living for school dropouts and youth who have previously been incarcerated.

KATHERINE A. LEMIRE is counsel to Raymond W. Kelly, the police commissioner of the City of New York. She previously was an assistant United States attorney in the United States Attorney's Office for the Southern District of New York, where she primarily prosecuted public corruption offenses, campaign finance fraud, and violent gang cases involving racketeering, murder, and narcotics trafficking. She also previously was an assistant district attorney in the Manhattan District Attorney's Office.

JORGE MONTES is chairman of the Prisoner Review Board of the State of Illinois. He has been chairman since 2004 and a member of the board since 1994. He also co-chairs the American Bar Association's Parole and Probation Committee of the Criminal Justice Section. Previously, Montes was a supervising litigation attorney for the Cook County State's Attorney's Office and a spokesperson for the Office of the Illinois Attorney General. He also has been a member of the Illinois Department of Corrections Board of Education.

CRISTINA RODRÍGUEZ is professor of law at NYU School of Law. She teaches and writes in the areas of constitutional law, immigration law, citizenship theory, and language rights and language policy. Her recent works include "Constraint Through Delegation" (2010), "The President and Immigration Law" (2009) (with Adam Cox), and "The Significance of the Local in Immigration Regulations" (2008). She is a nonresident fellow of the Migration Policy Institute, a term member of the Council on Foreign Relations, and a former clerk to Justice Sandra Day O'Connor. She is currently on leave to serve in the Office of Legal Counsel, Department of Justice.

SCHOLARS-IN-RESIDENCE

KIMBERLY KESSLER FERZAN is a professor of law at Rutgers-Camden Law School and a scholar-in-residence at the Center during academic year 2011-12. She is also the co-director of the Rutgers-Camden Institute for Law and Philosophy and is associate graduate faculty in the Rutgers-New Brunswick Philosophy Department. Ferzan's primary field of interest is criminal law theory.

Prior to joining the Rutgers faculty in 2000, Ferzan clerked for the Honorable Marvin Katz in the Eastern District of Pennsylvania and then worked as a trial attorney for the U.S. Department of Justice, Criminal Division, Public Integrity Section, investigating and prosecuting criminal offenses committed by federal, state, and local officials. She also served as a special assistant United States attorney in the District of Columbia.

Ferzan's scholarship includes *Crime and Culpability: A Theory of Criminal Law* (with Larry Alexander and Stephen Morse; Cambridge University Press, 2009), as well as numerous book chapters and law review articles. She was selected to present at the 2007 Analytic Legal Philosophy Conference, and her paper, "Beyond Intention," was selected for the 2006 Stanford/Yale Junior Faculty Forum in the criminal law category. She was an associate editor of Law and Philosophy.

Ferzan has also received honors for her teaching, including the Chancellor's Award for Teaching Excellence (2010) and Professor of the Year (2004 and 2010).

DAN MARKEL, the D'Alemberte Professor of Law at Florida State University College of Law, is a scholar-in-residence at the Center during calendar year 2011.

Raised in Toronto, Markel studied politics and philosophy as an undergraduate at Harvard. He then did graduate work in political philosophy at the Hebrew University of Jerusalem and the University of Cambridge before returning to Harvard for his law degree, where he was an Olin Fellow and an editor of the *Harvard Law Review*. Upon graduation from law school, Markel was a research fellow at the Berkman Center at Harvard Law School, a clerk for Judge Michael Daly Hawkins on the U.S. Court of Appeals for the Ninth Circuit, and an associate at Kellogg, Huber, Hansen, Todd, Evans & Figel PLLC in Washington, D.C., where he practiced white-collar criminal defense and civil litigation in trial and appellate courts. He has taught at Florida State University since 2005.

He teaches and writes about criminal law, procedure and policy. His scholarship tends to focus on extending insights from the realm of punishment theory to policy design in a number of legal areas, both inside and outside the criminal justice system. Markel's book on criminal justice and the family, *Privilege or Punish: Criminal Justice and the Challenge of Family Ties* (Oxford 2009), as well as his articles and essays, are available for download through his website, www.danmarkel.com. He is the founder of *Prawfs.com*, a group blog for and by law professors. While at NYU, Markel will be co-convenor of the NYC Criminal Law Theory Colloquium with Michael Cahill of Brooklyn Law School.

ATTORNEYS

COURTNEY OLIVA is an attorney at the Center. She graduated from Brown University in 2001, with an A.B. in urban studies. In 2004, she graduated from the University of Chicago Law School. Prior to joining the Center, she spent seven years working in both New York and Chicago at two large law firms, specializing in securities litigation, as well as SEC/DOJ and internal investigations.

SARAH M. NISSEL is an attorney at the Center. After graduating from Yale University (B.A. '03), she attended New York University School of Law (J.D. '08), where she was a Dean's Scholar. Prior to joining the Center, she worked as an associate at the law firm Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, where she focused on white-collar criminal litigation. She also previously worked as an intern at the Innocence Project.

RENA STERN KATES is an attorney at the Center. She graduated from Washington University in St. Louis (B.A. summa cum laude) in 2008 and from Columbia University School of Law, where she was a Harlan Fiske Stone Scholar and senior editor of the *Human Rights Law Review*, in 2011.

FELLOWS

Much of the Center's work is done by New York University School of Law students who are chosen as fellows after a competitive application process. The Center's current fellows are Yotam Barkai '13, Christina Dahlman '12, Chad W. Harple '12, Philip T. Kovoor '12, Alexander Li '12, Evelyn Malavé '13, Julie K. Mecca '13, David B. Mesrobian '12, Karl D. Mulloney-Radke '12, Zachary B. Savage '13, Cameron Tepfer '13, Michael Levi Thomas '12, Julia Torti '13, and Elizabeth Daniel Vasquez '13.

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Center fellows have gone on to post-graduation employment including clerkships on the United States Court of Appeals for the District of Columbia Circuit, the United States Court of Appeals for the Third Circuit, the United States Court of Appeals for the Sixth Circuit, and the United States District Court for the Southern District of New York; the Department of Justice Office of Legal Counsel; the Department of Justice Attorney General's Honors Program; the Office of the Bronx District Attorney; the Defender Association of Philadelphia; and various prominent international and national law firms.

Center fellows have also held criminal justice–related summer employment positions at various organizations including the Manhattan District Attorney's Office, the Department of Justice, the United States Attorney's Offices for the Eastern District of New York and for the Northern District of Texas, the American Civil Liberties Union, the Philadelphia District Attorney's Office, Women Empowered Against Violence Inc., the Juvenile Justice Project of Louisiana, the United States Senate Judiciary Committee, and the Defender Association of Philadelphia.

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