Justice Scalia’s Criminal Jurisprudence

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Justice Scalia’s unexpected passing will have a dramatic effect on our country in many ways.1 His outsized personality had both detractors2 and proponents3—but it is hard to argue with Judge Posner when he called Justice Scalia “the most influential Justice of the last quarter-century.”4 Surely much will be written about his undeniably large impact,5 but it was his influence on the criminal law system that best represents his nuanced legacy.

Justice Scalia’s time on the bench saw many important cases, and his forceful opinions and pointed dissents often earned him both critique and praise.6 It often seemed

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2 See, e.g., Erwin Chemerinsky, The Jurisprudence of Justice Scalia: A Critical Appraisal, 22 HAWAI L. REV. 385, 385 (2000) (“Yet, if it is possible to put ideology aside, I'd suggest that Justice Scalia should be criticized by all—conservatives as well as liberals—for the constitutional philosophy he espouses which hides rather than defends value choices and for the tone and rhetoric of his opinions.”).

Justice Scalia’s jurisprudence is indeed seductive, both in its simplicity and in its clarity. Additionally, Justice Scalia generally applies his principles consistently and honestly. While many may disagree with the outcome of Scalia’s opinions, or with his choice of legal principles, one is left with the question, often posed by Scalia himself, if not these legal principles then what principles?

Id.

5 Rachel Barkow, A Scalia Clerk Remembers Her Former Boss, OBSERVER (Feb. 13, 2016), http://observer.com/2016/02/a-tribute-to-justice-scalia-from-his-former-clerk/ (“[M]ost Justices fail to leave a lasting imprint on the law that goes beyond [the] votes. Justice Scalia’s jurisprudence, in contrast, will long outlast his time on the bench.”).
6 Compare Richard Posner, The Incoherence of Antonin Scalia, NEW REPUBLIC (Aug. 24, 2012), https://newrepublic.com/article/106441/scalia-garner-reading-the-law-textual-originalism (“Justice Scalia’s interpretation of the Second Amendment probably is erroneous, but one who doubts this should conclude that the relevant meaning of the amendment had been ‘lost in the passage of time,’ and so the Court should have let the District of Columbia’s gun ordinance stand.”), with:

In his most significant decision for the court’s majority, District of Columbia v. Heller, in 2008, Scalia transformed the understanding of the Second Amendment. Reversing a century of interpretation of the right to bear arms, he announced that individuals have a constitutional right to possess handguns for personal protection. The Heller decision was so influential that even President Obama, whose politics differ deeply from Scalia’s, has

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that he was a reliable conservative vote. However, when it came to criminal law, Justice Scalia confounded those who sought to paint him an ideologue. Justice Scalia would likely have attributed his views on criminal law to his “originalist” method of legal interpretation that called for determining a law’s meaning based upon how a reasonable person would have understood the Constitution’s text at the time it was ratified. So while Justice Scalia found himself voting most frequently with the other conservative members of the Court, he nevertheless built numerous coalitions featuring liberal justices in criminal cases—and often these coalitions made prosecution more difficult and protected defendants. In fact, when it came to Fourth Amendment protections, vague criminal statutes, or the Sixth Amendment, Justice Scalia was usually a friend to the accused.

Justice Scalia announced a major affirmation of Fourth Amendment protections in 2001 with Kyllo v. United States. The Court ruled that thermal imaging technology was a kind of sense-enhancing technology not in public use and, therefore, a search under the Fourth Amendment. Justice Scalia, writing for the majority, noted:

We have said that the Fourth Amendment draws “a firm line at the entrance to the house.” That line, we think, must be not only firm but also bright—which requires clear specification of those methods of surveillance that require a warrant. While it is certainly possible to conclude from the videotape of the thermal imaging that occurred in this case that no "significant" compromise of the homeowner's privacy has occurred, we must take the long view, from the original meaning of the Fourth Amendment forward. . . . Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would

embraced the view that the Second Amendment gives individuals a constitutional right to bear arms.


8 Barkow, supra note 5 (“The Justice has not shied away from the consequences of his chosen methodologies, even when it has meant . . . rejecting the government’s attempt to deprive an American citizen accused of terrorism of his procedural rights in Hamdi v. Rumsfeld.”).


10 Bowers, supra note 7 (detailing how Justice Scalia joined Justice Thomas 91% of the time but Justice Ginsburg only 70% of the time).

11 See, e.g., Liptak, supra note 1 (“Justice Scalia also helped transform aspects of the criminal law, often in ways that helped people accused of crimes.”). But see, e.g., Illinois v. Wardlow, 528 U.S. 119 (2000) (holding unprovoked flight in a high crime area satisfies reasonable suspicion, an opinion Justice Scalia joined with four other conservative members of the court).

12 U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).


14 Id. at 34.
previously have been unknowable without physical intrusion, the surveillance is a “search” and is presumptively unreasonable without a warrant.\(^{15}\)

In forming the majority in this case, Justice Scalia joined with some of the more liberal members of the Court,\(^{16}\) including his friend and colleague Justice Ginsburg,\(^{17}\) in an alliance that would have been unusual outside of the criminal law setting. Yet when it came to protecting the privacy of the home, and by extension the rights of defendants, Justice Scalia was a staunch defender of the Fourth Amendment.\(^{18}\) It should not have surprised many that he also penned the majority in 2013 for *Florida v. Jardines*, holding that the use of a drug-sniffing dog on the porch of a home constituted a Fourth Amendment search.\(^{19}\) Justice Ginsburg would later refer to Justice Scalia as “one of the most pro-Fourth Amendment judges on the court.”\(^{20}\)

**Justice Scalia was also no stranger to protecting defendants from vague laws.**\(^{21}\) In

\(^{15}\) Id. at 40 (citations omitted). *Kyllo* also reflects Scalia’s sarcastic writing style, with the well-known reference to the lady taking her bath: “The Agema Thermovision 210 might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath—a detail that many would consider ‘intimate’ . . . .” Id. at 38.

\(^{16}\) Id. at 28 (noting the majority consisted of Justices Souter, Thomas, Ginsburg, Breyer, and the majority author, Scalia).

\(^{17}\) Rebecca Savransky, *Ginsburg on Scalia: We Were Best Buddies*, THE HILL (Feb. 14, 2016) http://thehill.com/blogs/blog-briefing-room/news/269458-ginsburg-on-scalia-we-were-best-buddies (“From our years together at the D.C. Circuit, we were best buddies. We disagreed now and then, but when I wrote for the Court and received a Scalia dissent, the opinion ultimately released was notably better than my initial circulation, [Justice Ginsburg said in a statement].”).

\(^{18}\) Also famous for his biting dissents, Justice Scalia further championed the Fourth Amendment in *Maryland v. King* where he argued DNA testing was unconstitutional because:

> The Fourth Amendment forbids searching a person for evidence of a crime when there is no basis for believing the person is guilty of the crime or is in possession of incriminating evidence. That prohibition is categorical and without exception; it lies at the very heart of the Fourth Amendment.


Today’s judgment will, to be sure, have the beneficial effect of solving more crimes; then again, so would the taking of DNA samples from anyone who flies on an airplane (surely the Transportation Security Administration needs to know the “identity” of the flying public), applies for a driver’s license, or attends a public school. Perhaps the construction of such a genetic panopticon is wise. But I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection. I therefore dissent and hope that today’s incursion upon the Fourth Amendment, like an earlier one, will some day be repudiated.

*Id.* at 1989–90.


\(^{21}\) Consider:
one particular case, Johnson v. United States, Scalia wrote for a majority that overturned the sentence of Samuel Johnson, convicted as a repeat offender of violent crimes. Johnson challenged the Armed Career Criminal Act as unconstitutionally vague in relation to his simple battery conviction because it defined a “violent felony” as “any crime punishable by imprisonment for a term exceeding one year” that “(i) has as an element of the use, attempted use, or threatened use of physical force against the person of another. . . .” Justice Scalia, and seven of his colleagues, agreed and focused on the meaning of the word “force,” saying:

It is the noun that poses the difficulty; “force” has a number of meanings. For present purposes we can exclude its specialized meaning in the field of physics: a cause of the acceleration of mass. In more general usage it means “[s]trength or energy; active power; vigor; often an unusual degree of strength or energy,” “[p]ower to affect strongly in physical relations,” or “[p]ower, violence, compulsion, or constraint exerted upon a person.” Black's Law Dictionary defines “force” as “[p]ower, violence, or pressure directed against a person or thing.” And it defines “physical force” as “[f]orce consisting in a physical act, esp. a violent act directed against a robbery victim.” All of these definitions suggest a degree of power that would not be satisfied by the merest touching.

Though it may have gone against his tough-on-crime exterior, Justice Scalia often found himself defending even those individuals—like Samuel Johnson, the white supremacist with numerous previous convictions—who were far from innocent.

When it came to the Sixth Amendment, Scalia’s championing of defendant’s rights peaked. In Crawford v. Washington, Justice Scalia penned a majority opinion that forcefully protected the Sixth Amendment right to confrontation. The case involved the testimony of the defendant’s wife who was unavailable at trial due to marital privilege.

Justice Scalia’s opinions were also helpful to criminal defendants charged under vague laws. In 2009, he objected to the court’s decision not to hear an appeal concerning a federal law that made it a crime ‘to deprive another of the intangible right of honest services.’ The law was so vague, he wrote, that ‘it would seemingly cover a salaried employee’s phoning in sick to go to a ballgame.’ The Supreme Court soon agreed to hear three separate cases on the law and substantially cut back its scope.

Liptak, supra note 1. But see, City of Chicago v. Morales, 527 U.S. 41, 89–90 (1999) (Scalia, J., dissenting) (arguing that though “[t]here may be some ambiguity at the margin,” a statute that made it a crime to “remain in one place with no apparent purpose” was not unconstitutionally vague).


Id. at 136.

Id. at 138–39 (citations omitted).

Michael McGough, Justice Antonin Scalia (Yes, Scalia) Rules for a Criminal Defendant, L.A. TIMES (June 30, 2015), http://www.latimes.com/opinion/opinion-la/la-ol-scalia-crime-sentence-20150630-story.html (“[T]he court by an 8-1 vote overturned the sentence of Samuel Johnson, a white supremacist who was arrested after telling an undercover FBI agent that he had homemade explosives and had picked out several targets.”).


Id.
Justice Scalia left little room for confusion or interpretation:

In this case, the State admitted Sylvia's testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment. . . . Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.28

. . .

Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.29

Later, in Melendez-Diaz v. Massachusetts, Justice Scalia reaffirmed his vigorous defense of the Sixth Amendment stating that it “does not permit the prosecution to prove its case via ex parte out-of-court affidavits.”30 In this case, the prosecution sought to introduce certificates signed by state laboratory analysts which stated that evidence that was connected to the defendant was cocaine.31 The defendant objected to admission as a violation of his Sixth Amendment right to confront the analysts.32 This time, Justice Scalia, again writing for the majority, concluded that affidavits reporting the results of forensic tests are testimonial and, therefore, render the affiants’ witnesses subject to the defendant’s right to confrontation.33

[R]espondent asks us to relax the requirements of the Confrontation Clause to accommodate the “necessities of trial and the adversary process.” It is not clear whence we would derive the authority to do so. The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. The Confrontation Clause—like those other constitutional provisions—is binding, and we may not disregard it at our convenience.34

Even outside of the context of the Confrontation Clause, Justice Scalia championed the Sixth Amendment and its right to a trial by jury.35 In Apprendi v. New Jersey, Justice Scalia

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28 Id.
29 Id. at 62.
31 Id.
32 Id.
33 Id. at 307.
34 Id. at 325.
35 Consider:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him . . . .
wrote a concurrence defending the jury right. 36 “[T]he criminal will never get more punishment than he bargained for when he did the crime, and his guilt of the crime (and hence the length of the sentence to which he is exposed) will be determined beyond a reasonable doubt by the unanimous vote of [twelve] of his fellow citizens.” 37

Later, in Ring v. Arizona, Justice Scalia wrote another concurrence stating that:

[T]he fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt. 38

His impassioned defense of the Sixth Amendment was decisive. He continued, “[w]e cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it.” 39

It would be wrong to paint a picture of Justice Scalia as one who always sided with the accused. He famously argued in Herrera v. Collins that there was no right for a convicted defendant to bring forth evidence of actual innocence. 40 Though he was a fierce protector of privacy in the home when it came to the Fourth Amendment, he also penned a

U.S. Const. amend. VI.

36 Apprendi v. New Jersey, 530 U.S. 466, 498 (2000) (Scalia, J., concurring). In this case, the defendant’s sentence was enhanced by the state trial court after the court found by a preponderance of the evidence that the defendant had acted to intimidate a family based on the family’s race. Id. at 468.

37 Id. (Scalia, J., concurring) (emphasis in original).

38 Ring v. Arizona, 536 U.S. 584, 610 (2002) (Scalia, J., concurring). The question in this case was whether an aggravating factor relevant to sentencing in a capital case could be found by a judge or must be determined by the jury. Id. at 588.

39 Id. at 612.

40 Herrera v. Collins, 506 U.S. 390, 427 (1993) (Scalia, J., concurring). This case featured an inmate convicted of capital murder who filed a habeas corpus petition ten years after his conviction—based on affidavits collected after trial—that indicated the defendant’s brother committed the murder. Id. at 393. Justice Scalia’s concurrence was succinct in this case:

We granted certiorari on the question whether it violates due process or constitutes cruel and unusual punishment for a State to execute a person who, having been convicted of murder after a full and fair trial, later alleges that newly discovered evidence shows him to be "actually innocent." I would have preferred to decide that question, particularly since, as the Court's discussion shows, it is perfectly clear what the answer is: There is no basis in text, tradition, or even in contemporary practice (if that were enough) for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction. . . . If the system that has been in place for 200 years (and remains widely approved) "shock[s]" the dissenters' consciences, perhaps they should doubt the calibration of their consciences, or, better still, the usefulness of "conscience shocking" as a legal test.

Id. at 427–28 (Scalia, J., concurring) (citations omitted).
dissent in *Lawrence v. Texas* that did not mince words when he condemned the Court for overturning an anti-sodomy statute.\(^{41}\) He has told audiences he would like to do away with Miranda Rights,\(^{42}\) and penned an opinion in *Maryland v. Shatzer* that held a two-week break in interrogation was sufficient to outweigh the presumption of involuntariness (and thus statements made after such a break weren’t required to be suppressed).\(^{43}\) In *Hudson v. Michigan*, he determined that “[r]esort to the massive remedy of suppressing evidence of guilt is unjustified” in a case featuring a violation of the knock-and-announce rule.\(^{44}\) And perhaps his most well-known anti-defendant stance can be found in any death penalty case, where Justice Scalia could be especially ruthless.\(^{45}\)

In sum, Justice Scalia had a large influence in many areas of jurisprudence, and criminal law was no exception. His devotion to originalism likely played a large role in his criminal opinions, which will shape criminal justice for many years to come. His outsized influence on the Court matched his personality, and he has surely “left an indelible mark on our history.”\(^{46}\) While many may disagree with his views on various issues, it would be hard to conclude that his jurisprudence was anything other than nuanced. The previous cases represent only some of the majority and dissenting opinions he penned himself, but his influence on the Court was undoubtedly much greater, even when only joining in opinions written by colleagues. Though he will be missed—if nothing else, he has kept things interesting—his jurisprudence will live on.

\(^{41}\) *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (“Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda.”).


\(^{43}\) *Maryland v. Shatzer*, 559 U.S. 98, 117 (2010). In this case, a police officer attempted to question an inmate, but the interview ended after the inmate invoked his Miranda rights. *Id.* at 101–03. Later, a different police officer again sought to question the inmate and the inmate waived his Miranda rights and made inculpatory statements. *Id.* at 101–03. The Court ruled unanimously that the inmate had resumed normal life, even though he remained incarcerated, and thus his inculpatory statements could be used against him at trial. *Id.* at 117.


\(^{45}\) See, e.g., *Glossip v. Gross*, 135 S. Ct. 2726, 2747 (2015) (“[T]hey ask us for clemency, as though clemency were ours to give.”). Justice Scalia was well-known as a supporter of the death penalty and seemed to go out of his way to promote the punishment in some cases, including exploring the gritty details of a crime the defendant was allegedly to have committed. Consider also:

> Scalia spent nearly a minute and a half reading a description of the December 2000 crime. . . . The brothers broke into a home occupied by three men and two women, forced the victims into a closet, demanded they perform sex acts, drove them to ATMs to withdraw money, shot them at a soccer field, and drove over them with a truck. One woman survived.


\(^{46}\) Savransky, *supra* note 17 (quoting Justice Sotomayor) (“My colleague Nino Scalia was devoted to his family, friends, our Court, and our country, said Justice Sonia Sotomayor. He left an indelible mark on our history. I will miss him and the dimming of his special light is a great loss for me.”).
His colleagues on the Court, some of the people who knew him best, called him a “legal giant,” a “titan,” with “unyielding commitment” who was “treasured by his colleagues.” He was a “transformational Supreme Court Justice,” who was “devoted to our country,” and who was a “remarkable person.” Perhaps his best buddy, Justice Ginsburg, said it best:

Justice Scalia once described as the peak of his days on the bench an evening at the Opera Ball when he joined two Washington National Opera tenors at the piano for a medley of songs. He called it the famous Three Tenors performance. He was, indeed, a magnificent performer. It was my great good fortune to have known him as working colleague and treasured friend.

He was a jurist of captivating brilliance and wit, with a rare talent to make even the most sober judge laugh.

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48 Id. (quoting Justice Breyer).
49 Id. (quoting Justice Kennedy).
50 Id. (quoting Chief Justice Roberts).
51 Id. (quoting Justice Kagan).
52 Id. (quoting Justice Sotomayor).
53 Id. (quoting Justice Alito).
54 Id. (quoting Justice Ginsburg).
55 Id.