

CHOICE OF COUNSEL AND THE APPEARANCE OF EQUAL JUSTICE UNDER LAW

Wesley M. Oliver*

The Supreme Court ruled this term, in *Kaley v. United States*, that defendants have no opportunity to challenge grand jury findings that lead to pretrial restraint of potentially forfeitable assets they would use to retain counsel.¹ Consequently, prosecutors are able to decide, without any opportunity for challenge from the defense, whether they would like to handicap defendants' abilities to mount a case.² The Court has certainly not been uniformly vigilant in maintaining a level playing field between prosecutors and defense lawyers,³ but examining *Kaley* in isolation, it is difficult to explain the authorization of such an imbalance of power. Recognizing the strategic effect of freezing assets used to retain counsel, however, would have spotlighted the differences in the protections afforded to wealthy and indigent defendants. The opinion thus is more easily explained as an effort to obscure the realities of justice in a world of scarce resources than it is an assessment of the appropriate use of prosecutorial power.

Part I of this Essay surveys the background of forfeiture laws before and after *Kaley v. United States*. Part II then examines the Court's problematic analysis. Part III argues that the majority in *Kaley* was driven by the desire to avoid the potential ramifications of defining a standard for criminal representation.

I. FREEZING ASSETS, FREEZING A DEFENSE

A. Taking Title Through Forfeiture Laws

Forfeiture laws enable the government to handicap criminal organizations by taking their profits and means of operations.⁴ The laws

* Associate Professor of Law and Criminal Justice Program Director, Duquesne University. B.A., J.D., University of Virginia; LL.M., J.S.D., Yale University.

¹ *Kaley v. United States*, 134 S. Ct. 1090 (2014).

² *See id.* at 1107 (Roberts, C.J., dissenting) ("The possibility that a prosecutor could elect to hamstring his target by preventing him from paying his counsel of choice raises substantial concerns about the fairness of the entire proceeding.").

³ *See* Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393 (1992) (describing powers the Supreme Court has given to prosecutors).

⁴ *See* Russello v. United States, 464 U.S. 16, 27–28 (1983); Note, *A Proposal to Reform Criminal Forfeiture Under RICO and CCE*, 97 HARV. L. REV. 1929, 1935–36 (1984).

also present prosecutors with incredible strategic pretrial advantages.⁵ Forfeiture allows the government to ultimately take title to assets that are the proceeds of criminal activity or have been used to facilitate criminal activity.⁶ These laws are of two types: civil and criminal.

Civil forfeiture laws are proceedings against the property and require only a finding by the preponderance of the evidence.⁷ The offending property is taken so that individuals, or criminal organizations, may neither profit from the spoils of a crime, nor press the property back into service to commit further crimes.⁸ Criminal forfeiture laws punish the person by taking the property involved in criminal activity after a finding of guilt.⁹ This forfeiture mechanism requires proof of criminal wrongdoing beyond a reasonable doubt.¹⁰ Although the burden is higher, prosecutors often opt for criminal forfeiture, as a parallel civil forfeiture proceeding would allow the criminal defendant to depose many of the witnesses that the prosecution would call at trial.¹¹

Once a grand jury returns an indictment, federal prosecutors can obtain an ex parte order restraining assets traceable to the criminal conduct alleged if there is a “substantial probability” that the government will prevail in the forfeiture sought and if the property would be unavailable for forfeiture absent the requested restraint.¹² Prior to the *Kaley* decision, a number of federal circuits held that the Sixth Amendment right to choice of counsel guaranteed a defendant the right to a hearing to challenge an order freezing assets intended to retain counsel.¹³ These courts concluded that defendants

⁵ See Bruce J. Winick, *Forfeiture of Attorneys’ Fees Under RICO and CCE and the Right to Counsel of Choice*, 43 U. MIAMI L. REV. 765, 778–79 (1989).

⁶ Barclay Thomas Johnson, Note, *Restoring Civility—the Civil Asset Forfeiture Reform Act of 2000*, 35 IND. L. REV. 1045, 1048–52 (2002).

⁷ *Id.* at 1071–72.

⁸ *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 630 (1989); *Russello*, 464 U.S. at 27–28.

⁹ The admittedly punitive nature of criminal forfeitures has led to a recent debate about whether juries must find the facts specifically giving rise to criminal forfeiture. See Richard E. Finneran & Steven K. Luther, *Criminal Forfeiture and the Sixth Amendment*, 35 CARDOZO L. REV. 1, 56–64 (2013) (concluding that a jury is not required to determine facts); Matthew R. Ford, Comment, *Criminal Forfeiture and the Sixth Amendment’s Right to Jury Trial Post-Booker*, 101 NW. U. L. REV. 1371 (2007) (concluding that there is a limited right to a jury’s determination of these facts).

¹⁰ See Stefan D. Cassella, *Does Apprendi v. New Jersey Change the Standard of Proof in Criminal Forfeiture Cases?*, 89 KY. L. J. 631 (2001) (concluding that criminal forfeiture is a consequence of a conviction requiring proof beyond a reasonable doubt and that no additional evidence beyond proof of the crime giving rise to the forfeiture must be demonstrated).

¹¹ See Susan R. Klein, *Civil In Rem Forfeiture and Double Jeopardy*, 82 IOWA L. REV. 183, 225 (1996) (recognizing that a prosecutor must obtain a stay of the civil proceedings when there are parallel civil forfeiture actions and criminal prosecutions, but noting that these stays are frequently granted).

¹² 21 U.S.C. § 853(e) (2012).

¹³ See *United States v. E-Gold, Ltd.*, 521 F.3d 411, 421 (D.C. Cir. 2008), *abrogated by Kaley v. United States*, 134 S. Ct. 1090 (2014); *United States v. Farmer*, 274 F.3d 800, 806 (4th Cir. 2001); *United States v. Michelle’s Lounge*, 39 F.3d 684, 700–01 (7th Cir. 1994), *abrogated by Kaley*, 134 S.

were permitted to challenge both the government's claim that probable cause existed to believe that the defendant had committed the crimes giving rise to forfeiture and the claim that the frozen assets were traceable to the alleged crimes.¹⁴

B. *The Kaley Decision*

In *Kaley*, the Supreme Court held that while a defendant could challenge the district court's determination that the frozen assets were traceable to the defendant's alleged crimes, he could not challenge the preliminary determination that he had committed the alleged crimes.¹⁵ Justice Kagan's majority opinion concluded that the grand jury's finding of probable cause to believe the defendant committed the crime giving rise to forfeiture was sufficient to justify pretrial restraint of all assets traceable to the alleged crime, even if the assets would be used to fund the defendant's constitutionally protected right to choice of counsel.¹⁶

The facts in *Kaley* presented a compelling reason for allowing an adversarial hearing on the sufficiency of the evidence to justify the restraint of assets. Brian and Kerri Kaley were charged in a scheme to steal and sell medical devices.¹⁷ Kerri was employed by a subsidiary of Johnson & Johnson.¹⁸ She and her husband, Brian, obtained and sold medical devices, discarded by hospitals, which had initially been purchased from Kerri's employer.¹⁹ The government sought and obtained a pretrial protective order over the proceeds of the sales of these devices.²⁰ The Kaleys requested a hearing to contest the restraint of these assets, claiming there was no theft and thus no basis for freezing the assets—assets they planned to use to pay their lawyers in the case the government had brought against them.²¹

Others were prosecuted as part of this alleged scheme. Two entered guilty pleas, though the district court judges who took their pleas expressed substantial concerns that there were no victims of this alleged theft as the hospital owned the property and willingly gave it to the Kaleys.²² Another defendant took her case to trial with her choice of counsel, as the government did not seek to restrain any of her assets, and was acquitted.²³

Ct. 1090; *United States v. Monsanto*, 924 F.2d 1186, 1197–98 (2d Cir. 1991), *abrogated by Kaley*, 134 S. Ct. 1090; *United States v. Roth*, 912 F.2d 1131, 1333 (9th Cir. 1990).

¹⁴ *See, e.g., E-Gold*, 521 F.3d at 421.

¹⁵ *Kaley v. United States*, 134 S. Ct. 1090, 1105 (2014).

¹⁶ *Id.* at 1097–1100.

¹⁷ *Id.* at 1095.

¹⁸ *Id.*

¹⁹ *Id.* at 1105 (Roberts, C.J., dissenting).

²⁰ *Id.* at 1106.

²¹ *Id.*

²² Brief for Petitioners at 8–11, *Kaley v. United States*, 134 S. Ct. 1090 (2014) (No. 12-464).

²³ *Kaley*, 134 S. Ct. at 1106–07 (Roberts, C.J., dissenting).

II. THE PROBLEMATIC DECISION

A. *The Fallacy of the Grand Jury*

Justice Kagan relied on long-standing respect for the grand jury's role as an independent protector against unjust prosecution to conclude that judges were not permitted to second-guess a finding of probable cause to believe assets were subject to forfeiture.²⁴ Commentators, however, have long rejected the premise of the independent role of the grand jury. It is frequently recognized that the modern grand jury is an investigatory tool of prosecutors.²⁵ Grand juries meet in secret, and the only advice on the law they receive comes from the prosecutors in the room with them.²⁶ The standard of proof in these proceedings is remarkably low. Cases are permitted to go forward against defendants if only twelve of as many as twenty-three grand jurors determine that probable cause exists.²⁷ Mathematically, the probable cause standard for a grand jury is therefore *lower* than it is for a judge.²⁸ A judge must believe probable cause exists to issue a warrant.²⁹ Only slightly greater than half the members of the grand jury must believe probable cause exists to return an indictment.

Nevertheless, as Justice Kagan observed, a grand jury's finding of probable cause creates substantial consequences for individuals indicted. An indicted defendant is forced to proceed to trial "with all the economic,

²⁴ *Id.* at 1097 (majority opinion) (internal quotation marks omitted) ("[T]he whole history of the grand jury institution demonstrates that a challenge to the reliability or competence of the evidence supporting a grand jury's finding of probable cause will not be heard.") (quoting *United States v. Williams*, 504 U.S. 36, 54 (1992)).

²⁵ The former Chief Judge of the New York Court of Appeals once famously noted that a prosecutor could get a grand jury to "indict a ham sandwich." See *In re Grand Jury Subpoena of Stewart*, 545 N.Y.S. 2d 974, 977 n.1 (N.Y. Sup. Ct. 1989) (internal quotation marks omitted); see also Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 323 (1995) (concluding that in most cases, defendants "would be just as well off without the grand jury as [they are] with it"); David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L. J. 683, 690 (2006) (observing that the grand jury plays no role in protecting the accused); Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2353 (2008) (observing frequent criticisms of grand jury independence).

²⁶ See Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 29–33 (2004) (describing the procedures and processes that leave prosecutors in all-but complete control of the work of the grand jury).

²⁷ FED. R. CRIM. P. 6(a)(1), (f).

²⁸ Uzi Segal and Alex Stein have observed that there is some predictive value to the number of grand jurors who vote to indict. Quite logically, the fewer who vote to indict, the more likely the defendant is to be acquitted at trial. See Uzi Segal & Alex Stein, *Ambiguity Aversion and the Criminal Process*, 81 NOTRE DAME L. REV. 1495, 1531–32 (2006).

²⁹ Though, of course, the Supreme Court has recognized that "[a] magistrate's determination of probable cause should be paid great deference by reviewing courts." *Illinois v. Gates*, 462 U.S. 213, 236 (1983) (quoting *Spinelli v. United States*, 393 U.S. 410, 419 (1969)) (internal quotation marks omitted).

reputational, and personal harm that entails.³⁰ A defendant arrested on the basis of a grand jury indictment is not entitled to an adversarial determination of probable cause—a right to which the defendant is constitutionally entitled if arrested in the absence of an indictment, with or without a warrant.³¹ The Supreme Court has recognized the limited protection grand juries provide. States are constitutionally permitted to proceed against a criminal defendant based on an information (which is, of course, nothing more than a prosecutor’s assertion that probable cause exists) if they so choose.³²

Restraining a defendant’s property at the start of a criminal prosecution is a significant burden in an already burdensome process. A pretrial restraint of assets absolutely prevents the use of frozen assets, but a finding of probable cause does not necessarily involve pretrial detention. The Constitution prohibits excessive bail,³³ and many defendants are freed on bond prior to trial.³⁴ Bond hearings limit the degree of the prosecution’s power to restrain a defendant prior to a final determination of guilt. By contrast, the restraint of assets is binary: either they are restrained or they are not. This absolute restraint on assets is significant because it impairs defendants’ ability to select their counsel of choice, a well-established constitutional right of the accused in a criminal prosecution.³⁵

The *Kaley* majority’s analysis is problematic for an additional, more technical reason. The forfeiture statutes themselves do not make a grand jury’s determination of probable cause dispositive of the government’s power to freeze a defendant’s assets. A judge reviewing a request for a protective order must conclude that there is a “substantial probability” that the government will prevail on the forfeiture to freeze the assets.³⁶ Whether “substantial probability” in this context means something more than “probable cause,” it is clearly a differently worded standard, suggesting that a grand jury’s determination of probable cause does not conclusively establish that this standard has been met. The Court’s description of the Kaleys’ requested hearing as an effort to re-litigate a grand jury determination shows that the Court missed this technical, yet important point. The Kaleys were actually seeking reconsideration of what should be a

³⁰ *Kaley v. United States*, 134 S. Ct. 1090, 1098 (2014).

³¹ *Id.* at 1097 (citing *Gerstein v. Pugh*, 420 U.S. 103, 117 n.19 (1975)).

³² This has been true since the earliest days of the Supreme Court’s consideration of state court procedures. See *Hurtado v. California*, 110 U.S. 516, 538 (1884).

³³ U.S. CONST. amend. VIII.

³⁴ The Supreme Court has never recognized a right to bail, however, and pretrial detention is increasingly the norm. See Matthew J. Hegreness, *America’s Fundamental and Vanishing Right to Bail*, 55 ARIZ. L. REV. 909, 915 (2013).

³⁵ As Chief Justice Roberts noted in his dissent, “‘the right to select counsel of one’s choice [is at] the root meaning of the constitutional guarantee’ of the Sixth Amendment.” *Kaley*, 134 S. Ct. at 1107 (Roberts, C.J., dissenting) (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147–48 (2006)).

³⁶ See 21 U.S.C. § 853(e) (2012).

judicial determination in which the defendants were not permitted to participate.

B. *The Narrowly Drawn Issue*

The Supreme Court's reluctance to recognize a right to be heard on the restraint of a defendant's assets may ironically have been precisely because of the right to choice of counsel implicated by the government's *ex parte* request for a protective order. The issue before the Court was *not* whether the government has a right to freeze all of the assets traceable to the crimes for which a grand jury found probable cause. Many lower courts had concluded that a defendant's right to counsel of choice renders a grand jury's determination of probable cause insufficient to restrain those assets that would be used to fund counsel if the defendant requested a hearing on the government's right to restrain the assets.³⁷ If a judge at such a hearing found no probable cause to believe the defendant was guilty of any crime, only those funds that would be used to pay counsel would be released.³⁸

It is understandable that when lower courts granted hearings on pretrial restraint of potentially forfeitable assets, they limited the scope of the hearing to those assets that would be used to fund counsel.³⁹ There was more compelling authority for a court to second-guess a restraining order for assets that would be used to retain counsel than for assets a defendant would use for other purposes. The Constitution specifically mentions the right to counsel, and the Supreme Court has recognized a defendant's presumptive right to choice of counsel.⁴⁰ Due process does require protection be in place to prevent even temporary erroneous deprivations,⁴¹ but there is no specific constitutional right to fund a vacation, college education, mortgage, grocery bill, or any other use of the assets. Further, if the defendant is acquitted, with any frozen assets returned, the defendant

³⁷ See *supra* notes 13–14 and accompanying text.

³⁸ As Justice Kagan observed at oral argument, the government seldom lost these hearings, thus few courts had been confronted with the difficult question of how much money to release to fund one's representation. See Amy Howe, *Argument Analysis: Asset Forfeiture Case is a Close Call*, SCOTUSBLOG (Oct. 16, 2013 4:53 PM), <http://www.scotusblog.com/2013/10/argument-analysis-asset-forfeiture-case-is-close-call/>. The Supreme Court's recognition of the right to have these funds released would have, however, raised the profile of the issue and potentially forced the Court itself to take on the question of how to determine how much retained counsel should be paid.

³⁹ See *United States v. E-Gold, Ltd.*, 521 F.3d 411, 415 (D.C. Cir. 2008) (recognizing the defendant's right to an adversary hearing on restraint of assets "at least in a case in which they have demonstrated the inability to retain counsel of their choice without access to the seized assets"), *abrogated by* *Kaley v. United States*, 134 S. Ct. 1090 (2014); *United States v. Michelle's Lounge*, 39 F.3d 684, 701 (7th Cir. 1994) ("[I]f the defendant successfully rebuts the government's showing of probable cause and the government cannot or chooses not to bring forth additional evidence, due process requires that sufficient assets be released to remedy the deprivation of assets needed to pay a defense attorney's reasonable fees."), *abrogated by* *Kaley*, 134 S. Ct. 1090.

⁴⁰ *Wheat v. United States*, 486 U.S. 153, 164 (1988).

⁴¹ See *Mathews v. Eldridge*, 424 U.S. 319, 340 (1976).

may use the assets for most any purpose, except hiring a lawyer for the trial—that ship will have sailed. Finally, as Chief Justice Roberts observed in his *Kaley* dissent, there is a particular concern that “a prosecutor could elect to hamstring his target by preventing him from paying his counsel of choice”⁴²

Precisely because the issue before the Supreme Court dealt only with the restraint of assets used to retain counsel, the *Kaley* case threatened to place too fine a point on the role of money in the representation of a criminal defendant. The Kaleys did not claim the right to a hearing to determine the legitimacy of a restraint placed on *all* of the assets traceable to the alleged wrongdoing, but only the right to a hearing with a much more limited scope. A judge’s finding at such a hearing that there was no probable cause to believe the Kaleys were involved in criminal conduct would have effectively concluded that the prosecution of the Kaleys was inappropriate and the restraint of *any* of their assets unlawful. The consequences of success at the hearing they requested, however, would have been considerably more modest. The trial against them certainly would have gone forward, unless the prosecution voluntarily dismissed the case. Additionally, only the frozen assets they would use to fund their defense would have been released, even though the success at such a hearing would imply that *all* of the assets should be released.

III. DODGING A STANDARD

The Supreme Court’s recognition of a right to a hearing limited to a challenge of pre-trial seizure of assets used to retain counsel would have necessitated standards to determine which portion of seized assets should be released to retain counsel. Under what is known as the relation-back doctrine, the government takes title to forfeitable assets at the time they become tainted (either when they facilitate a crime or are obtained through the commission of a crime).⁴³ The assets are restrained because the government claims to have a superior claim to the property. A judicial finding of no probable cause to restrain the assets required to retain counsel would do nothing to the temporary hold over assets the government claimed as its own that were *not* being used to retain counsel. Courts would thus have to determine which portion of those frozen assets would be used to fund the defense, and only those funds could be released.

In broad terms, there were only two possible standards to determine what funds could be released. Courts could either release the same amount of money as for the representation of an indigent defendant or turn to another method of calculation. Under the Criminal Justice Act (CJA), indigent criminal defendants are assigned to public defenders or lawyers on

⁴² *Kaley v. United States*, 134 S. Ct. 1090 at 1107 (2014) (Roberts, C.J., dissenting).

⁴³ See 21 U.S.C. § 853(c); *United States v. Lazarenko*, 476 F.3d 642, 652 (9th Cir. 2007).

a CJA list, who are compensated at the rate of \$125 per hour.⁴⁴ Federal Public Defender offices have investigators on staff, but should CJA-appointed attorneys require investigators, they must apply to the court for funding. Federal judges, in approving payment for appointed counsel and approving requests for investigators, essentially decide whether the defendant's need for counsel and investigative services justifies taking the requested funds from the public treasury. Courts would surely face a similar choice when asked to consider whether the defense requires access to funds in which the government claims a superior interest.

Upon a defendant's showing that there was no probable cause, if judges released only the funds that would be provided to indigent counsel, they would effectively be denying (or at least severely restricting) the defendant's choice of counsel, while still requiring him to foot a bill that would otherwise be covered by the government. Alternatively, if courts released a greater amount of money to defendants whose assets had been restrained as subject to forfeiture, they would be implicitly recognizing the existence of two criminal justice systems: one for the rich and one for the poor. Further, by recognizing that a defendant has a legitimate need for assets greater than those that would be provided to an indigent defendant, courts would call into question the adequacy of representation by those whose funding was more limited. The Supreme Court has taken great pains to avoid establishing standards for criminal representation. The Court specifically declined to define the standard for criminal representation beyond "reasonably effective assistance" in *Strickland v. Washington*,⁴⁵ and at no point has the Court even hinted that the Constitution requires an indigent defendant be provided with any level of funding for his defense. And the Court has steered clear of any suggestion that indigent defendants are entitled to have their lawyers adequately compensated.⁴⁶

Public defenders at the state and federal level are often excellent lawyers, and perform remarkably well given the restraints on their time and the limited access to investigators.⁴⁷ Federal public defenders, with much

⁴⁴ See Joanna Jacobbi Lydgate, Comment, *Assembly-Line Justice: A Review of Operation Streamline*, 98 CALIF. L. REV. 481, 506 n.160 (2010) (describing the history of compensation rates for federal public defenders).

⁴⁵ *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984).

⁴⁶ See Jessa DeSimone, Comment, *Bucking Conventional Wisdom: The Montana Public Defender Act*, 96 J. CRIM. L. & CRIMINOLOGY 1479, 1483 (2006) (observing that "the Supreme Court has not specified exactly what type of indigent defense systems states must provide"). Payment for court-appointed counsel in state cases, even in capital cases, is abysmal. One study, detailing particularly bad representative examples, showed that lawyers in Virginia, after overhead, were compensated at the rate of \$13 an hour, while lawyers in a Texas case received a total of \$800 for handling capital cases. Sanjay K. Chhablani, *Chronically Stricken: A Continuing Legacy of Ineffective Assistance of Counsel*, 28 ST. LOUIS U. PUB. L. REV. 351, 387 (2009).

⁴⁷ See, e.g., Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 LAW & CONTEMP. PROBS. 81, 92–93 (1995) (extolling the virtues of the services rendered by the D.C. Public Defender Service).

smaller caseloads than state public defenders and higher compensation than most of their state counterparts, often perform extraordinary services for their clients.⁴⁸ Nevertheless, the amount of time a well-compensated lawyer can spend on a case is typically much greater than that of a public defender. The record of appointed lawyers is considerably more mixed than the record of public defenders, especially on the state level, where low per-hour rates and limits placed on the maximum fee an appointed lawyer can receive for representation are common.⁴⁹

To have recognized the right to have only a *portion* of the funds frozen released because the seizure lacked probable cause would have highlighted the reality that indigent defendants do not receive the funds that judges find appropriate for private representation. Ironically, a stronger defense claim would have created a lesser tension for the Court. The defendants in *Kaley* did not argue that they had a right to challenge the seizure of *all* of the assets frozen by a grand jury's determination that there was probable cause to believe the funds were tainted by criminal activity. A federal judge finding that the grand jury incorrectly found probable cause would simply return *all* of the assets seized.

Courts tend to avoid decisions that reveal inevitable tensions between our fundamental values and the practical limits on our ability to preserve those values.⁵⁰ Judge Calabresi, prior to his appointment to the bench, once explained, as paraphrased by Professor David Shapiro, that scholars are to “‘*think*, lucidly and openly,’ about the issues,” while “the judge must *act* in a manner sensitive to political and other realities and thus may opt for something less, or at least different” than complete candor.⁵¹

Doctrines of criminal procedure are replete with efforts to hide our unattainable virtues and unenforceable limitations. The paradox of pretrial detention is an excellent example. In *United States v. Salerno*, Justice Marshall criticized the majority for permitting pretrial detention on the basis of a suspect's dangerousness.⁵² According to Marshall, pretrial detention is indistinguishable from punishment, and punishment is

⁴⁸ See Zachary Cloud, Note, *The Problem of Low Crime: Constitutionally Inadequate Criminal Defense in Rural America*, 22 B.U. PUB. INT. L.J. 403, 420 (2013) (observing that “some of the most widely-respected criminal defense attorneys work as federal public defenders.”).

⁴⁹ See *id.* at 413–15.

⁵⁰ Guido Calabresi and Philip Bobbitt have observed that society at large is equally reluctant to draw attention to the fact that scarcity of resources defies our ability to achieve values we identify as absolute. See generally GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* (1978).

⁵¹ See David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 731 (1987) (emphasis in original) (quoting GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 181 (1982)). The virtues and appropriate limits on judicial candor have been thoroughly debated in the academic community. See Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307 (1995).

⁵² *United States v. Salerno*, 481 U.S. 739, 762–64 (1987) (Marshall, J., dissenting).

constitutionally permitted only upon conviction.⁵³ Unable, or unwilling, to quarrel with the maxim that punishment requires a previous conviction, Chief Justice Rehnquist's opinion instead defined away the difficulty. The majority concluded that not all incarceration amounts to punishment.⁵⁴ Consistent with Congressional intent, pretrial incarceration is regulatory, not punitive, and thus detention prior to conviction is not inconsistent with our fundamental values.⁵⁵

Similarly, racially motivated investigations, prosecutions, or sentences are obviously contrary to constitutional values. Yet, practical realities often prevent remedies for improperly motivated law enforcement, prosecution, and punishment. For example, *Whren v. United States* involved a difficult-to-refute claim that officers stopped the defendant's car because he fit a racial profile.⁵⁶ In *United States v. Armstrong*, a defendant claimed that African-Americans were disproportionately prosecuted for crack cocaine offenses.⁵⁷ The statistics in *McCleskey v. Kemp* showed that the race of the victim and the race of the defendant were statistically significant in determining which murderers in Georgia were sentenced to death.⁵⁸ Recognizing a constitutional violation in each case would not have been difficult, but fashioning a remedy would have been nearly impossible. The defendants had not claimed that authorities had no right to stop, prosecute, or execute them. Rather, they each claimed that the authorities were more inclined to exercise their discretion to act against defendants on the basis of race and that others had improperly been given a pass. The only remedy for the issues each raised would be to order officers and prosecutors to use their discretion more equitably, perhaps meaning they could only comply with the judgment by stopping more white motorists, prosecuting more white crack dealers, and executing more murderers of black victims. In short, the remedies for these complaints would be nearly impossible to monitor and enforce. Rather than recognize an unconstitutional motivation was afoot, yet deny relief, the Court repeatedly concluded there was inadequate proof of an improper motive. Legislatures, city councils, prosecutors' offices and police departments are in a position to improve equality of enforcement, but

⁵³ *Id.*

⁵⁴ *Id.* at 748 (majority opinion).

⁵⁵ *Id.* at 747. Justice Marshall's opinion was equally unable to offer a completely consistent theory. Marshall admitted, as he had to, that pretrial detention had long been permitted to prevent flight and this type of detention definitionally occurred prior to a conviction. *Id.* at 762 (Marshall, J., dissenting). Marshall also raised a practical concern that prosecutors could use the threat of pretrial detention strategically to extract cooperation. *Id.* at 757-58. The logical extension of this concern is that there should be some sort of judicial oversight over the use of prosecutorial charging decisions to extract concessions from the defendant during the plea bargaining process, something Marshall expressly rejected in *United States v. Batchelder*, 442 U.S. 114, 124 (1979).

⁵⁶ *Whren v. United States*, 517 U.S. 806, 810 (1996).

⁵⁷ *United States v. Armstrong*, 517 U.S. 456, 459 (1996).

⁵⁸ *McCleskey v. Kemp*, 481 U.S. 279, 286 (1987).

a court recognizing unequal treatment in each of these circumstances to be unconstitutional would have been powerless to do anything about it. The conflict between our fundamental values and the practical inability to remedy the problem was thus avoided.

CONCLUSION

A decision in *Kaley* requiring courts to release assets for the use of privately retained counsel would have exposed the ugly underbelly of the criminal justice system. Courts cannot fashion doctrines ensuring indigent defendants receive the equivalent quality of representation that the wealthy are able to obtain, and legislatures lack the funding to ensure that appointed lawyers are as well compensated as highly-paid private attorneys. Just as it has done in other contexts, the Court avoided an ugly reality by denying that a constitutional right existed.

Justice Kagan's opinion is not lacking in candor—she observed that the legitimacy of the criminal justice system would be compromised by a prosecution in the face of a judicial finding that there was no probable cause supporting the prosecution. As she described:

[S]uppose the judge performed that task and came to the opposite conclusion. Two inconsistent findings would then govern different aspects of one criminal proceeding: Probable cause would exist to bring the Kaleys to trial (and, if otherwise appropriate, to hold them in prison), but not to restrain their property. And assuming the prosecutor continued to press the charges, the same judge who found probable cause lacking would preside over a trial premised on its presence. *That legal dissonance, if sustainable at all, could not but undermine the criminal justice system's integrity—and especially the grand jury's integral, constitutionally prescribed role.*⁵⁹

A different ruling, however, would have required lower courts to engage in far greater candor. Affording the Kaleys relief would have been the first step in creating doctrines to operate separate systems of justice for the rich and poor.

⁵⁹ *Kaley v. United States*, 134 S. Ct. 1090, 1099 (2014) (footnote omitted) (emphasis added).