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The Impact of Government Appellate Strategies on the Development of Criminal Law

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THE IMPACT OF GOVERNMENT APPELLATE STRATEGIES ON THE DEVELOPMENT OF CRIMINAL LAW

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Appellate courts are a principal source of change in and growth of the criminal law. In the course of resolving disputes, appellate courts announce rules that govern future cases. For the government, seeing that these rules develop in a favorable way is often more important than the outcome in the case before the appellate court. The government is charged with protecting the public, and developing generally applicable rules of criminal law is often more important in obtaining that goal than securing the conviction of one individual. In its efforts to ensure the development of government-friendly rules, the government does not depend solely on the merits of its substantive arguments; it also uses strategies on appeal, sometimes over the course of many appeals, to nudge courts to adopt rules that are favorable to the government or to establish obstacles designed to discourage courts from adopting unfriendly rules.

This Article describes some of these strategies and discusses how they may affect the development of the law. It proceeds in three parts. Part I introduces the subject by explaining why the government is in a better position than individual criminal defendants to use strategy on appeal to influence the law. Unlike criminal defendants, the government is a party in all criminal appeals. Its repeated appearances allow the government to develop and implement a long-term strategy over a series of cases to affect the law. Part II explores the various strategies employed by the government on appeal. As this Part explains, those strategies range from the simple technique of refusing to make one argument in a case in an effort to get the court to decide the case based on a different argument, to the much more complex strategy of bringing a series of cases in a particular order to bring about, through incremental changes, a legal doctrine that an appellate court would have been inclined to reject had the government sought the legal change in one fell swoop. Part III addresses the normative question of the desirability of

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the government's influence over the law through appellate strategies. It concludes that this influence may be undesirable not only because it imbues the Executive with some level of control over the development of the law, but also because it gives the government another advantage in a criminal process that is already skewed in favor of the government. Part III further explains, however, that courts can reduce the impact of appellate strategies by refusing to be swayed by them.

I. THE DIFFERING ROLES OF THE CRIMINAL DEFENDANT AND OF THE GOVERNMENT

Criminal appeals have a different purpose for criminal defendants than for the government. The principal goal of the criminal defendant in a criminal case, before the court of appeals as before the trial court, is to avoid a judgment of guilty and the consequential punishment. He is usually not particularly interested in the reason for his victory. The criminal defendant will generally be happy with any reason for his acquittal, be it that the search leading to his arrest was illegal, the conduct for which he was charged is constitutionally protected, or the judge improperly instructed the jury. But how a criminal defendant wins his appeal can have immense impact on future cases. The reasoning that underlies an appellate decision establishes legal rules for future cases.[1] With rare exceptions like *Griswold v. Connecticut*,[2] criminal defendants generally have no interest in developing particular legal rules.[3] Criminal defendants are not an organized group seeking to protect the interests of other criminal defendants. Today's defendants have no reason to seek to establish rules that will protect the next defendant tomorrow.[4]

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1. To avoid appearing arbitrary in resolving disputes, courts announce rules providing the basis for their decisions. When an appellate court announces a rule, that rule becomes part of the law, binding lower courts within that appellate court's purview, and in the federal system, the appellate court itself.

2. 381 U.S. 479 (1965).

3. *Id*. at 481 (where appellants "raise[d] the constitutional rights of the married people with whom they had a professional relationship").

4. Consider *Ring v. Arizona*, 536 U.S. 584 (2002). There, Ring, who was convicted of murder and sentenced to death, argued that the imposition of his death sentence violated the Sixth Amendment because it turned on facts that were found by a judge instead of a jury. *Id*. at 595. Ring's argument, which prevailed before the Supreme Court, was that when a factual finding is necessary to support a punishment of death, the Sixth Amendment requires that a jury, not a judge, make those factual findings. *Id*. at 609. Although Ring won his case, the legal rule the case established may disadvantage future defendants, since judges may be less inclined to impose the death penalty than jurors, who, not having tried any other cases, are likely to consider *any* murder to be heinous enough to warrant death. Although there is some evidence to the contrary, see Paul Mancino, III, Note, *Jury Waiver in Capital Cases: An Assessment of the Voluntary, Knowing, and Intelligent Standard*, 39 CLEV. ST. L. REV. 605, 613 (1991) (concluding that judges in Florida and Alabama impose death more often than juries), those studies focus on states where judges face reelection.

For the government, things are different. Like criminal defendants, the government is interested in winning each case on appeal; however, the government also is interested in developing rules. The government is charged with protecting the public, and it has an interest in fostering a criminal law that best achieves that goal. That interest often trumps the government's interest in winning a particular case because rules prescribe generally applicable codes of conduct for the public while the outcome in a particular case is relevant only to the defendant in that case.

The government may employ strategies to encourage or facilitate the creation of government-friendly law on appeal. The government is able to implement these strategies because it is a repeat player before the courts of appeals. Unlike a criminal defendant, who appears only in his own case, the government appears in all criminal appeals. This constant involvement does not simply provide the government with numerous opportunities to influence the growth of the criminal law; it also allows the government to be flexible in how it seeks to influence the law. Instead of seeking to change the law based solely on the strength of its substantive arguments, the government may try to control the development of the law through procedural strategies such as selecting a specific case to press particular substantive arguments. Indeed, the ability to influence law through these procedural strategies is one reason that all decisions whether to appeal cases that the federal government has lost is centralized in the Solicitor General.[5]

Conversely, because they are not repeat players, individual defendants generally do not engage in similar strategic behavior. There are, however, pro-defense interest groups such as the American Civil Liberties Union (ACLU) that may engage in strategic behavior on appeal in an effort to influence the law. But their strategizing is likely to be less effective. Unlike the government, interest groups usually do not have the resources to participate in all criminal cases. It therefore may be more difficult for these groups to influence the law through sustained strategies. An interest group's ability to strategize may also be hampered by its ethical obligations to clients. As with all defense lawyers, the principal task of an interest group representing a defendant is to protect that client's interest. Ensuring that the client wins is always more important than developing rules favorable to a future defendant.[6] The government does not face similar ethical constraints because the government is its own client. Similarly, interest groups may face

5. *See* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-2.170 (2007); 28 C.F.R. § 0.20(b) (2009).

6. *See* Seth P. Waxman, *Foreword: Does the Solicitor General Matter?*, 53 STAN. L. REV. 1115, 1117 (2001) ("[N]one other [than the Solicitor General] has the authority to decline to pursue cases solely because doing so would not promote the orderly development of the law.").

constitutional constraints that the government does not. For example, criminal defense lawyers cannot waive their clients' constitutional right to the assistance of counsel[7] or the right to plead not guilty,[8] and unless a client waives those rights, they limit the arguments available to the criminal defense lawyer. Government lawyers, by contrast, do not face similar constraints because the Constitution does not afford the government similar constitutional rights in criminal trials.

II. GOVERNMENT APPELLATE STRATEGIES

On appeal, the government may employ several strategies to influence the development of criminal law. Most fall into two broad categories: argument selection and case selection. The discussion below explores these, and other, government strategies on appeal. In doing so, it focuses on the federal government's employment of these strategies, not because states do not engage in similar strategies, but because information on federal strategies is more readily available. Similarly, this Article often uses U.S. Supreme Court cases as examples. The strategies considered in appealing to the Supreme Court also apply in appeals to the circuit courts, because the Supreme Court is an appellate court. However, Supreme Court cases are more likely to be familiar to the reader than those from the circuit courts.

A. Argument Selection

Aside from appeals that focus solely on disputes about factual findings by the trial court, the primary issue in an appeal is what legal rule should apply to the case at hand. The principal tool in those appeals is reasoned argument. The parties argue in support of the legal rule that they think should control the case and then demonstrate why they should prevail under that rule.

In this process, most parties choose the arguments that most likely assure them of victory. The government, however, may deliberately forsake its best argument in favor of an argument that is less certain of victory but more beneficial to the government's long-term policy interests. An example is *United States v. Leon*.[9] There, police conducted searches based on a warrant for the homes of several people suspected of drug dealing.[10] Although the warrant was facially valid, the district court suppressed the evidence seized during the search based on the conclusion that the affidavits supporting the warrant did not establish probable cause, and the Ninth Circuit affirmed.[11]

7. *See* Johnson v. Zerbst, 304 U.S. 458, 465 (1938).
8. Brookhart v. Janis, 384 U.S. 1, 7 (1966).
9. 468 U.S. 897 (1984).
10. *Id.* at 902.
11. *Id.* at 902–03, 905.

Following the Ninth Circuit's decision, however, the Supreme Court in *Illinois v. Gates* announced a new standard for probable cause,[12] under which the *Leon* warrant likely would have been found sufficient.[13] The federal government, however, did not seek a GVR[14] from the Supreme Court.[15] Moreover, its petition for a writ of certiorari expressly declined to challenge the lower courts' determination that the warrant was unsupported by probable cause.[16] Instead, the government argued only that the exclusionary rule should not apply to "'evidence seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective.'"[17] Courts generally seek to avoid deciding cases based on arguments that are not made because the courts are left without the benefit of the adversary process.[18] Thus, the government's decision not to challenge the finding of probable cause encouraged the Court to issue a ruling on the good-faith exception.[19]

Similarly, the government may refuse to pursue an argument out of fear that it will result in bad precedent. *MacDonald v. United States*[20] is an example. MacDonald, a former Army captain, was indicted on three counts of murder.[21] The Fourth Circuit ordered the charges dismissed on the ground that MacDonald's speedy trial rights had been violated,[22] explaining that four-

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12. 462 U.S. 213, 238 (1983).

13. *Leon*, 468 U.S. at 961 (Stevens, J., concurring in the judgment in part and dissenting in part) ("It is probable, though admittedly not certain, that the Court of Appeals would now conclude that the warrant in *Leon* satisfied the Fourth Amendment if it were given the opportunity to reconsider the issue in the light of *Gates*.").

14. "GVR" refers to the grant, vacation, and remand of a judgment.

15. *See Leon*, 468 U.S. at 905 (majority opinion).

16. *Id*.

17. *Id*.

> The Government's petition for certiorari expressly declined to seek review of the lower courts' determinations that the search warrant was unsupported by probable cause and presented only the question "[w]hether the Fourth Amendment exclusionary rule should be modified so as not to bar the admission of evidence seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective."

Id. (citation omitted).

18. *Cf.* Harmon v. Thornburgh, 878 F.2d 484, 494 (D.C. Cir. 1989) (reluctance to make constitutional ruling "heightened by the absence of any meaningful argument by the parties" on the issue).

19. *Leon*, 468 U.S. at 913. The government's strategy in *Leon* may also have been informed by the fact that the case presented the good-faith issue to the Court in a particularly favorable light: The law enforcement officers' actions may have seemed all the more reasonable because, after *Gates*, probable cause was arguably present. For more discussion on this topic, see *infra* notes 56–71 and accompanying text.

20. 456 U.S. 1 (1982).

21. *Id*. at 3, 5.

22. *Id*. at 5.

and-a-half years earlier the Army had charged, though ultimately not prosecuted, MacDonald with the same murders while he was a captain in the Army.[23] It was hardly clear that the Army's charges triggered MacDonald's right to a speedy trial. But the government chose not to seek review on that ground.[24] Instead, it challenged the dismissal solely on the ground that the delay between the original military charges and the subsequent indictment did not violate the right to a speedy trial.[25] It is reasonable to think that the decision was motivated in part by a fear that, if the Court were to reject the argument that military charges do not start the speedy trial clock, it might do so in a way that suggested that military charges triggered the whole panoply of Sixth Amendment rights.[26] Framing the case in terms of the amount of delay reduced the chances of such a ruling.

The government also engages in triage when selecting its arguments in situations where the defendant is appealing an adverse ruling. When the government perceives that the Court is inclined to rule in a way that is unfavorable to its interests, the government may focus more on reducing the impact of the decision than on trying to win the particular case. Consider *Miranda v. Arizona*.[27] The issue in that case was whether police had to inform suspects in custody of their rights to remain silent and to consult an attorney before interrogation.[28] Two terms earlier, in *Escobedo v. Illinois*, the Court held that the police acted unconstitutionally by interrogating a suspect in custody whom they prevented from speaking with his attorney.[29] In light of *Escobedo*, the federal government, which participated as an amicus in *Miranda*, concluded that it would be fruitless to try to convince the Court to allow the confession in *Miranda*.[30] So instead of trying to convince the Court

23. *Id*. at 4–5.

24. Brief for the United States at 28–29, United States v. MacDonald, 356 U.S. 1 (1982) (No. 80-1582).

25. *See id.* at 30–31.

26. Except for the right to the assistance of counsel, *see* United States v. Culp, 14 C.M.A. 199, 217 (1963) (Quinn, C.J., concurring in the result), earlier opinions suggested that the Sixth Amendment does not apply to courts-martial. *See, e.g.*, *Ex parte* Quirin, 317 U.S. 1, 17 (1942) ("[C]ases arising in the land or naval forces . . . are expressly excepted from the Fifth Amendment, and are deemed excepted by implication from the Sixth."); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 123 (1866) (stating that "the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the [S]ixth [A]mendment, to those persons who were subject to indictment or presentment in the [F]ifth," which expressly does not apply to the military); *see also, e.g.*, O'Callahan v. Parker, 395 U.S. 258, 262–63 (1969) (stating that the Sixth Amendment guarantee to a trial by jury of one's peers does not apply to criminal cases in military courts).

27. 384 U.S. 436 (1966).

28. *See id.* at 444.

29. 378 U.S. 478, 490–91 (1964).

30. Conversation with Ralph Spritzer, First Assistant to the Solicitor General from 1962 to 1968, in Tempe, Ariz. (on or around Apr. 20, 2009).

to admit the statements, the government focused on trying to persuade the Court to base its decision in *Miranda* on the Fifth Amendment protection against self-incrimination,[31] as opposed to the Sixth Amendment right to the assistance of counsel, which had been the basis of the ruling in *Escobedo*.[32] The fear was that, if the ruling was based on the right to counsel, police would not merely have to inform suspects of their right to an attorney, but would be forbidden from ever conducting questioning without the presence of the attorney.[33]

Another strategy to avoid the development of unfavorable law is the confession of error.[34] A confession of error consists of the government arguing that the decision reached by the lower court, though in the government's favor, was erroneous.[35] Although not limited to criminal cases, most confessions of error occur on criminal appeals.[36] The confession of error is a useful means for avoiding the establishment of a rule unfavorable to the government. Although courts do not simply accept the confession of error but instead conduct an independent evaluation of the merits,[37] they almost always agree with the reason the government gives for its confession, no doubt in part because a court is probably more inclined to trust the government when the government is arguing against its own interests.[38] The government therefore

31. *See Miranda*, 384 U.S. at 439.

32. *Escobedo*, 378 U.S. at 491. *Compare* Brief for the United States at 29, Westover v. United States, 384 U.S. 436 (1966) (No. 761) ("We agree that if a suspect's post-arrest statement is the product of compulsion or overreaching by law-enforcement officers, it has been obtained in violation of the Fifth Amendment and is inadmissible as evidence of his guilt."), *with id.* at 39 ("Any attempts to import rigid Sixth Amendment concepts into the whole range of investigation for all types of crimes, including the myriad daily problems requiring investigation by local police, is beset with enormous practical difficulties.").

33. Conversation with Ralph Spritzer, *supra* note 30.

34. LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW 9 (1987).

35. *Id.*

36. *Id.*

37. *See* Lawrence *ex rel.* Lawrence v. Chater, 516 U.S. 163, 170–71 (1996) (per curiam) ("All Members of the Court are agreed that we 'should [not] mechanically accept any suggestion from the Solicitor General that a decision rendered in favor of the Government by a United States Court of Appeals was in error.'") (quoting Mariscal v. United States, 449 U.S. 405, 406 (1981) (Rehnquist, J., dissenting)). *But see* United States v. Latu, 479 F.3d 1153, 1159 (9th Cir. 2007) (reversing conviction based solely on government's confession of error). The judiciary's duty to evaluate the merits despite a confession of error is reflected in the Supreme Court's occasional practice of appointing an amicus to defend the lower court judgment when the government confesses error. *See, e.g.*, Dickerson v. United States, 528 U.S. 1045, 1045 (1999).

38. *See* David M. Rosenzweig, Note, *Confession of Error in the Supreme Court by the Solicitor General*, 82 GEO. L.J. 2079, 2081 (1994) ("When the Solicitor General claims that reversible error has been committed, the Court almost always agrees and reverses.") (citation omitted). Indeed, the Supreme Court has criticized circuit courts for not accepting a confession of error. *See* Upshaw v. United States, 335 U.S. 410, 411–12 (1948).

may use the confession of error to steer an appellate court away from adopting an overly broad rule and instead to issue a ruling based on narrow grounds.[39] Consider *Redmond v. United States*.[40] There, the government successfully prosecuted a couple for sending nude photographs through the mail.[41] The couple appealed their convictions.[42] The government confessed error on the ground that the prosecution violated a Department of Justice policy that prosecutions be limited to those who have repeatedly mailed obscene material, and the Court overturned the convictions on that ground.[43] One explanation for the decision to confess error on that ground was that it guided the Court away from issuing a ruling providing constitutional protections to the mailing of nude photographs.

Another illustration of confession of error as strategy is *Knox v. United States*.[44] Knox had been convicted for receiving and possessing videos depicting scantily clad underage girls.[45] He challenged his conviction on the ground that the videos did not contain a "lascivious exhibition of the genitals or pubic area"—an element of the crime for which he was convicted[46]—because the minors in the video were clothed.[47] The Third Circuit upheld the conviction, concluding that nudity was not necessary to constitute a lascivious exhibition of the pubic area.[48] After the Supreme Court granted Knox's petition for certiorari, the Solicitor General confessed error.[49] The principal reason for the Solicitor General's confession was that he believed the Third Circuit's interpretation was "strained and incorrect."[50] But the Solicitor General later explained that another consideration influencing his

39. *See* Casey v. United States, 343 U.S. 808, 811–12 (1952) (Douglas, J., dissenting) (stating that the confession of error may be used "to save one case at the expense of another"); Rosenzweig, *supra* note 38, at 2111 ("The need to consider and advance such long-term interests may lead the Solicitor General to confess error, even at the cost of sacrificing a victory in a particular case, in order to avoid an adverse ruling with potentially far-reaching effects."). Cases decided on confession of error constitute precedent as much as any other decision. *See, e.g.*, Sibron v. New York, 392 U.S. 40, 58 (1968) ("[O]ur judgments are precedents, and the proper administration of the criminal law cannot be left merely to the stipulation of parties.") (citation omitted). *But see Casey*, 343 U.S. at 808 (per curiam) ("To accept in this case his confession of error would not involve the establishment of any precedent.").

40. 384 U.S. 264 (1966).

41. *Id*. at 264.

42. *See id.*

43. *Redmond*, 384 U.S. at 264–65.

44. 510 U.S. 939 (1993).

45. United States v. Knox, 977 F.2d 815, 817–18 (3d Cir. 1992).

46. *Id*. at 820.

47. *Id*.

48. *Id*.

49. Drew S. Days, III, *When the President Says "No": A Few Thoughts on Executive Power and the Tradition of Solicitor General Independence*, 3 J. APP. PRAC. & PROCESS 509, 515 (2001).

50. *Id*.

decision was that pressing that interpretation before the Court risked the "possibility of the Court's issuing a broad adverse ruling likely to jeopardize later child-pornography prosecutions."[51]

Argument selection and confession of error are not the only strategies for avoiding bad precedent. The government has a number of other ways to discourage the courts from moving the law in unfavorable directions. For example, if the government perceives that an appellate court may issue a decision establishing unfavorable law, the government could conceivably moot the case by pardoning the defendant. Although so far as I know, the government has not employed that tactic, it did something somewhat similar in two of the detainee cases. To avoid Supreme Court review of the military detainment of Jose Padilla and Ali Saleh Kahlah al-Marri, the government moved them to civilian custody.[52]

B. Case Selection

Supplementing the government's ability to pick arguments strategically is the government's ability to choose, to some degree, the context for presenting new arguments. Because it participates in all criminal cases, the government may wait for a favorable factual case before presenting an argument.[53] As the maxim that "'hard cases make bad law'" suggests,[54] the facts of a case may

51. *Id*. *Knox* is also an example of the government deliberately forsaking a good argument in an effort to expand the law. Apparently, the prosecutor in *Knox* had "intentionally left out evidence of Knox's collection of hard-core child pornography" in an effort to force the court to hold that possession of clothed depictions of minors could be illegal. *Id*.

52. *See, e.g.*, Glenn Greenwald, Preventing a Judicial Ruling on the Power to Imprison Without Charges, Salon.com (March 7, 2009), http://www.salon.com/opinion/greenwald/2009/03/07/al_marri/. The government may have used a comparable tactic to avert Supreme Court review in *Medellin v. Dretke*, 544 U.S. 660 (2005). Medellin, a citizen of Mexico, had been sentenced to death by a Texas state court. *Id*. at 662. After Medellin unsuccessfully challenged the conviction on direct appeal, he filed a petition for habeas corpus first in state court and then federal court, arguing that his conviction should be reversed because Texas had failed to inform him of his consular rights under the Vienna Convention. *Id*. The state and federal courts both rejected the argument on the ground that it was procedurally defaulted because Medellin had not raised the argument on direct appeal. *Id*. at 662–63. Meanwhile, the International Court of Justice (ICJ) issued a decision ordering the United States to reconsider Medellin's Vienna Convention claim, without regard to procedural default. *Id*. at 663. Medellin petitioned the Supreme Court for certiorari, asking the Court to vacate his conviction in light of the ICJ's ruling. *See id*. at 661–62. After the petition was granted, the federal government issued a memorandum directing the Texas courts to reconsider Medellin's petition, which resulted in the Supreme Court dismissing the writ. *Id*. at 663–64, 667. One reason for the federal government's conduct might have been to avoid a potentially sweeping ruling giving broad authority to rulings of the ICJ or establishing the enforceability of the Geneva Convention by private individuals.

53. Criminal defendants cannot take advantage of this strategy. A defendant is a one-time player, and his principal interest is winning his case. Defendants therefore have an interest in making every available argument, regardless of whether his case is the best for making that argument.

54. Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 884 (2006) (quoting N. Secs. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting)).

persuade a court to adopt a rule that it otherwise may have rejected. The case-by-case nature of the appellate process requires courts to develop rules in the context of the facts of a particular case. Those facts inevitably influence the courts in the development of legal rules.[55] It is hard to doubt, for example, that a court would stretch legal doctrine to avoid a ruling that would result in the release of Jeffrey Dahmer. Similarly, a court is bound to be more inclined to develop doctrines in a way that is more favorable to sympathetic defendants, such as draft dodgers or political demonstrators charged with trespass. Indeed, criminal appeals pose a particularly fertile field for this sort of manipulation because criminal cases are more likely than other types of cases to present facts that play on visceral instincts. Serial killers are less likely to evoke sympathy than contract breachers.

The government, therefore, has an interest in raising novel arguments in those cases that present the government's position in the best possible light.[56] For this reason, the Solicitor General may oppose certiorari, or even refuse to seek certiorari itself, in cases that squarely present a circuit conflict, opting instead to wait for a case with facts more favorable to the government before seeking Supreme Court review (or acquiescing in petitions for certiorari).[57] *United States v. Resendiz-Ponce*[58] provides an example. In that case, the government petitioned for certiorari on the issue of whether the failure to allege an element of an offense in an indictment can be harmless error.[59] The government had opposed certiorari in several previous cases presenting the same issue, even after the circuit split warranting certiorari had already been well developed.[60] Those cases presented the issue in circumstances that the government may have perceived as unlikely to result in a favorable court ruling. For example, one of those cases, *United States v. Allen*, was a death

55. Schauer, *supra* note 54, at 885.

56. As former Solicitor General Erwin Griswold once said, it is a "basic rule of the Solicitor General's office '[n]ever [to] risk an important point on a weak case.'" Seth P. Waxman, *The Physics of Persuasion: Arguing the New Deal*, 88 GEO. L.J. 2399, 2400 (2000) (quoting ERWIN N. GRISWOLD, OULD FIELDS, NEW CORNE: THE PERSONAL MEMOIRS OF A TWENTIETH CENTURY LAWYER 109 (1992)).

57. *See* Barbara D. Underwood, *Facts on the Ground and Federalism in the Air: The Solicitor General's Effort to Defend Federal Statutes During the Federalism Revival*, 21 ST. JOHNS J. LEGAL COMMENT. 473, 475–76 (2007).

58. 549 U.S. 102 (2007).

59. *Id*. at 103.

60. *See* United States v. Allen, 406 F.3d 940, 945 (8th Cir. 2005); United States v. Robinson, 367 F.3d 278, 285–86 (5th Cir. 2004), *cert. denied*, 543 U.S. 1005 (2004); United States v. Higgs, 353 F.3d 281, 304 (4th Cir. 2003), *cert. denied*, 543 U.S. 999 (2004); United States v. Trennell, 290 F.3d 881, 889–90 (7th Cir. 2002), *cert. denied*, 537 U.S. 1014 (2002); United States v. Cor-Bon Custom Bullet Co., 287 F.3d 576, 580–81 (6th Cir. 2002), *cert. denied*, 537 U.S. 880 (2002); United States v. Prentiss, 256 F.3d 971, 981–85 (10th Cir. 2001) (en banc); United States v. Corporan-Cuevas, 244 F.3d 199, 202 (1st Cir. 2001), *cert. denied*, 534 U.S. 880 (2001).

penalty case.[61] The government had omitted from the indictment allegations of aggravating factors that, after *Ring v. Arizona*,[62] must be included in the indictment. [63] Defending the conviction would have forced the government to make the unattractive argument that the Court permit the imposition of the death penalty despite procedural error.[64]

Resendiz-Ponce did not have this sort of atmospheric problem. It was not a death penalty case.[65] Resendiz-Ponce had been charged with attempting to reenter the United States after deportation.[66] Moreover, the element that had been left out of the indictment did not even appear to be required.[67] The Ninth Circuit held the indictment inadequate because it failed to allege a specific overt act that Resendiz-Ponce had committed in seeking to reenter.[68] But there was reason to think that the allegation of a specific overt act was not required because a number of federal cases had held that an allegation of attempt is generally understood to implicitly include an allegation of an overt act.[69] It stands to reason that the government decided to seek review in *Resendiz-Ponce* in part because it perceived that the Court would be more inclined to rule that the failure to include an element in the indictment was harmless, given that alleging that element probably was not even required.

The strategy of not pressing arguments in unsympathetic cases is not limited to the cases before the Supreme Court. The Solicitor General may withhold authorization to appeal in cases with facts that cast the government's argument in a bad light. The government's practice in appeals of sentencing decisions provides an example. In *United States v. Booker*, the Supreme Court held that federal sentences are reviewed for reasonableness on appeal.[70] Since *Booker*, the government has been quite selective in deciding which sentences to appeal as unreasonable. It has explained that it does not appeal

61. 406 F.3d at 943.

62. 536 U.S. 584 (2002).

63. *Id*.

64. *See Allen*, 406 F.3d at 943.

65. United States v. Resendiz-Ponce, 425 F.3d 729, 730 (9th Cir. 2005).

66. *Id*.

67. *Id*. at 731–32.

68. *Id*. at 731.

69. *See, e.g.*, United States v. Rodriguez, 416 F.3d 123, 128 (2d Cir. 2005); United States v. Gallagher, 83 F. App'x 742, 744 (6th Cir. 2003); United States v. Cardenas-Alvarez, 987 F.2d 1129, 1131–32 (5th Cir. 1993); *see also* United States v. Gregory, No. 03-CR-50027-1, 2003 WL 21698447, at *1 (N.D. Ill. July 21, 2003) (stating that an allegation of attempt implicitly includes an allegation of an overt act); United States v. Bolden, No. 95-40062-01, 1995 WL 783638, at *2 (D. Kan. Dec. 20, 1995). Although some courts required proof of a separate specific overt act, those courts did not specify whether the indictment must separately allege that act. *See* United States v. Marte, 356 F.3d 1336, 1344–45 (11th Cir. 2004); United States v. De León, 270 F.3d 90, 92 (1st Cir. 2001).

70. 543 U.S. 220, 261 (2005).

all sentences in which the district court has awarded a downward variance from the Sentencing Guidelines.[71] Instead, it appeals only a "small percentage" of such cases, challenging only those sentences where the unreasonableness of the sentence is clear.[72] Sentences on the margin of reasonableness pose the greatest risk of being found reasonable by the appellate courts and, accordingly, of resulting in the appellate court creating law adverse to the government interest. By appealing only those downward variances that the government believes are likely to be found unreasonable, the government minimizes those risks.

Of course, there are limits to the strategy of case selection. Although the government has complete control when it is the potential appellant in a case, it has substantially less control when it is the appellee because the decision whether to appeal rests with the defendant. Still, the government has some control insofar as it may choose which arguments to make as an appellee.[73]

Case selection based on favorable facts is not the only strategy relating to argument presentation. Another such strategy is to move the law incrementally over a series of cases, thereby convincing an appellate court in the long run to adopt a rule that the court might have initially found too extreme to accept. The most famous use of this strategy is the NAACP's line of suits seeking to desegregate schools.[74] During the 1930s and 1940s, the NAACP filed test cases arguing that specific black institutions were unequal to analogous white institutions; the NAACP argued in later suits that those earlier cases established the basic principle that separate means unequal.[75]

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71. Brief for the United States at 41, Claiborne v. United States, 551 U.S. 87 (2007) (No. 06-5618).

72. *Id.*

> And the government appeals a small percentage of sentences on the ground of unreasonableness, while criminal defendants appeal a high percentage (likely including nearly all upward variances). Both the FPCD [Federal Public and Community Defenders] and the NYCDL [New York Council of Defense Lawyers] report more than 17 times as many defendant appeals as government appeals, despite the fact that, since *Booker*, district courts have imposed below-Guidelines sentences more than seven times as often as above-Guidelines sentences.

Id. (citation omitted). According to Professors Bibas and Klein, the unofficial rule is that the government will not appeal sentences within 50% of a guideline range. Stephanos Bibas & Susan Klein, *The Sixth Amendment and Criminal Sentencing*, 30 CARDOZO L. REV. 775, 794 n.91 (2008).

73. The government continues to have more control as a respondent before the Supreme Court than before other appellate courts. The government can offer various grounds for opposing certiorari, and when certiorari is granted, the government has various tools to force the Court to dismiss the writ as improvidently granted, including granting a pardon to the defendant.

74. *See* Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910–1920)*, 20 LAW & HIST. REV. 97, 115–16 (2002).

75. *See* Genna Rae McNeil, *Charles Hamilton Houston*, 3 BLACK L.J. 123, 125–26 (1973). For more discussion of individual test cases, see GENNA RAE MCNEIL, GROUNDWORK: CHARLES

The government has frequently employed a similar strategy in both criminal and noncriminal cases.[76] The government's effort to limit the exclusionary rule for Fourth Amendment violations provides an example. In 1984, the government convinced the Court in *Leon* to adopt a good-faith exception to the warrant requirement for searches.[77] Chances are that the Court would have rejected the good-faith exception in the early 1970s. At that time, Court opinions suggested that any violations of the Fourth Amendment necessarily resulted in exclusion.[78] But during the 1970s and 1980s, the Court decided a series of cases creating exceptions to the exclusionary rule.[79] These inroads were based on the Court's conclusion that the purpose of the exclusionary rule is not to remedy the violation of individual rights, but to deter law enforcement from violating the Fourth Amendment, and that the exceptions were proper because requiring exclusion in those circumstances would not achieve additional deterrence.[80] In light of these decisions,[81] the Court was

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76. The government employed a similar incremental strategy in litigation surrounding the Gold Clause, the Commerce Clause, and legislation enacted during the New Deal. *See* Waxman, *supra* note 6, at 1118; *see also* Transcript, *Rex E. Lee Conference on the Office of the Solicitor General of the United States*, 2003 BYU L. REV. 1, 151 (2003).

> Finally, the ultimate constraint in this area is that the whole premise of picking cases and moving the best one forward in an effort to move the law incrementally in a direction that the solicitor general, on behalf of the political branches, believes is correct is just that—it is a strategy incrementally to *move* the law.

Id.

77. United States v. Leon, 468 U.S. 897, 913 (1984).

78. *Id*. at 905 ("Language in opinions of this Court and of individual Justices has sometimes implied that the exclusionary rule is a necessary corollary of the Fourth Amendment . . . .") (citation omitted).

79. *See, e.g.*, United States v. Havens, 446 U.S. 620, 627–28 (1980) (allowing prosecutor to use illegally obtained evidence to impeach statements made by a defendant "in response to proper cross-examination reasonably suggested by the defendant's direct examination"); United States v. Ceccolini, 435 U.S. 268, 279 (1978) (allowing testimony of a witness whose identity was discovered through an illegal search); United States v. Janis, 428 U.S. 433, 454 (1976) (holding that exclusionary rule does not apply in federal civil tax proceedings to evidence obtained by a state criminal law enforcement officer in good-faith reliance on a warrant that later proved to be defective); Brown v. Illinois, 422 U.S. 590, 603–05 (1975) (refusing to adopt a per se rule rendering inadmissible any evidence obtained because of an illegal arrest); United States v. Calandra, 414 U.S. 338, 349 (1974) (refusing to extend exclusionary rule to grand jury proceedings); *see also* Stone v. Powell, 428 U.S. 465, 486 (1976) (refusing to extend exclusionary rule to habeas proceedings).

80. *See, e.g.*, *Janis*, 428 U.S. at 446 ("[T]he 'prime purpose' of the rule, if not the sole one, 'is to deter future unlawful police conduct.'") (quoting *Calandra*, 414 U.S. at 347); *id*. at 348 (describing the exclusionary rule as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved"); *see also Stone*, 428 U.S. at 486 ("The primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights.").

81. Indeed, the 1976 decision *United States v. Janis* recognized a limited good-faith exception,

more likely to be amenable to the government's argument in *Leon* for the good-faith exception, which itself was premised on the notion that requiring exclusion when law enforcement has made a good-faith mistake would not deter violations of the Fourth Amendment.[82] Moreover, statements by Solicitor General Waxman suggest that the progression of cases leading up to *Leon* was part of a deliberate strategy of the government to shift the law of the Fourth Amendment in a more government-friendly direction.[83]

III. THE DESIRABILITY OF THE GOVERNMENT'S INFLUENCE

If the government can affect the development of criminal law through strategies on appeals, one natural question is whether this influence is problematic. At first glance, the answer might seem to be "no" because the government's ability to influence the law through procedural strategies is probably rather limited. Although it is unclear just how much the government can influence the development of law through appellate strategy, it seems likely that appellate strategies have less impact on the development of the law than many other factors. After all, the government's strategies do not give the government direct control over the development of criminal law; the appellate courts have that control, and government manipulation is probably low on the list of influences on appellate court decisions. The effect of the government's strategies may be nothing more than to alter the playing field in a way that either temporarily forestalls a court from adopting an argument or encourages a court to accept an argument that it is already inclined to accept.

Still, there are reasons to question the desirability of the government's influence through appellate strategies. To start, the creation and development of law are functions performed by the legislature and courts, and it is one of the basic principles of our government that the Executive should not perform legislative or judicial functions.[84] Maintaining that separation is particularly important in the criminal law context because the purpose of dividing powers was to protect individual liberties from government intrusion, and criminal penalties pose one of the greatest threats to those liberties.[85] Allowing the

holding that the exclusionary rule does not apply in federal civil tax proceedings to evidence obtained by a state criminal law enforcement officer in good-faith reliance on a warrant that later proved to be defective. *Janis*, 428 U.S. at 454.

82. *See generally* Brief for the United States at 22, United States v. Leon, 468 U.S. 897 (1984) (No. 82-1771).

83. *Rex E. Lee Conference*, *supra* note 76, at 151 (quoting Seth P. Waxman, Solicitor General from 1997 to 2001, who remarked that Deputy Solicitor General Andy Frey "shepherded the Fourth Amendment cases" during the 1970s and 1980s).

84. *See* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 997 (2006).

85. *Id*. at 1012–34.

branch that is charged with prosecuting criminal defendants to shape the criminal law poses a risk that the law will develop in ways that are less protective of defendants' rights and more likely to result in the imposition of criminal penalties.[86]

In addition, there is something unsettling about the fact that appellate strategies tend to push the law in only the government's favor. As noted above, defendants do not have the same opportunities or incentives to use appellate strategies to develop the law in defendant-friendly ways. Appellate strategy, thus, is an unequal tool that may tend to push the criminal law in the government's favor over the long run.

Most important, appellate strategies are not the only way in which the government may influence the development of criminal law. The government has a number of other tools at its disposal for fashioning the criminal law. For instance, the government may directly seek to change criminal law through legislation. Although the government is not the sole interest group involved in criminal legislation, it is the most powerful, and the interests of other groups tend to coincide more with those of the government than those of defendants.[87] The Department of Justice also has a seat on the federal rules committee,[88] which provides the Department with a measure of influence over the Federal Rules of Criminal Procedure.

More generally, the government has a number of other weapons in its arsenal that skew the criminal process in its favor. The vast number of different criminal laws provides prosecutors with broad discretion in which charges to bring. Prosecutors also have the power to enter into plea deals and recommend sentences. Given today's norm of plea bargaining, these powers provide prosecutors substantial control over the criminal process and the sentences defendants receive.[89] At the same time, defendants are in a weaker position than the government in the bargaining process. Most federal criminal

86. This is not to say that maximizing convictions and punishment are the Executive's primary priority. The government's ultimate goal is to accomplish justice. But to the extent that combating crime is one of the ways by which the government may attain that goal, it may seek to push the law in a more restrictive way.

87. *See* Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109, 1130 (2008); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529 (2001) ("[F]or most of criminal law, the effect of private interest groups is small: the most important interest groups are usually other government actors, chiefly police and prosecutors.") (footnote omitted).

88. *See* James C. Duff, The Rulemaking Process: A Summary for the Bench and Bar (Oct. 2007), http://www.uscourts.gov/rules/proceduresum.htm.

89. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871 (2009) ("Federal prosecutors control the terms of confinement in this vast penal system because they have the authority to make charging decisions, enter cooperation agreements, accept pleas, and recommend sentences.").

laws carry such substantial penalties that the defendant has little leverage against the government, and the government may threaten to bring prosecutions against friends or relatives of defendants if they refuse to accept the government's deal.[90] The government also has significant advantages at criminal trials because of limits on discovery against the government.[91]

The combination of the government's partial control over the development of the criminal law and its ability to skirt the judiciary through the plea bargaining process may result in the government being too powerful in the criminal context. Reducing the government's ability to influence the law through appellate strategies would help correct that balance.

Although appellate strategies are probably among the weaker weapons in the government's arsenal, limiting the impact of appellate strategies is almost certainly easier to do than restricting the government's ability to use tools such as plea bargaining or lobbying. Placing any limits on the government's prosecutorial powers is bound to be unpopular—as are all measures that appear "soft on crime"—and the decision to limit the government's power to plea bargain, to recommend sentences, or to lobby rests with the political branches, which obviously seek to avoid unpopular measures.[92] By contrast, appellate courts, which are not as beholden to popularity, have the power to limit the impact of appellate strategy, because, after all, those strategies are simply tools for manipulating the courts.

Courts have no way to avert the effect of some government strategies. If the government moots a case, for example, a court has no alternative but to dismiss. But courts can counteract a number of other government strategies by simply refusing to be manipulated. Thus, for example, if the government opts against making an obvious favorable argument in favor of making a novel, less certain argument in an apparent effort to extend the law in the government's favor, a court may nevertheless exercise its discretion to decide the case on the more established ground.[93] To avoid the influence of the

90. *See* United States v. Spilmon, 454 F.3d 657, 658 (7th Cir. 2006) (rejecting the claim that a plea is involuntary if it was accepted to prevent charges against a relative).

91. *See, e.g.*, FED. R. CRIM. P. 16(a)(2), 26.2; Degen v. United States, 517 U.S. 820, 825 (1996) ("A criminal defendant is entitled to rather limited discovery, with no general right to obtain the statements of the Government's witnesses before they have testified.").

92. Most proposed reforms have focused on the government's role in plea bargaining and sentencing recommendations because the government's powers over plea bargaining and sentencing are much more powerful tools than the influence the government may obtain through appellate strategy. *See* Barkow, *supra* note 84, at 1046–47.

93. The Supreme Court followed that course in *United States v. Resendiz-Ponce*, 549 U.S. 102 (2007). There, the government declined to seek review of the court of appeals' holding that the commission of an overt act was an element of the offense of attempted unlawful reentry, and instead sought review solely on the issue whether, assuming that an overt act was required, its omission from an indictment is harmless. *Id*. at 103–04. But on its own initiative, the Court reversed based on its

government's strategy of raising a novel argument on appeal because the case presents particularly sympathetic facts, appellate judges should consider fashioning the ruling to be limited to the facts of the case, or writing dicta or issuing separate opinions providing examples of when the rule would not apply.[94] Courts could similarly write dicta in opinions that create exceptions to rules to prevent those exceptions from providing the foundation for more drastic changes. Courts already employ all of these mechanisms for reasons other than minimizing the impact of strategy, and employing them to minimize the influence of appellate strategies accordingly would not cause any disruption to the judicial process.

IV. CONCLUSION

The criminal law is constantly changing. Appellate courts are one of the principal sources of that evolution, and insofar as appellate strategies may influence that evolution, the government has reason to employ them.

I do not want to overstate the importance of appellate strategies. Strategy influences courts less than other considerations, such as the strength of the substantive arguments, and for that reason, governments routinely focus more on substantive arguments than on appellate strategy. Indeed, to the extent strategies may appear to have been effective, that success may in fact be attributable, at least in part, to any number of factors other than to the efficacy of the strategy. It is also important to recognize that no one government has complete strategic control. The federal government and each of the state governments may develop appellate strategies, and those strategies often are not coordinated. State governments, for example, often seek certiorari in cases in which the federal government opposes certiorari for strategic reasons. Moreover, although their ability to strategize is less substantial than the government's, pro-defense interest groups like the ACLU can exert some influence on courts through their strategies. Finally, judges themselves occasionally engage in strategic behavior, and their strategies may conflict with the strategy of the government.[95]

Still, there is no doubt that the government's appellate strategies may have some effect on the development of the criminal law. The effect of these strategies may be undesirable. Over the long run, this effect may tilt the

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conclusion that an overt act was not required, and it accordingly did not reach the harmless-error issue. *Id*. at 104.

94. Dictum ordinarily is disfavored because it involves a court in exceeding its traditional function by making law beyond that necessary to decide the case. *See* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2001 (1994). But that concern may be outweighed when the dictum serves the role of limiting the arguably unwarranted influence of the Executive.

95. *See, e.g.*,Virginia A. Hettinger, Stefanie A. Lindquist & Wendy L. Martinek, JUDGING ON A COLLEGIAL COURT: INFLUENCES ON FEDERAL APPELLATE DECISION MAKING 75–76 (2006).

playing field against criminal defendants by producing law that is the product of tactics instead of principles. But with diligence and attention, the courts can reduce the impact of those strategies and concentrate on fashioning law that is the product of principle free from strategic influences.