

# Justice Harlan on Criminal Procedure: Two Cheers for the Legal Process School

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*The standard portrait of the second Justice Harlan paints him as the voice of judicial restraint on an activist court. Justice Harlan's approach to criminal procedure cases, however, has not found favor with the current Court, even though a majority of the justices for many years have shown more sympathy to the prosecution than to the defense. This article locates the decisive weakness in Harlan's approach in his reliance on legislatures to reform the criminal process. If that reliance were justified, Harlan's supposition that the courts should play only an interstitial law-making role would be justified. Despite occasional exceptions, legislatures have not undertaken systematic criminal justice reforms. The modern Court has recognized this political reality, and accepted a primary, rather than secondary, law-making role for the judiciary in the criminal procedure context. The article argues that, when combined with a more realistic assessment of institutional competence, Harlan's legal-process approach offers a better path for criminal procedure's future than the formalistic new originalism evident in some of the Court's recent decisions.*

## I. INTRODUCTION

The Warren Court provoked a great deal of academic criticism. The Warren Court's greatest contemporary critics, such as Henry Hart, Herbert Wechsler, and Alexander Bickel, faulted the Court more for shoddy judicial craftsmanship than for reaching unjust results.<sup>1</sup> These early critics represented the views of the legal process

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<sup>1</sup> See, e.g., Henry M. Hart, Jr., *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 100 (1959) ("But few of the Court's opinions, far too few, genuinely illumine the area of law with which they deal. Other opinions fail even by much more elementary standards."); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 32 (1959) ("The problem [with *Brown v. Board of Education*] inheres strictly in the reasoning of the opinion, an opinion which is often read with less fidelity by those who praise it than by those by whom it is condemned."); see also Louis Henkin, *Foreword: On Drawing Lines*, 82 HARV. L. REV. 63 (1968); Philip B. Kurland, *Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 HARV. L. REV. 143 (1964).

The metaphor of the craftsman may sound humble, but humility was not the leading trait of the founders of the legal process school. The craft metaphor likely derives from Hand's tribute to Holmes as the "President of the Society of Jobbists," thus implying comparison with the Yankee from Olympus rather than with some brick mason. See LEARNED HAND, *Mr. Justice Holmes, in THE SPIRIT OF LIBERTY* 57 (Irving Dillard ed., 1952).

school, a loose grouping of academic lawyers who sought a middle ground between realism and formalism.<sup>2</sup>

The legal process theorists did not deny that judges often make, rather than discover, law. But they maintained that judicial decision-making ought to involve more than unconstrained policy choices. Policy choices, on the legal process account, ought to be made by institutions best equipped for the kind of question at hand. It followed that courts should resolve disputes, and that in doing so courts should behave in appropriately court-like ways. Courts should respect procedural regularity and the authoritative legal materials, especially precedent; carefully consider the arguments of the parties; and justify the result with an honest and reasoned judicial opinion that provides a reasoned elaboration of the purposes behind the law being interpreted.<sup>3</sup>

Perhaps surprisingly, the great landmarks of the Warren Court's criminal procedure revolution—*Mapp v. Ohio*,<sup>4</sup> *Gideon v. Wainwright*,<sup>5</sup> *Miranda v. Arizona*,<sup>6</sup> *Katz v. United States*,<sup>7</sup> and *Terry v. Ohio*<sup>8</sup>—escaped the judicial-craft critics largely unscathed.<sup>9</sup> The criminal procedure revolution, however, has called forth an

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<sup>2</sup> See, e.g., Mark Tushnet & Timothy Lynch, *The Project of the Harvard Forewords: A Social and Intellectual Inquiry*, 11 CONST. COMMENT. 463, 476–80 (1994–1995) (discussing legal process orientation of the Forewords to the Supreme Court Review issue of the *Harvard Law Review*, which contained many of the prominent attacks on Warren Court craftsmanship).

<sup>3</sup> See, e.g., William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2043–45 (1994) (identifying reasoned elaboration of law's purpose, careful assessments of institutional competence, and the centrality of process as the key commitments of the school as reflected in HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (10th ed. 1958)); Anthony J. Seabok, *Reading the Legal Process*, 94 MICH. L. REV. 1571 (1994) (identifying concern with institutional competence, purposive interpretation, and reason as core legal process commitments, and connecting these to Lon Fuller's theory of adjudication).

<sup>4</sup> 367 U.S. 643 (1961) (overruling *Wolf v. Colorado*, 338 U.S. 25 (1949), and holding that Fourteenth Amendment due process requires exclusion of evidence from state criminal trials when evidence was seized in violation of the Fourth Amendment).

<sup>5</sup> 372 U.S. 335 (1963) (overruling *Betts v. Brady*, 316 U.S. 455 (1942), and holding that Fourteenth Amendment due process requires appointment of defense counsel for all indigent felony defendants in state courts).

<sup>6</sup> 384 U.S. 436 (1966) (overruling *Crooker v. California*, 357 U.S. 433 (1958), and *Cicenia v. Lagay*, 357 U.S. 504 (1958), and holding that statements obtained by custodial interrogation are inadmissible under Fifth and Fourteenth Amendments unless questioning is preceded by warnings and waiver or other steps to dispel inherent coerciveness of custodial environment).

<sup>7</sup> 389 U.S. 347 (1967) (overruling *Olmstead v. United States*, 277 U.S. 438 (1928), and *Goldman v. United States*, 316 U.S. 129 (1942), and holding that the Fourth Amendment covers electronic surveillance of private communications even in the absence of a physical trespass).

<sup>8</sup> 392 U.S. 1 (1968) (holding that frisk of suspect detained for investigation is a Fourth Amendment "search" that can be justified by specific facts short of probable cause).

<sup>9</sup> For example, Alexander Bickel described *Miranda* as "a radical, if justifiable, departure from prior practice." ALEXANDER BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 49 (1970). Some prominent writers offered craft critiques of Warren Court criminal procedure decisions. See Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929 (1965), reprinted in HENRY J. FRIENDLY, *BENCHMARKS* 235 (1967); Jerold H. Israel, *Gideon v. Wainwright: The "Art" of*

independent outpouring of critique, emphasizing the legitimate interest in public security and the dubious legitimacy of the Warren Court's innovations.<sup>10</sup>

This article engages both strands of criticism by taking a hard look at the criminal procedure opinions of Justice Harlan.<sup>11</sup> In retrospect, at least, Justice Harlan personified the virtues of the judicial craft the early critics found wanting in the Warren Court's jurisprudence.<sup>12</sup> Commentators have lauded Harlan as a "lawyer's

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*Overruling*, 1963 SUP. CT. REV. 211.

<sup>10</sup> See, e.g., Office of Legal Policy, U.S. Dep't of Justice, *Truth in Criminal Justice Papers*, reprinted in 22 U. MICH. J.L. REFORM 393 (1989); JOSEPH GRANO, CONFESSIONS, TRUTH AND THE LAW (1993); AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES (1997). Each of these treatments criticizes modern doctrine as a whole, including some developments that took place both before and after the Warren Court. Modern doctrine continues to be built on the Warren Court landmarks, however, and each of these treatments argues against some of those landmarks both because doctrine defeats truth in adjudication and because doctrine has not developed from a fair reading of text and history. The difference between the craft critics and these later criminal procedure critics is marked.

<sup>11</sup> Harlan the second was the grandson of Justice John Marshall Harlan, a dissenter in *Plessy v. Ferguson*, 163 U.S. 537 (1896), and an early defender of the view that the Fourteenth Amendment applies the Bill of Rights to the states. See *Twining v. New Jersey*, 211 U.S. 78, 114 (1908) (Harlan, J., dissenting) (arguing that Fourteenth Amendment applies Fifth Amendment privilege against self-incrimination to the states); *Maxwell v. Dow*, 176 U.S. 581, 605 (1900) (Harlan, J., dissenting) (arguing that Fourteenth Amendment applies Sixth Amendment right to jury trial to the states); *Hurtado v. California*, 110 U.S. 516, 538 (1884) (Harlan, J., dissenting) (arguing that Fourteenth Amendment applies Fifth Amendment right to grand jury presentment to the states). All subsequent references to "Harlan" or "Justice Harlan" refer to Harlan the second, except where the contrary is specifically noted.

<sup>12</sup> See Robert Nagel, *Name-Calling and the Clear Error Rule*, 88 NW. U. L. REV. 193, 206-07 (1993) (footnotes omitted):

Recently, Harlan has been the subject of considerable and respectful academic interest. His jurisprudence is held up as a model of responsible restraint even in popular journals. Conservative Justices, including Sandra Day O'Connor, David Souter, and Anthony Kennedy, find themselves being rehabilitated by mainstream commentators who find Harlan-like tendencies in their work. Harlan's opinions are highly regarded precisely because they display all the elements of Thayer's approach. Justice Harlan understood constitutional issues to involve, not the "narrow" or "literal" issues of text and history, but the grand and practical issues of political life. To these issues, however, he brought intellectual rigor rather than emotion or abstraction. He understood the need to defer to wisdom expressed in the political process. He was restrained both in his formulation of the issues and in his willingness to let the meaning of initial decisions be elaborated on a case by case basis. And Harlan saw the judiciary's task of interpretation as an aspect of its duty to adjudicate specific disputes.

Nagel dissents, at least to a degree, from the prevailing view, aligning himself with other critics who find in Harlan's common-law method judicial aggrandizement rather than truly principled restraint. See *id.* at 211 ("The rigorous and restrained analysis in his opinions was in significant instances only a prelude to the extravagant characterization of the societal interests to be served by the Justices' decisions.").

lawyer”<sup>13</sup> and a “judge’s judge.”<sup>14</sup> Several of the current justices have pointed to him as a model.<sup>15</sup>

Yet Justice Harlan’s criminal procedure opinions did not provide the Burger and Rehnquist Courts with a viable alternative to the criminal procedure revolution. Harlan’s misplaced faith in Congress and the states led him to favor ad hoc, case by case adjudication. The case-by-case approach could not generate workable law, and for the most part it has been abandoned (in my view, justifiably) by the modern Court.<sup>16</sup> Indeed, Justice Harlan himself occasionally recognized the tension between rule-of-law values and ad hoc adjudication.<sup>17</sup> But he never repudiated the case-by-case approach.

The failure of Harlan’s preferred approach goes far toward a defense of the Warren Court criminal procedure revolution. It certainly helps to rationalize the otherwise puzzling tolerance of the criminal cases on the part of the craft critics.<sup>18</sup> In the criminal justice context, the usual assumptions about federalism and deference to legislatures are counterfactual.

In the criminal context, constitutional law is not the doctrine of last resort, the rarely-dropped hammer that keeps a rogue state or an overreaching Congress from occasional excesses. The law of criminal procedure is *primarily* constitutional law, because legislatures have refused to make policy in this area. The statutes that are passed typically provide for increasingly numerous offenses with increased

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<sup>13</sup> See, e.g., BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 270–71 (1993).

<sup>14</sup> “Judge’s Judge” is, for example, the title of the epilogue to the first full-length biography of Harlan. TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT 337 (1992).

<sup>15</sup> See, e.g., Jeffrey Rosen, *Poetic Justice—The Education of David Souter*, NEW REPUBLIC, Mar. 8, 1993, at 25–26 (“There is a cult of Harlan among conservatives and liberals on the Court today, and Souter is jockeying for high priest. (At his confirmation hearings, Souter called Harlan his judicial hero.)”) (parenthesis in original); Toni J. Ellington, *Ruth Bader Ginsburg and John Marshall Harlan: A Justice and Her Hero*, 20 U. HAW. L. REV. 797, 797 (1998) (at confirmation hearing, Justice Ginsburg identified Harlan as her judicial hero).

<sup>16</sup> See *infra* text accompanying notes 145–54.

<sup>17</sup> I have in mind his opinions in *Gideon v. Wainwright*, 372 U.S. 335 (1963), where Harlan rejected the case-by-case counsel rule of *Betts v. Brady*, 316 U.S. 455 (1942), and *Desist v. United States*, 394 U.S. 244 (1969), where Harlan preferred an absolute rule about when new constitutional rulings would be retroactive.

<sup>18</sup> In a rebuttal to the craft critics, Judge J. Skelly Wright pointed out, among other things, that Alexander Bickel, perhaps the leading craft critic of all, pointedly did not criticize the Warren Court’s criminal procedure cases. See J. Skelly Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 794 (1971) (footnote omitted):

The only other decisions of the Warren Court arguably conforming to the centralization theme are those expanding access of a prisoner to federal court review on habeas corpus and those incorporating Bill of Rights guarantees into the fourteenth amendment. Strangely, Professor Bickel has no harsh words for these developments, crucial to the Court’s achievement though they were. In the criminal process, for some reason, he finds no attraction in the old chestnut about the states’ capacities as little laboratories for experimentation—experimentation with men’s lives, liberty, and privacy.

penalties.<sup>19</sup> The working assumptions of American legislators apparently are that prosecutors will make most of the important decisions, while the courts keep the police from behaving too outrageously.

Justice Harlan's assumption that a constitutional ruling by the judiciary nullifying a policy choice by the people's representatives should be a rare and grand occasion is counterfactual in the criminal procedure context. Courts rule on constitutional issues in criminal cases on a daily basis. The Supreme Court issues several important rulings in this area every term.<sup>20</sup>

When the Supreme Court fails to issue these rulings, or fails to issue them with both generality and clarity, the result is not legislation, but unconstrained executive discretion—virtual lawlessness. In the criminal context, legislative default turns the usual precepts of constitutional theory upside-down. The Court *is* making the law here, not because it ought to or even wants to, but because the alternatives to judge-made law are even worse. Court majorities being committees, rather than persons, some degree of compromise, with attendant inconsistencies, is inevitable. Those who begin their thinking about constitutional law with James Bradley Thayer's famous article,<sup>21</sup> and then turn to the criminal cases, will feel more than a little like Alice in Wonderland.

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<sup>19</sup> See, e.g., William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 523–40 (2001) (offering political incentives bearing on prosecutors and legislators as explanation for steady expansion in the scope and severity of liability provided by criminal codes).

<sup>20</sup> For example, the 2003–2004 term, the most recent one completed at this writing, gave us *Blakely v. Washington*, 542 U.S. 296 (2004) (invalidating sentencing enhancement triggered by judicial, as opposed to jury, fact-finding), *United States v. Patane*, 542 U.S. 630 (2004) (holding that when a statement inadmissible under *Miranda* leads to physical evidence, the physical evidence is admissible), *Missouri v. Seibert*, 542 U.S. 600 (2004) (holding that when police deliberately omit *Miranda* warnings until suspect has made admissions, subsequent admissions made after administration of *Miranda* warnings and facially valid waiver are inadmissible), *Crawford v. Washington*, 541 U.S. 36 (2004) (holding that Confrontation Clause bars use of accusatory out-of-court statements, dying declarations excepted, absent cross-examination by accused before or at trial), *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177 (2004) (holding that state law punishing as a crime the failure of citizen validly stopped under *Terry v. Ohio* to provide identification does not violate either the Fourth or Fifth Amendment), *Thornton v. United States*, 541 U.S. 615 (2004) (upholding *Belton* search of interior of car following arrest of motorist who had exited the vehicle before being placed under arrest), *Illinois v. Lidster*, 540 U.S. 419 (2004) (rejecting Fourth Amendment challenge to road block set up to investigate specific hit-and-run accident), *Groh v. Ramirez*, 540 U.S. 551 (2004) (holding that search warrant that failed to particularly describe place to be searched and things to be seized was void on its face and conferred no qualified immunity, even though application for warrant did contain particular descriptions), and *Maryland v. Pringle*, 540 U.S. 366 (2003) (holding that discovery of cocaine under rear seat armrest of vehicle containing three occupants, who supplied no further information to police, together with discovery of cash in glove compartment, gave police probable cause to arrest front seat passenger for possession of cocaine).

<sup>21</sup> James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). Felix Frankfurter wrote to Learned Hand in 1957 that he had given a copy of Thayer's essay to Harlan and advised him to "read it, then reread it, and then read it again and then think about it long." H.N. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* 182 (1981).

A common view holds that Harlan was a conservative on a liberal Court, and that the Court became conservative about the time that Harlan left it.<sup>22</sup> There is some truth in this description. Yet the criminal procedure doctrine built up by the Burger and Rehnquist Courts rejects almost every element in Harlan's approach.<sup>23</sup> With respect to habeas corpus and retroactivity, Harlan's views have prevailed.<sup>24</sup> The test of privacy under the Fourth Amendment remains the one bequeathed to us by Justice Harlan.<sup>25</sup> But there the Harlan legacy in the positive law of criminal procedure ends.

The modern constitutional law of criminal procedure permits the states to depart from federal requirements on only a few minor details.<sup>26</sup> In state cases, the incorporated terms of the Fourth, Fifth and Sixth Amendments have eclipsed doctrine based directly on the Fourteenth Amendment.<sup>27</sup> The Court has come to prefer bright-line rules to general standards.<sup>28</sup> The totality-of-the-circumstances rubric applies in

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<sup>22</sup> See, e.g., Nadine Strossen, *Justice Harlan and the Bill of Rights: A Model for How a Classic Conservative Court Would Enforce the Bill of Rights*, 36 N.Y.L. SCH. L. REV. 133 (1991) (arguing that the Rehnquist Court shows both more activism and less respect for liberty than Justice Harlan would have approved).

<sup>23</sup> See *infra* text accompanying notes 145–54.

<sup>24</sup> See *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion) (adopting Harlan's approach in *Desist* to retroactivity). For a summary of Harlan's *Desist* approach, see *supra* note 17. *Teague* was later endorsed by a majority of the Court and applied as the best interpretation of the 1996 federal habeas statute. See *Horn v. Banks*, 536 U.S. 266 (2002).

<sup>25</sup> See *infra* notes 56–57 and accompanying text.

<sup>26</sup> A minority of the Court briefly subscribed to Harlan's position that the Fourteenth Amendment permitted the states to interpret the provisions of the Bill of Rights in reasonable variance from the decisions of the federal courts, at least where the Sixth Amendment right to jury trial was concerned. In *Apodaca v. Oregon*, 406 U.S. 404 (1972), eight justices agreed that the federal interpretation of the Sixth Amendment binds the states, but split four-to-four on whether the Sixth Amendment required unanimity in federal cases. Justice Powell concurred in the judgment on the ground that while federal juries have to be unanimous, the Fourteenth Amendment does not incorporate this aspect of the Sixth Amendment and thus states are free to depart from unanimity. In *Ballew v. Georgia*, 435 U.S. 223, 245 (1978) (Powell, J. concurring), Chief Justice Burger and then Justice Rehnquist joined Powell's concurrence, which took the position that five-person juries in serious criminal cases violate the Fourteenth Amendment but that the Sixth Amendment does not apply in states cases precisely as it does in federal cases. Protestations of this sort have ceased. For example, the dissent in *Blakely v. Washington*, 542 U.S. 296 (2004), a state case, and the majority in *United States v. Booker*, 125 S. Ct. 738 (2005), agreed that the Sixth Amendment issue should come out the same way in both state and federal cases, making the Court unanimous on that point. The state's brief in *Blakely* offers a good measure of how remote Justice Powell's approach in the jury-trial cases has become. *Washington* did not argue that the states could depart from the federal standard, and did not cite *Apodaca* or *Ballew*. See Brief for the State of Washington, *Blakely v. Washington*, 542 U.S. 296 (2004) (No. 02–1632).

<sup>27</sup> See *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) (rejecting free-standing substantive due process claim because police conduct of high-speed chase that killed bystander did not shock the conscience); *Medina v. California*, 505 U.S. 437 (1992) (rejecting free-standing due process attack on state standard for determining competence to stand trial because defendant failed to show that state standard was "fundamentally unfair in operation").

<sup>28</sup> See Donald Dripps, *The Fourth Amendment and the Fallacy of Composition: Determinacy Versus Legitimacy in a Regime of Bright-Line Rules*, 74 Miss. L.J. 341 (2004) (arguing that need for determinacy induced Burger Court to reject individualized determinations of reasonableness in favor of

only a handful of situations.<sup>29</sup> Conservative justices have found case-by-case review of state cases under the vague rubric of fundamental fairness to be dysfunctional.

If the modern Court's turn to bright-line rules is understandable, perhaps even inevitable, today's justices would do well to consider the possibility that some babies have been thrown out with the bath water. Harlan's skepticism about arguments from original intent, his measured and honest regard for precedent, and his focus in state cases on due process have much to commend them. As the current Court increasingly embraces "the vice known to legal theory as formalism,"<sup>30</sup> Harlan's opinions not only reveal some weaknesses of legal process theory; they also showcase its considerable strengths. The new originalism in the criminal procedure cases is, as Harlan thought of the old originalism of Justice Black, self-vindicating rather than constraining, and pernicious when it is not irrelevant.

Part I reviews the various principles that guided Harlan's jurisprudence, and summarizes his application of these principles to the great Warren Court criminal procedure landmarks. Part II criticizes the fundamental fairness test Harlan supported for failing to provide principled or determinate law and bolsters this critique with a survey of Harlan's legacy in the current law of criminal procedure, law that has turned away from case-by-case adjudication toward bright-line rules. Part III traces the disagreement about criminal procedure between Harlan and the Warren Court majority to differing assessments of institutional competence; differences of constitutional theory mattered rather less. Yet, as Part III explains, the legal process perspective offers better chances for developing principled and functional law than any species of formalism, whether it be the old originalism of Justice Black, or the new originalism appearing more and more frequently in important criminal procedure opinions. Part IV applies the argument to the specific case of so-called consensual electronic surveillance, the practice that evoked one of Harlan's most famous opinions.

Is it possible to envision a body of constitutional law that regulates the criminal process without betraying the legitimacy of the former or doing grave functional damage to the latter? Justice Harlan's opinions in *Gideon*, *Katz*, *Terry*, and *Winship* supply us with some of the tools we will need to answer that question affirmatively—a respectful but general view of the original understanding, the judicial development of standards that can be applied to a large number of subsequent cases, and the willingness to follow or overrule precedent with an awareness that the Court is managing an elaborate and inter-related body of judge-made law.

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bright-line rules in Fourth Amendment cases).

<sup>29</sup> See *infra* notes 148–59 and accompanying text.

<sup>30</sup> H.L.A. HART, *THE CONCEPT OF RULES* 129 (2d ed. 1994) ("The vice known to legal theory as formalism or conceptualism consists in an attitude to verbally formulated rules which both seeks to disguise and to minimize the need for such choice, once the general rule has been laid down.").

## II. JUSTICE HARLAN'S JURISPRUDENCE

### A. *Justice Harlan's Judicial Philosophy: The Legal Process School and the Constitution*

The ascendancy of the legal process school coincided with Harlan's arrival on the Supreme Court. Felix Frankfurter, one of the school's originators, exerted considerable influence on Harlan during the years that marked the beginning of Harlan's, and the close of Frankfurter's, tenure on the Court.<sup>31</sup>

Harlan personified the approach of the legal process school.<sup>32</sup> He believed in federalism,<sup>33</sup> deference to the other branches of government, strong but not absolute respect for precedent, and meticulous respect for the Court's own procedures.<sup>34</sup> A more general fidelity to neutral principles and the rule of law unified these otherwise disparate elements.

Harlan's fundamental commitment to legality followed the legal process school rather than any species of formalism. The Court should carefully consider the institutional advantages and disadvantages of Congress, the states, and the Court itself. For the most part, important policy choices should be left to the states and to Congress, but when the Court acted within the proper sphere of its institutional competence, the justices had no choice but to consider values as well as facts in reaching their decisions. History counted, but you will not find Harlan asking the Framers for answers to questions that never occurred to them.<sup>35</sup>

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<sup>31</sup> See, e.g., Charles Nesson, *The Harlan-Frankfurter Connection: An Aspect of Justice Harlan's Judicial Education*, 36 N.Y.L. SCH. L. REV. 179 (1991).

<sup>32</sup> See, e.g., Martha A. Field, *Justice Harlan's Legal Process*, 36 N.Y.L. SCH. L. REV. 155, 155 (1991):

[Harlan] stressed that judicial restraint, stare decisis, and reasoned elaboration are central to decision making. Harlan was unusual because he genuinely seemed to care more about how a case was decided than about the result reached. Even today—twenty years after his retirement—he serves as the model for these judicial virtues.

<sup>33</sup> See, e.g., J. Harvie Wilkinson III, *Justice John M. Harlan and the Values of Federalism*, 57 VA. L. REV. 1185, 1186 (1971) (“[F]ederalism is the transcendent theme of Harlan's legal career, the cornerstone of his judicial perspective.”).

<sup>34</sup> For general treatments of Harlan's judicial philosophy, see Henry J. Bourguignon, *The Second Mr. Justice Harlan: His Principles of Judicial Decision Making*, 1979 SUP. CT. REV. 251; J. Richard Broughton, *Unforgettable, Too: The (Juris)Prudential Legacy of the Second Justice Harlan*, 10 SETON HALL CONST. L. J. 57 (1999); Stephen M. Dane, “*Ordered Liberty*” and *Self-Restraint: The Judicial Philosophy of the Second Justice Harlan*, 51 U. CIN. L. REV. 545 (1982).

<sup>35</sup> See, e.g., Louis R. Cohen, *A Biography of the Second Justice Harlan*, 91 MICH. L. REV. 1609, 1612 (1993) (reviewing YARBROUGH, *supra* note 14) (footnote omitted):

No formula told him the results in constitutional cases: he respected the text of the Constitution but did not believe that it alone answered many of the hard questions; he thought “original intent,” a notion frequently invoked by more recent conservative judges, was an illusion. His approach, as many have noted, was that of the common law: he believed in carefully examining the facts of each case and deciding it on the basis of the most nearly applicable precedent. The constraints were respect for precedent and what he saw as a

Text, history and precedent matter to almost every constitutional theorist, but important differences of degree divide judges and scholars. Legal scholars agree that Harlan stood in the tradition of the common law, concentrating on cases, rather than the tradition of direct appeal to the constitutional text.<sup>36</sup> Harlan did not reject appeals to text and history, but tended to voice these in cases in which the Warren Court majority made new law.<sup>37</sup> Once that law was made, Harlan took the decided cases as determining the legal ecology and worked accordingly,<sup>38</sup> with occasional exceptions.<sup>39</sup>

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judge's duty to move slowly, with the focus always on the particular, rather than to jump to superficially attractive generalizations not required by the facts of the case.

To be sure, Harlan's dissent in *Oregon v. Mitchell*, 400 U.S. 112, 152 (1970) (Harlan, J., concurring and dissenting) does argue that the Court's reading of the Fourteenth Amendment as authorizing Congress to supersede state voter qualification laws in federal elections was wrong as a matter of text and original understanding. But *Mitchell* was exceptional in the gap between Harlan's sense of the original understanding and the majority's result; it was also a case in which Harlan's sense of constitutional structure and political prudence played as large a role in his opinion as the more on-point authoritative legal materials. Likewise, Harlan endorsed Charles Fairman's assessment of the historical evidence bearing on the incorporation issue, *see, e.g., Pointer v. Texas*, 380 U.S. 400, 408–09 (1965) (Harlan, J., concurring), but he seemed less concerned with the departure from historical expectations than with the imposition of identical standards on different institutional contexts. Harlan's opinion in *Pointer* references Fairman's article, but the rhetorical focus is on institutional competence (citations omitted):

While either of these constitutional approaches brings one to the same end result in this particular case, there is a basic difference between the two in the kind of future constitutional development they portend. The concept of Fourteenth Amendment due process embodied in *Palko* and a host of other thoughtful past decisions now rapidly falling into discard, recognizes that our Constitution tolerates, indeed encourages, differences between the methods used to effectuate legitimate federal and state concerns, subject to the requirements of fundamental fairness "implicit in the concept of ordered liberty." The philosophy of "incorporation," on the other hand, subordinates all such state differences to the particular requirements of the Federal Bill of Rights and increasingly subjects state legal processes to enveloping federal judicial authority.

Harlan's view on incorporation would not have changed unless Justice Black produced the sort of conclusive authoritative demonstration that Harlan rarely saw in real cases, *Mitchell* being just such an exceptional case.

<sup>36</sup> Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 26–27 (2000) (characterizing Harlan as a "doctrinalist" rather than a "documentarian"); Bruce Ackerman, *The Common Law Constitution of John Marshall Harlan*, 36 N.Y. L. SCH. L. REV. 5 (1991) (classifying Harlan as a common-law constitutionalist rather than an "independent" constitutionalist). Professor Gunther objected to Professor Ackerman's critique of Harlan's work, but did not dispute the characterization of Harlan as a judge in the common-law tradition. *See* Gerald Gunther, *Another View of Justice Harlan—A Comment on Fried and Ackerman*, 36 N.Y. L. SCH. L. REV. 67, 71–72 (1991).

<sup>37</sup> *See, e.g., Wesberry v. Sanders*, 376 U.S. 1, 20 (1964) (Harlan, J., dissenting).

<sup>38</sup> *See, e.g., Orozco v. Texas*, 394 U.S. 324, 327 (1969) (Harlan, J., concurring) (following *Miranda v. Arizona*, from which Harlan had dissented three years earlier); *Coolidge v. New Hampshire*, 403 U.S. 443, 490 (1971) (Harlan, J. concurring) (following *Mapp v. Ohio*, 367 U.S. 643 (1961), from which Harlan had dissented); *North Carolina v. Pearce*, 395 U.S. 711, 744 (1969) (Harlan, J., concurring and dissenting) (following *Benton v. Maryland*, 395 U.S. 784 (1969), from which Harlan had dissented that very term); Bourguignon, *supra* note 34, at 279–80 ("Harlan's usual practice was to continue for duration of a Term to adhere to his position expressed in dissents. After the end of the Term he would consider himself bound by the precedent he had originally opposed.") (footnote omitted). *Pearce* was by

The affinity of legal process theory with common law methodology is apparent. Cases counted as the most useful type of legal authority, and it followed that cases should be created as carefully as possible—with deference to the other branches of government, scrupulous concern for procedural regularity, and faithful but not blind respect for precedent.

*B. Justice Harlan and the Criminal Procedure Revolution*

In the criminal procedure cases coming up from the state courts during the 1960s, the state's side of the judicial scales often held more than one of Harlan's favored principles, leading him to disagree with most of the reasoning, and many of the results, reached by a majority of the Warren Court. Harlan opposed the incorporation of the Bill of Rights into the Fourteenth Amendment. In state cases he relied on a due process standard that prohibited only state procedures deemed fundamentally unfair based on the totality of the circumstances in particular cases. Justice Harlan held these positions based on considerations of constitutional structure and then-prevailing precedent rather than based on respect for the original understanding.

In federal cases governed by the Fourth Amendment, Harlan identified privacy as the constitutional value, and the warrant requirement as the primary means for protecting privacy. Harlan opposed plenary review of state court convictions in federal habeas corpus proceedings, but he insisted, on rule-of-law grounds, that constitutional rights announced by the Court could be claimed by all defendants whose convictions were not yet final.

We will now examine Harlan's approach in four related areas of doctrine—the Fourth, Fifth, and Sixth Amendment, and free-standing due process claims. The topical, rather than temporal, organization does not imply that Harlan's views were settled throughout his term. On the contrary, they changed significantly, sometimes with the ebb and flow of the cases and sometimes with a change of heart rather than of the legal ecology.<sup>40</sup> Harlan was more than consistent enough, however, to have developed a distinctive approach to criminal procedure questions. My concern is with that overall approach, rather than with trying to capture his specific views at any particular point in time.

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Harlan's admission an exception to his rule of following his dissents for the rest of the term. *See* 395 U.S. at 744.

<sup>39</sup> *See* *Williams v. Florida*, 399 U.S. 78 (1970) (Harlan, J. dissenting) (refusing to follow *Duncan v. Louisiana*, 391 U.S. 145 (1968), from which Harlan had dissented).

<sup>40</sup> *See, e.g.*, *Dutton v. Evans*, 400 U.S. 74, 94 (1970) (Harlan, J., concurring) (rejecting cross-examination based approach to Sixth Amendment confrontation clause, endorsed by Court in an opinion by Harlan only months before in *California v. Green*, 399 U.S. 149 (1970)).

### 1. Justice Harlan on Search and Seizure

*Mapp v. Ohio*<sup>41</sup> involved a warrantless home search based on scant suspicion for a suspected bomber and explosives.<sup>42</sup> All the police found were some allegedly obscene publications.<sup>43</sup> The state prosecuted Ms. Mapp for possessing these materials.

The state courts admitted the evidence because, although discovered in violation of the Fourth Amendment, the Ohio courts did not require the exclusion of illegally-seized evidence. This they were free to do under *Wolf v. Colorado*,<sup>44</sup> although *Wolf* had held that the substantive rights protected by the Fourth Amendment against federal abridgement were protected as against the states by the Fourteenth. The Court granted certiorari on a First Amendment issue, and the parties briefed and argued that question. The only reference to *Wolf v. Colorado* in the briefs and oral argument was a single paragraph in the ACLU's amicus brief requesting the Court to reconsider *Wolf*.<sup>45</sup>

The majority overruled *Wolf* and imposed the exclusionary rule on the states, heralding the commencement of the Warren Court's "criminal procedure revolution."<sup>46</sup> Justice Harlan's dissent brought together three of his themes. First, by ruling on the Fourth Amendment issue without proper briefing and argument, "five members of this Court have simply 'reached out' to overrule *Wolf*."<sup>47</sup> Second, whatever the merits of that issue, *Wolf*'s resolution of that issue controlled the question. "It certainly has never been a postulate of judicial power that mere altered disposition, or subsequent membership on the Court, is sufficient warrant for overturning a deliberately decided rule of Constitutional law."<sup>48</sup> Third, reasonable people, like Cardozo and Wigmore, might well reject the exclusionary rule. Given the uncertainty of the rule's merits and the different situations in different states, the states should be allowed to continue to experiment with different remedies.<sup>49</sup>

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<sup>41</sup> 367 U.S. 643 (1961).

<sup>42</sup> See *id.* at 644–45.

<sup>43</sup> *Id.*

<sup>44</sup> 338 U.S. 25 (1949).

<sup>45</sup> See *Mapp*, 367 U.S. at 673 n.5 (Harlan, J., dissenting).

<sup>46</sup> See Yale Kamisar, *How Earl Warren's Twenty-Two Years in Law Enforcement Affected His Work As Chief Justice*, 3 OHIO ST. J. CRIM. L. 11, 17 (2005) (noting that the Chief Justice and Justices Brennan and Douglas visited Justice Black in his chambers "and persuaded him to come aboard" and thus form the *Mapp* majority).

<sup>47</sup> *Mapp*, 367 U.S. at 674.

<sup>48</sup> *Id.* at 677.

<sup>49</sup> *Id.* at 680–81:

The preservation of a proper balance between state and federal responsibility in the administration of criminal justice demands patience on the part of those who might like to see things move faster among the States in this respect. Problems of criminal law enforcement vary widely from State to State. One State, in considering the totality of its legal picture, may conclude that the need for embracing the *Weeks* rule is pressing because

Justice Harlan's dissent in *Mapp* is as noteworthy for what it did not say as for what it did say. Harlan did not invoke the original understanding of either the Fourth Amendment or the Fourteenth. His concerns lay with procedural regularity, federalism, and *stare decisis*. Even in state cases, he did not categorically reject suppressing evidence on federal constitutional grounds. He had joined the majority opinion in *Breithaupt v. Abram*, which held that the Fourteenth Amendment required excluding evidence in state prosecutions when the police obtained the evidence by violating the Fourth Amendment search-and-seizure doctrine in an especially outrageous fashion ("shocking" was the word the Court used to describe the test).<sup>50</sup> *Breithaupt* held that taking a blood test without consent was not "shocking" (as the stomach-pumping in the *Rochin* case had been). The charge that this test was too subjective made by the *Breithaupt* dissenters<sup>51</sup> did not convince Justice Harlan.

Harlan wrote two Fourth Amendment concurrences that majorities of the Court later accepted as sounder bases of law than the majority opinions. In *Katz v. United States*,<sup>52</sup> the defendant sought to suppress telephone conversations overheard by means of a microphone hidden on top of a telephone booth. The 1928 decision in *Olmstead v. United States*<sup>53</sup> had excluded the tapping of telephone lines from the Fourth Amendment. Under *Olmstead*, absent a trespass by the police, there could be no "search" under the Fourth Amendment.

The *Katz* majority overruled *Olmstead*.<sup>54</sup> Potter Stewart's majority opinion declared that the "Fourth Amendment protects people, not places."<sup>55</sup> Harlan wrote that:

The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an

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other remedies are unavailable or inadequate to secure compliance with the substantive Constitutional principle involved. Another, though equally solicitous of Constitutional rights, may choose to pursue one purpose at a time, allowing all evidence relevant to guilt to be brought into a criminal trial, and dealing with Constitutional infractions by other means. Still another may consider the exclusionary rule too rough-and-ready a remedy, in that it reaches only unconstitutional intrusions which eventuate in criminal prosecution of the victims. Further, a State after experimenting with the *Weeks* rule for a time may, because of unsatisfactory experience with it, decide to revert to a non-exclusionary rule.

<sup>50</sup> 352 U.S. 432 (1957).

<sup>51</sup> See *id.* at 442 (Warren, C.J., dissenting) ("Only personal reaction to the stomach pump and the blood test can distinguish them").

<sup>52</sup> 389 U.S. 347 (1967).

<sup>53</sup> 277 U.S. 438 (1928).

<sup>54</sup> See 389 U.S. at 353 ("We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling.").

<sup>55</sup> *Id.* at 351.

actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as “reasonable.”<sup>56</sup>

The Court subsequently endorsed this test,<sup>57</sup> and it continues to frame the Court’s approach in recent cases.<sup>58</sup>

Harlan’s brief, bland, and precise concurrence in *Katz*, like the dissent in *Mapp*, is noteworthy for what it does not say. Harlan again did not invoke the original understanding. Justice Black dissented in *Katz*, relying in strong terms on the text and history of the Fourth Amendment.<sup>59</sup> Nor did Harlan explain why electronic eavesdropping, unlike the exclusionary rule, was not a subject better left to legislative rather than judicial oversight. The *Katz* test looks to modern social norms, not the expectations of the founders; and it relies on judges, rather than elected officials, to identify these norms.

One possible explanation is that the Court’s prior decision in *Berger v. New York*,<sup>60</sup> invalidating New York’s electronic surveillance statute on its face for failing to require particularized warrants for wiretaps, had the potential to eliminate all legislation on electronic surveillance, because of the inherent difficulty of particularizing the content of conversations that have yet to occur.<sup>61</sup> Harlan’s

<sup>56</sup> *Id.* at 361 (Harlan, J., concurring).

<sup>57</sup> *See, e.g.*, *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (expressly adopting Harlan’s test).

<sup>58</sup> *See, e.g.*, *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (“As Justice Harlan’s oft-quoted concurrence described it, a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable.”); *id.* at 44 (Stevens, J., dissenting) (quoting Harlan concurrence in *Katz*). It should be voiced that the *Kyllo* majority noted criticisms of the test and declined to say that widespread private use of technology that discloses information about life behind closed doors in private homes would, as Harlan’s *Katz* opinion suggests, cease to be a Fourth Amendment search. *See id.* at 34. This may signal a willingness to reconsider the reasonable expectation of privacy formula. *See* David A. Sklansky, *Back to the Future: Kyllo, Katz, and Common Law*, 72 *Miss. L.J.* 143, 147 (2002):

The second question *Kyllo* leaves open is whether devices like thermal imagers are regulated by the Fourth Amendment only so long as they remain uncommon. I argue that the answer should be no, but that defending this answer may require the Court to reconsider certain other features of search-and-seizure law—features that are due for reconsideration in any event.

The Court, however, continues to rely on the expectation-that-society-is-prepared-to-recognize-as-reasonable formula. *See Illinois v. Caballes*, 125 S. Ct. 834, 837–38 (2005).

<sup>59</sup> *See* 389 U.S. at 366 (Black, J., dissenting):

There can be no doubt that the Framers were aware of this practice, and if they had desired to outlaw or restrict the use of evidence obtained by eavesdropping, I believe that they would have used the appropriate language to do so in the Fourth Amendment. They certainly would not have left such a task to the ingenuity of language-stretching judges.

<sup>60</sup> 388 U.S. 41 (1967).

<sup>61</sup> *See id.* at 89 (Harlan, J., dissenting) (“the use of electronic eavesdropping devices as instruments of criminal law enforcement is currently being comprehensively addressed by the Congress and various other bodies in the country” and the Court’s decision “will seriously restrict, if not entirely thwart, such efforts”).

approach, however, unlike Black's, did not leave the field to legislatures, but instead took it over for the courts.

Harlan's filed his other prophetic Fourth Amendment concurrence in *Terry v. Ohio*.<sup>62</sup> For all of his great regard for privacy, Harlan did not yield to privacy's tendency "to obscure more serious harms that attend police misconduct, harms that flow not from information disclosure but from the police use of force."<sup>63</sup> Chief Justice Warren's majority opinion in *Terry* focuses on the protective frisk, not the coercive police intervention that precedes it.<sup>64</sup> Harlan's concurrence sets that right, by demanding that the restraint of liberty, as well as the invasion of privacy, be justified by specific facts.<sup>65</sup> Just as with *Katz*, the Harlan concurrence has become the governing law.<sup>66</sup>

## 2. Justice Harlan on Confessions

Harlan took the Court's confessions jurisprudence as he found it in the 1950s. A confession would be thrown out on due process grounds if the court found the statement involuntary.<sup>67</sup> In reaching this judgment, the court considered the totality of the circumstances, including the duration of the questioning, any use of physical force, threats, promises, isolation of the suspect from friends, relatives, and counsel, and the physical and mental characteristics of the suspect.<sup>68</sup>

The uncertainty of the test had disadvantages. The voluntariness standard invited the police to continue increasing the pressure on the suspect, because, short of physical brutality, they could never be sure that the courts would rule the confession

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<sup>62</sup> 392 U.S. 1 (1968).

<sup>63</sup> William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1020 (1995).

<sup>64</sup> See *Terry*, 392 U.S. at 23 ("The crux of this case, however, is not the propriety of Officer McFadden's taking steps to investigate petitioner's suspicious behavior, but rather, whether there was justification for McFadden's invasion of Terry's personal security by searching him for weapons in the course of that investigation.").

<sup>65</sup> See *id.* at 32 (Harlan, J., concurring) ("[I]f the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a forcible stop.").

<sup>66</sup> See, e.g., *United States v. Place*, 462 U.S. 696, 702 n.4 (1983) ("In his concurring opinion in *Terry*, Justice Harlan made this logical underpinning of the Court's Fourth Amendment holding clear . . .") (quoting the language from Harlan's *Terry* concurrence quoted in the previous footnote).

<sup>67</sup> For a review of the pre-*Miranda* confessions cases, see Catherine Hancock, *Due Process Before Miranda*, 70 TUL. L. REV. 2195 (1996). Professor Hancock distinguishes cases finding confessions voluntary from those finding them involuntary, and locates seeds of the *Miranda* doctrine in the latter set of cases. Without agreeing with her characterization of all the cases, her essay shows how Justice Harlan might have done in *Miranda* what he did in *Gideon*—derive bright-line rules from the Due Process Clause.

<sup>68</sup> Harlan reviewed the state of the voluntariness doctrine in his *Miranda* dissent. See 384 U.S. at 507–09 (Harlan, J., dissenting).

involuntary.<sup>69</sup> Lower courts asked to suppress a confession by an apparently guilty defendant enjoyed considerable wiggle-room and tended to wiggle in favor of the prosecution.<sup>70</sup> In response, the federal courts reviewed the record independently in habeas corpus cases,<sup>71</sup> leading to frequent relitigation of fact-specific determinations. From the standpoint of federalism, the imposition of a clear rule that state police and courts could follow might well have seemed a lesser federal intrusion than ongoing federal backseat driving in costly collateral review proceedings.

The confessions cases paralleled the right-to-counsel cases under *Betts v. Brady*,<sup>72</sup> and one might have thought that Justice Harlan, who endorsed *Gideon* on due process grounds,<sup>73</sup> might have found a similar declaration of due-process based rules for confession cases attractive.<sup>74</sup> He declined the opportunity in *Crooker v. California*<sup>75</sup> and *Cicenia v. LeGay*,<sup>76</sup> writing the majority opinion in both cases, rejecting the claim that police denial of a suspect's explicit request to consult with counsel *per se* violates due process. And when Justice Frankfurter attempted to clarify the voluntariness test with the mammoth opinion in *Culombe v. Connecticut*,<sup>77</sup> Harlan filed a one paragraph dissent agreeing with Frankfurter's description of the test but rejecting its application to the facts of the case.<sup>78</sup>

Harlan dissented in both *Malloy v. Hogan*,<sup>79</sup> which incorporated the Fifth Amendment privilege against compelled self-incrimination into the Fourteenth Amendment's Due Process Clause, and in *Miranda v. Arizona*, which applied the privilege to police interrogation.<sup>80</sup> As with the Fourth Amendment opinions, Harlan expressed concern not with the idea of a living Constitution, but with the majority's disrespect for precedent and questionable policy choices.

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<sup>69</sup> Comment, *The Coerced Confession Cases in Search of a Rationale*, 31 U. CHI. L. REV. 313, 320 (1964) (footnotes omitted):

As the law now stands the police have little to lose from interrogation. They can apply increasingly greater pressure until the suspect confesses. If the confession is admissible, well and good. If it is not, no harm has been done since police wouldn't have been able to get the confession unless they had applied the pressure.

<sup>70</sup> See, e.g., YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 444–45 (10th ed. 2002).

<sup>71</sup> See *Miller v. Fenton*, 474 U.S. 104, 110 (1985) (“Without exception, the Court’s confession cases hold that the ultimate issue of ‘voluntariness’ is a legal question requiring independent federal determination.”) (citations omitted).

<sup>72</sup> 316 U.S. 455 (1942).

<sup>73</sup> See *Culombe v. Connecticut*, 367 U.S. 568, 642 (1961) (Harlan, J., dissenting).

<sup>74</sup> Cf. *Hancock*, *supra* note 67.

<sup>75</sup> 357 U.S. 433 (1958).

<sup>76</sup> 357 U.S. 504 (1958).

<sup>77</sup> 367 U.S. 568 (1961) (plurality opinion).

<sup>78</sup> See *id.* at 642 (Harlan, J., dissenting).

<sup>79</sup> 378 U.S. 1, 14 (1964) (Harlan, J., dissenting).

<sup>80</sup> 384 U.S. 436, 504 (1966) (Harlan, J., dissenting).

One might wonder why Harlan fought so hard against incorporation if he did not believe that the text of the Bill of Rights, or its history, so confined judicial choice as to require bad policy. Harlan, however, did not strongly object to imposing the Bill of Rights criminal procedure provisions on the states. All the states had highly similar provisions in their own constitutions. What divided the state and federal systems of criminal procedure was not constitutional text but the gloss the texts had acquired through judicial interpretation.

Harlan's legal process perspective could accept incorporation as a legitimate (if unwise) evolution in cases when the state made no pretense of complying with the text of the Bill of Rights provisions. What he would not accept was imposing on the states the federal case law, which dating from *Boyd v. United States*<sup>81</sup> in the 1880s had taken a strongly libertarian turn. *Gideon* excepted, the cases coming up from the state courts did not involve outright denials of fundamental rights. Instead, the state cases involved applications of fundamental rights that some might view as appropriate rules for managing the federal system but not for all fifty state systems. For example, the fight on the Supreme Court was not over the denial of counsel at trial, but the right to counsel during police interrogation;<sup>82</sup> not over holding the defendant in contempt for not testifying, but permitting the jury to draw an adverse inference from silence;<sup>83</sup> not over whether the states could deny trial by jury in felony cases, but whether it could deny jury trial in misdemeanor cases<sup>84</sup> or provide for juries of fewer than twelve members.<sup>85</sup>

Harlan had two standard and substantial reasons, rooted in legal process theory, for leaving these debatable points of interpretation to the states. First, as a matter of institutional design, the state systems faced challenges very different than the challenges facing either the federal system or other states. A homogenous response to a heterogeneous situation would certainly be wrong in some instances; and when designed by a Court remote from the circumstances, it would be very likely to be wrong in a great many instances. In short, the Court had developed the federal law to govern federal cases, and there were good reasons to think that the rules announced for federal cases would not be good rules for state cases as well. And if the rules changed to accommodate the circumstances in the states, the federal rules would suffer so long as the Court equated them.

Second, Harlan believed that the state legislators might handle criminal procedure better than the Supreme Court. Legislatures have obvious advantages in regulating the police. Legislatures can mount an empirical investigation of the problem area, prescribe rules with great precision, and supply sanctions to enforce the rules that do not depend on the exclusion of evidence. Legislatures, moreover, can change the rules they have chosen to reflect changes in circumstances, including

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<sup>81</sup> 116 U.S. 616 (1886).

<sup>82</sup> See *Escobedo v. Illinois*, 378 U.S. 478 (1964).

<sup>83</sup> See *Griffin v. California*, 380 U.S. 609 (1965).

<sup>84</sup> See *Duncan v. Louisiana*, 391 U.S. 145 (1968).

<sup>85</sup> See *Williams v. Florida*, 399 U.S. 78 (1970).

changes in popular sentiment about the difficult balance between civil liberty and public safety.

Harlan's *Miranda* dissenting opinion expressed these views most clearly. He talks about history, but the history that concerned him was not about founding-era understandings but the course of judicial decisions. Harlan repeatedly conceded that formal considerations of authority did not prohibit the majority's approach. History and precedent legitimately might be "strained" for "pragmatic considerations."<sup>86</sup> Moreover, "the privilege embodies basic principles always capable of expansion."<sup>87</sup> After this concession, Harlan dropped a footnote going still further—and casting a revealing light on his legal-process orientation: "Additionally, there are precedents and even historical arguments that can be arrayed in favor of bringing extra-legal questioning within the privilege."<sup>88</sup> The majority's error was not merely pushing the envelope of legitimate interpretation; it was pushing that envelope for an unworthy policy objective.<sup>89</sup>

Whether articulated in the due process language of "voluntary" or "involuntary," or the Fifth Amendment language of "compelled" or not "compelled," the policy question was how much pressure the Court should permit state police to put on suspects. Reasonable people could disagree about that question, and the *ad hoc* due process test struck a better balance than the majority's "code." Harlan, moreover, thought the Court's intervention exquisitely ill-timed; the decision would nip the ongoing process of legislative reform in the bud.<sup>90</sup>

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<sup>86</sup> See 384 U.S. at 505 (Harlan, J., dissenting) (majority's result depends on "a strained reading of history and precedent and a disregard of the very pragmatic concerns that alone may on occasion justify such strains.").

<sup>87</sup> *Id.* at 511 (footnote omitted).

<sup>88</sup> *Id.* at 511 n.7.

<sup>89</sup> Harlan joined Justice White's dissenting opinion, which includes the following passage:

That the Court's holding today is neither compelled nor even strongly suggested by the language of the Fifth Amendment, is at odds with American and English legal history, and involves a departure from a long line of precedent does not prove either that the Court has exceeded its powers or that the Court is wrong or unwise in its present reinterpretation of the Fifth Amendment. It does, however, underscore the obvious—that the Court has not discovered or found the law in making today's decision, nor has it derived it from some irrefutable sources; what it has done is to make new law and new public policy in much the same way that it has in the course of interpreting other great clauses of the Constitution. This is what the Court historically has done. Indeed, it is what it must do and will continue to do until and unless there is some fundamental change in the constitutional distribution of governmental powers.

384 U.S. at 531 (White, J., dissenting) (footnote omitted).

<sup>90</sup> See 384 U.S. at 523 (footnotes omitted):

In closing this necessarily truncated discussion of policy considerations attending the new confession rules, some reference must be made to their ironic untimeliness. There is now in progress in this country a massive re-examination of criminal law enforcement procedures on a scale never before witnessed. Participants in this undertaking include a Special Committee of the American Bar Association, under the chairmanship of Chief Judge Lumbard of the Court of Appeals for the Second Circuit; a distinguished study group of the

### 3. Justice Harlan and the Right to Counsel

*Gideon v. Wainwright*<sup>91</sup> held that the Fourteenth Amendment incorporates the Sixth Amendment right to counsel and that the Sixth Amendment requires the appointment of counsel, at public expense, for indigent defendants in felony cases. The companion case of *Douglas v. California*<sup>92</sup> held that the Equal Protection Clause required the states to appoint counsel at public expense for indigent felony defendants seeking to reverse their convictions on a first appeal of right from the trial court. Harlan concurred in *Gideon* and dissented in *Douglas*.

The *Gideon* concurrence made two basic points. First, *Betts* should be overruled because the law had passed it by, rather than because *Betts* had been a mistake. In the Supreme Court, the *Betts* test always led to requiring counsel for the indigent in state felony cases.<sup>93</sup> The failure to make this official had become a trap for the unwary in the state courts, leading to needless friction between the state and federal courts in an era of plenary federal habeas review of federal constitutional attacks on state convictions.<sup>94</sup> In this case, Harlan saw that the reasons behind his general interpretive approach did not apply, because *Betts* had become inconsistent with other precedents and had led to greater, rather than lesser, federal intrusions into state processes.

Second, Harlan distinguished the incorporation theory from the theory that fundamental fairness might require in every state case a version of a right required in federal cases by the Bill of Rights. Harlan was not mincing words, because the

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American Law Institute, headed by Professors Vorenberg and Bator of the Harvard Law School; and the President's Commission on Law Enforcement and Administration of Justice, under the leadership of the Attorney General of the United States. Studies are also being conducted by the District of Columbia Crime Commission, the Georgetown Law Center, and by others equipped to do practical research. There are also signs that legislatures in some of the States may be preparing to re-examine the problem before us.

<sup>91</sup> 372 U.S. 335 (1963).

<sup>92</sup> 372 U.S. 353 (1963).

<sup>93</sup> See 372 U.S. at 350–51 (Harlan, J., dissenting) (footnotes omitted):

In noncapital cases, the “special circumstances” rule has continued to exist in form while its substance has been substantially and steadily eroded. In the first decade after *Betts*, there were cases in which the Court found special circumstances to be lacking, but usually by a sharply divided vote. However, no such decision has been cited to us, and I have found none, after *Quicksall v. Michigan*, 339 U.S. 660, 70 S. Ct. 910, 94 L. Ed. 1188 decided in 1950. At the same time, there have been not a few cases in which special circumstances were found in little or nothing more than the “complexity” of the legal questions presented, although those questions were often of only routine difficulty. The Court has come to recognize, in other words, that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial. In truth the *Betts v. Brady* rule is no longer a reality.

<sup>94</sup> See *id.* at 351 (footnote omitted):

This evolution, however, appears not to have been fully recognized by many state courts, in this instance charged with the front-line responsibility for the enforcement of constitutional rights. To continue a rule which is honored by this Court only with lip service is not a healthy thing and in the long run will do disservice to the federal system.

distinction had significant doctrinal implications for him. If, for example, the defendant's right to counsel in state cases existed because its denial was fundamentally unfair, the presence of a right in the first eight amendments would be besides the point.<sup>95</sup> Moreover, *the version* of a right protected in state cases by the Fourteenth Amendment read as fundamental fairness might differ from the version of that same procedural safeguard in the Bill of Rights.<sup>96</sup> These differences with the majority reflect differences about the relative importance of federalism and precedent in constitutional adjudication.

As with other provisions in the Bill of Rights, Harlan was less concerned about incorporation than about permitting the states to interpret the constitutional text in ways that fit local conditions. He dissented in *Escobedo v. Illinois*<sup>97</sup> and joined Justice White's dissenting opinions in *Massiah v. United States*<sup>98</sup> and *United States v. Wade*,<sup>99</sup> in both cases reasoning that a right to counsel at trial does not necessarily imply a right to the presence of counsel before trial during such investigative procedures as interrogation or eyewitness identification.<sup>100</sup> Harlan's position in *Massiah* is especially noteworthy. Unlike Justice Stewart, who drew a line between questioning the suspect before and after the filing of a formal charge,<sup>101</sup> Justice Harlan was content to permit police questioning *sans* counsel even after indictment. The appropriate test for both confessions and identifications assessed due process or its absence from the totality of the circumstances.

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<sup>95</sup> See *id.* at 352 ("In what is done today I do not understand the Court to depart from the principles laid down in *Palko v. Connecticut*, 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288, or to embrace the concept that the Fourteenth Amendment 'incorporates' the Sixth Amendment as such.")

<sup>96</sup> See *id.* (footnote and citation omitted):

When we hold a right or immunity, valid against the Federal Government, to be 'implicit in the concept of ordered liberty' and thus valid against the States, I do not read our past decisions to suggest that by so holding, we automatically carry over an entire body of federal law and apply it in full sweep to the States. Any such concept would disregard the frequently wide disparity between the legitimate interests of the States and of the Federal Government, the divergent problems that they face, and the significantly different consequences of their actions.

<sup>97</sup> *Escobedo*, 378 U.S. 478, 492 (1964) (Harlan, J., dissenting).

<sup>98</sup> *Massiah v. United States*, 377 U.S. 201, 207 (1964) (White, J., dissenting).

<sup>99</sup> 388 U.S. 215, 250 (1967) (White, J., dissenting).

<sup>100</sup> Both *Wade* and *Massiah* were federal cases, to be sure, but Justice Harlan could surely see the incorporation handwriting on the wall. Thus, Harlan knew that any expansion of the Sixth Amendment right probably would carry over to the states through the Fourteenth.

<sup>101</sup> See *Spano v. New York*, 360 U.S. 315, 326 (1958) (Stewart, J., concurring). Justice Harlan agreed with the majority that Spano's confession should be excluded on due process grounds, but he did not endorse Stewart's position that post-indictment questioning triggered the Sixth Amendment right to counsel.

#### 4. Justice Harlan on Due Process

Nowadays we think about due process as either substantive or procedural. Justice Harlan's opinions blur this distinction, if they do not ignore it altogether. Fundamental fairness was the test not just for limits on police abuse during interrogation, but also for limits on state trial procedures such as cameras in the courtroom or assigning the burden of proof. His famous opinion in *Poe v. Ullman*,<sup>102</sup> a forerunner of *Griswold v. Connecticut*,<sup>103</sup> rejects any understanding of due process as protecting "isolated points pricked out" rather than "a rational continuum" of individual rights.<sup>104</sup> Harlan's opinion in *Poe* relies on *Palko v. Connecticut*<sup>105</sup>—a case excluding the robust federal right against double jeopardy from the category of rights required by fundamental fairness—as supplying a standard from which a constitutional right to contraception can be derived.<sup>106</sup>

### III. JUSTICE HARLAN ON CONSTITUTIONAL CRIMINAL PROCEDURE: A CRITIQUE

This review of Harlan's major criminal procedure decisions shows clearly enough the basic premises of his jurisprudence. He believed that the states bear primary responsibility for making policy decisions about criminal justice. The Fourteenth Amendment authorized the federal courts to set aside state convictions only in egregious cases. These premises interlocked; on the assumption that state legislatures, state courts, and Congress generally prohibited abusive police practices, and generally provided fair adjudicatory procedures, there was little need for federal supervision. Such federal oversight as was appropriate logically ought to take the form of scrutinizing the facts of each case to see if the defendant could dispel the presumption of fairness that attended the process doled out by the states or by Congress. And if only exceptional cases called for the intervention of the federal courts, when reasonable people could not disagree that the state had crossed the line, there was no need for Harlan to invest due process with any constraining commitment either to original intent or to some master value such as individual autonomy or truth in adjudication. A good man's sense of fair play would suffice.

The parallel with *Poe* is instructive. Aggressive judicial review of state laws regulating private conduct is the exception, not the rule, in modern constitutional law. Harlan took the anti-*Lochner* spirit less far than some others, for he did believe that

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<sup>102</sup> 367 U.S. 497 (1967) (rejecting standing of plaintiffs to challenge state ban on contraceptives). Harlan disagreed with the majority on the standing issue and reached the merits, concluding that the statute violated due process, even though it did not involve procedural unfairness and did not violate any provision in the Bill of Rights.

<sup>103</sup> 381 U.S. 479 (1965) (invalidating state statute barring married couples from obtaining contraceptives).

<sup>104</sup> *Poe*, 367 U.S. at 543 (Harlan, J., dissenting).

<sup>105</sup> 302 U.S. 319 (1937).

<sup>106</sup> *Poe*, 367 U.S. at 544 (Harlan, J., dissenting).

substantive due process protected some unenumerated rights.<sup>107</sup> His deference to legislatures was still considerable, and unlike other justices he held to that deference when deciding criminal procedure cases.

Harlan could concur in *Gideon* because only a few states refused to appoint counsel for all indigent felony defendants.<sup>108</sup> Each of these states had been a member of the Confederacy, with the attendant legacy of both Jim Crow justice and lynching.<sup>109</sup> Majority sentiment in the country at large hitherto had accommodated itself quite readily to reigning in Southern exceptionalism.<sup>110</sup>

The rest of the Warren Court's criminal procedure revolution, however, worked change throughout the Union. Illinois lost *Escobedo*; Ohio lost *Mapp*; California lost *Griffin*; New York lost *Vignera*, one of the cases in the *Miranda* litigation. The federal government lost *Massiah*, *Wade* and *Westover*, another case in the *Miranda* litigation. The criminal procedure revolution depended on the premise that the criminal process *nationwide* urgently required reforms of the sort that state legislatures and state courts would not deliver.

Given these premises rather than Harlan's, the majority logically turned to articulating doctrine as rules rather than standards—treating “the Bill of Rights as a code of criminal procedure,” in Henry Friendly's unfriendly phrase.<sup>111</sup> The basic divide between Harlan and the majority was not methodological. The only self-declared formalist on the Court was Black; the rest were realists or legal-process theorists. The disagreement was not about whether constitutional law ought to adapt with modern crises, or about whether to consider institutional competence as the law adapted. The disagreement in the criminal cases was about whether there was a national crisis in criminal justice and whether elected legislatures possessed the institutional competence to address it.

The Warren Court landmarks implicitly answered “yes” to the first question and “no” to the second. Harlan gave different answers. On these questions the Warren Court was right, so clearly right that the fundamental fairness test never returned from

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<sup>107</sup> See *id.* at 544 (Harlan, J., dissenting) (citing *United States v. Carolene Products Co.*, 304 U.S. 144 (1938)).

<sup>108</sup> See Israel, *supra* note 9, at 267 (noting, prior to *Gideon* that “thirty-eight states have legal provisions requiring the appointment of counsel in such cases, and seven more almost invariably follow that procedure as a matter of practice”) (footnotes omitted).

<sup>109</sup> See Brief for the Petitioner at 30, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (no. 155) (“There remain only five states—Alabama, Florida, Mississippi, North Carolina, and South Carolina—which do not make provision for appointment of counsel in behalf of indigents in all felony cases.”).

<sup>110</sup> Professor Klarman has pointed out that the fundamental fairness cases that reversed state convictions of black defendants in Southern states prior to the criminal procedure revolution probably reflected nationwide majority support. See Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 93 (2000) (“The decisions in *Moore*, *Powell*, *Norris* and *Brown* almost certainly were consonant with dominant national opinion at the time.”). Judge Friendly, in a critique of the criminal procedure revolution, wrote that “There is nigh unanimous applause for the insistence that persons charged with serious crime shall receive the assistance of counsel at their pleas and trials.” Friendly, *supra* note 9, at 237.

<sup>111</sup> Friendly, *supra* note 9, at 235.

exile even after the majority of the Court had become more conservative than Harlan himself.

Professor Stuntz, no apologist for the Brennan faction of the Warren Court, offers the following assessment:

The vast bodies of constitutional law that attach to the Fourth, Fifth, and Sixth Amendments did not, for the most part, displace developed bodies of state law. In most areas, there was little state law to displace. Rather, constitutional law entered fields where, again for the most part, no law applied, where local police and prosecutors had previously done as they pleased, or where local custom governed. Perhaps that is why the criminal procedure revolution succeeded.<sup>112</sup>

Success is a relative term; still the comparison of judge-made law with “no law,” a system “where local police and prosecutors” did “as they pleased,” sometimes restrained a bit by “local custom,” puts the legal process inquiry into institutional competence in a whole new light.

Consider the state of criminal procedure in 1960, the year before *Mapp v. Ohio*. With respect to police practices, in the years since *Wolf*, eight more states, prominently including California, had adopted the exclusionary rule.<sup>113</sup> The states overall, however, were evenly divided; the admissibility camp included Massachusetts, Pennsylvania, and New York.<sup>114</sup> If there was a trend toward reform it was barely perceptible.

Where the exclusionary rule did not apply police often showed no respect for constitutional rights against unreasonable search and seizure. California’s state supreme court adopted the exclusionary rule only after concluding that warrantless searches on mere suspicion had become routine.<sup>115</sup> Prior to that, California courts had affirmed one conviction based on evidence obtained by pumping the suspect’s stomach after a warrantless midnight entry,<sup>116</sup> and another based on the fruits of a microphone hidden, with the aid of a locksmith but without a warrant, in the marital bedroom.<sup>117</sup> After *Mapp*, prosecutors in many states had to blow the dust off the form books to find precedents for warrant applications.<sup>118</sup>

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<sup>112</sup> William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 588 n.292 (2001).

<sup>113</sup> See *Elkins v. United States*, 364 U.S. 206, 224 (1960) (Appendix).

<sup>114</sup> *Id.*

<sup>115</sup> *People v. Cahan*, 282 P.2d 905 (Cal. 1955).

<sup>116</sup> *People v. Rochin*, 225 P.2d 502 (Cal. Dist. Ct. App. 1952), *review denied*, 225 P.2d 905, 913 (Cal. 1951), *rev’d*, 342 U.S. 165 (1952).

<sup>117</sup> *People v. Irvine*, 248 P.2d 502 (Cal. Dist. Ct. App. 1952), *aff’d*, *Irvine v. California*, 347 U.S. 128 (1954). For a review of the facts, see *Irvine*, 347 U.S. at 145 (Frankfurter, J., dissenting).

<sup>118</sup> See Sam J. Ervin, Jr., *The Exclusionary Rule: An Essential Ingredient of the Fourth Amendment*, 1983 SUP. CT. REV. 283, 293 (“Before the *Mapp* decision, search warrants were virtually unknown and unused writs in many states having no exclusionary rule of their own.”). See also Bradley

Arrest on suspicion, or for such crimes as vagrancy or loitering, was common.<sup>119</sup> Once arrested, suspects could be held for days without seeing a judge, let alone a lawyer.<sup>120</sup> Interrogation could be prolonged, deceptive, manipulative or coercive.<sup>121</sup> Neither state legislatures nor Congress adopted regulations to govern interrogations or identification procedures.

Only five states denied appointed counsel for all indigent felony defendants. The quality of indigent defense was so low, however, that the usual test of ineffective assistance claims, even in federal courts, was whether counsel's performance had been so bad that the trial had become a farce and mockery of justice.<sup>122</sup> An indigent defendant might be arrested on suspicion, confronted by a witness in a suggestive show-up, held for days and questioned for hours at a time by police making veiled threats, making up evidence, and refusing requests for legal advice—all without violating any statutory rights (or at least any legal rights backed by a meaningful remedy).

When Congress did take steps to reform criminal justice, it did so not to regulate law enforcement but in reaction to the Warren Court's efforts to do so. When the *Miranda* Court left open the possibility that legislative solutions that dispelled the compulsion inherent in custodial questioning might make the *Miranda* warnings constitutionally unnecessary, Congress responded not with legislation requiring time limits and tape recordings, but by purporting to reinstate the voluntariness test the Court had declared constitutionally inadequate.<sup>123</sup>

The same legislation (its orientation toward civil liberties can be gleaned from its title, "Omnibus Crime Control and Safe Streets Act of 1968") for the first time authorized wiretapping and the planting of hidden microphones by federal law enforcement agents. Title III imposed procedural safeguards that go beyond ordinary Fourth Amendment requirements of probable cause and a warrant; but the explanation

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C. Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681, 708–811 (1974) (finding that warrant use in Cincinnati rose from 0–7 per year to 89–113 following *Mapp*; in Boston, the number of warrants rose from 176–267 to 560–940); Michael Murphy, *Judicial Review of Police Methods in Law Enforcement*, 44 TEX. L. REV. 939, 941–42 (1966) (stating that prior to *Mapp*, search warrants "had been rarely used," but as of December 1965, fewer than four years after *Mapp*, 17,889 had been obtained).

<sup>119</sup> See Caleb Foote, *Vagrancy-Type Law and its Administration*, 104 U. PA. L. REV. 603 (1956); William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960).

<sup>120</sup> For example, in *Darwin v. Connecticut*, 391 U.S. 346 (1968), the suspect was held *incommunicado* for two days before confessing. In *Culombe v. Connecticut*, 367 U.S. 568 (1961) the suspect was in custody for three days before being presented to a police court on a charge of disturbing the peace. See *id.* at 611–12. Although the Supreme Court held the confessions in both of these cases involuntary, there was no clear rule against prolonged interrogation. The length of detention was only one factor in the totality of the circumstances.

<sup>121</sup> See, e.g., Bernard Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, 52 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 21 (1961).

<sup>122</sup> See *Diggs v. Welch*, 148 F.2d 667 (D.C. Cir. 1945).

<sup>123</sup> Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 3501 (2000), held unconstitutional in *Dickerson v. United States*, 530 U.S. 428 (2000).

for that is that Congress understood these safeguards to be the bare minima acceptable under the Supreme Court's Fourth Amendment cases.

Prior to *Berger* and *Katz*, the Fourth Amendment had not applied to wiretapping.<sup>124</sup> A federal statute prohibited wiretapping, and the Supreme Court held that the statute required suppression of evidence obtained by intercepting communications.<sup>125</sup> The Justice Department interpreted the Communications Act to permit interception but not divulgence of private conversations, and so there was a significant amount of federal wiretapping to gather intelligence. The Court also held that the statutory exclusionary rule did not apply to evidence obtained by state agents offered in state prosecutions, even though the conduct of the state officers was a federal crime under the statute.<sup>126</sup> Those sympathetic to law enforcement feared that *Berger v. New York* and *Katz v. United States* meant the end of electronic surveillance.<sup>127</sup> The objective of Title III's proponents was to provide procedural safeguards that would survive constitutional challenge in the Supreme Court—and no more. For example, the Court's cases had imposed no Fourth Amendment limits on the use of hidden recording devices with the consent of one party to the

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<sup>124</sup> *Olmstead v. United States*, 277 U.S. 438 (1928).

<sup>125</sup> *Nardone v. United States*, 302 U.S. 379 (1939).

<sup>126</sup> *Schwartz v. Texas*, 344 U.S. 199 (1952).

<sup>127</sup> Professor Kerr argues that the prospects of congressional action impelled the Court to decide *Berger* and *Katz*, rather than the Supreme Court prompting the congressional activity. See Orin S. Kerr, *The Fourth Amendment and New Technologies*, 102 MICH. L. REV. 801, 848–50 (2004). There is clearly a measure of truth in this description, but it leaves out the critical point that *any* statute a majority of Congress might have adopted in the 1960s would have been a pro-government measure, given the Communications Act's prohibition on using wiretap evidence in court. The relevant legislative history frankly declares: "The major purpose of Title III is to combat organized crime." S. Rep. No. 90-1097 (1968), reprinted in 1968, U.S.C.C.A.N. 2112, 2157. The unofficial history of Title III reveals unmistakably the law-enforcement orientation of the legislation. See Richard Harris, *Annals of Legislation—the Turning Point*, NEW YORKER, Dec. 14, 1968, at 68, 164–76 (discussing legislators' sense of public demand for tough-on-crime policies). Other provisions of the statute make its pro-prosecution agenda graphically clear; Title II purported to supplant *Miranda* and was ignored until held unconstitutional decades later in *Dickerson v. United States*, 530 U.S. 428 (2000); and Title III's elaborate warrant procedure does not apply to consensual monitoring because the Supreme Court had not imposed Fourth Amendment restrictions on consensual recording. Finally, if a majority of the Court in *Berger* and *Katz* was moved by the desire to stimulate congressional action, they could have done a much better job of it. Contemporary observers were extremely doubtful about whether Title III really met the demands of *Berger*. See Herman Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of Law and Order*, 67 MICH. L. REV. 455, 460 (1969) ("Under the principles announced in *Berger*, *Katz*, and *Osborn*, both Title III and the ABA Standards contain serious constitutional infirmities with respect to the duration of the eavesdropping and the required particularity of the order authorizing it."); Ralph S. Spritzer, *Electronic Surveillance by Leave of the Magistrate: The Case in Opposition*, 118 U. PA. L. REV. 169, 191 (1969) (stating that "electronic surveillance is almost inevitably a general search"); Note, *The Supreme Court, 1967 Term—Constitutional Law—Search and Seizure—Electronic Surveillance*, 82 HARV. L. REV. 187, 196 (1968) ("Such continuous surveillance resembles so closely a general warrant and an exploratory, indiscriminate search that it is likely to be condemned under the rationale of *Berger* as inherently unreasonable.").

conversation.<sup>128</sup> Title III exempted this practice from legislative regulation as well, a pretty clear indicator that adjudication was the horse and legislation the recalcitrant cart.<sup>129</sup>

If the politics of law and order have changed since 1968, they have moved further in favor of police power and adjudications geared to convict. California has adopted Proposition 8<sup>130</sup> and the three strikes law;<sup>131</sup> Congress has restricted access to federal habeas<sup>132</sup> and created a federal death penalty;<sup>133</sup> many states have adopted sex offender registration or “sexually violent predator” civil-commitment laws.<sup>134</sup> The picture can be gauged in broadest terms by looking at the changes in the prison population.<sup>135</sup>

Proving negatives is difficult; all one can say is that the professional literature and the Internet do not show much evidence of legislative action to regulate the police or to provide procedural safeguards for the accused. No legislature has required taping interrogations.<sup>136</sup> None has required state-of-the-art identification techniques. Very few provide anything near the financial support that would be required to provide a professional defense to every indigent defendant.

<sup>128</sup> See *Lopez v. United States*, 373 U.S. 427 (1963).

<sup>129</sup> 18 U.S.C. § 2511(2)(d) (2000).

<sup>130</sup> See CAL. CONST. art. I, § 28(d).

<sup>131</sup> See *Ewing v. California*, 538 U.S. 11 (2003) (upholding three strikes law against Eighth Amendment challenge).

<sup>132</sup> Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214.

<sup>133</sup> Federal Death Penalty Act of 1994, Pub. L. No. 103–322, 108 Stat. 1959.

<sup>134</sup> See Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1431 nn.5 & 6 (2001).

<sup>135</sup> See, e.g., THE SENTENCING PROJECT, NEW INCARCERATION FIGURES: GROWTH IN POPULATION CONTINUES, available at <http://www.sentencingproject.org/pdfs/1044.pdf> (emphasis added).

Bureau of Justice Statistics figures for midyear 2004 indicate that there were nearly 2.1 million inmates in the nation’s prisons and jails, representing an increase of 2.3% (48,500) over the previous twelve months.

The new figures represent a record 32-year continuous rise in the number of inmates in the U.S. The current incarceration *rate* of 726 per 100,000 residents places the United States first in the world in this regard. Russia had previously rivaled the U.S., but substantial prisoner amnesties in recent years have led to a decline of the *prison population*, resulting in a current *rate* of incarceration of 532 per 100,000. Rates of incarceration per 100,000 for other industrialized nations include Australia, 117; Canada, 116; England/Wales, 142; France, 91; and Japan, 58.

*Id.* (emphasis added).

<sup>136</sup> See Donald A. Dripps, *Constitutional Theory for Criminal Procedure: Miranda, Dickerson, and the Continuing Quest for Broad-but-Shallow*, 43 WM. & MARY L. REV. 1, 45 (2001) (“To this day, only two American jurisdictions, Alaska and Minnesota, require taping interrogations. In both instances, the state courts, rather than the state legislature, were the source of reform.”). Requirements, whether statutory or judicial, for recording confessions do little to regulate the actual questioning. See, e.g., Steve Mills & Maurice Possley, *Will Taping Interrogations Fix the System?*, CHI. TRIB., June 21, 2005, § 1, at 1, available at [http://www.nacdl.org/sl\\_docs.nsf/freeform/mandatory:008](http://www.nacdl.org/sl_docs.nsf/freeform/mandatory:008). Illinois recently adopted legislation requiring taping interrogations, but the legislation is limited to murder cases. *Id.*

This is not to say that Congress ignores police practices that threaten politically powerful interest groups.<sup>137</sup> For example, in 1986 Congress brought cell phones and email within the protections of Title III. The Electronic Communication Privacy Act, however, benefited both business interests and upper-income individuals.<sup>138</sup>

More typical is the aftermath of *Atwater v. City of Lago Vista*.<sup>139</sup> In that case, the Supreme Court rejected a Fourth Amendment claim against a police officer who executed a custodial arrest for the non-jailable misdemeanor of operating a vehicle without wearing a seatbelt. Justice Souter's opinion has some Harlanesque qualities. The opinion leaves open the possibility that outrageous facts in a future case might call for a different result,<sup>140</sup> and it takes comfort from the prospect that if police abuse the power to arrest, legislatures will intervene.<sup>141</sup>

Many jurisdictions limit the arrest power by statute or rule, but the reason for this is that the cost of transporting and booking minor offenders exceeds the benefit to the police.<sup>142</sup> Where the police have concluded that plenary discretion yields a net benefit to law enforcement, elected officials have not rejected the police position. In Texas, the legislature did pass a statute limiting the arrest power after *Atwater*, but the governor vetoed the bill and his veto was not overridden.<sup>143</sup> Even if jurisdictions limit the arrest power, evidence obtained incident to arrests illegal under state law may not trigger the exclusionary sanction.<sup>144</sup>

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<sup>137</sup> See Kerr, *supra* note 127, at 855–56.

<sup>138</sup> See Jerry Berman & Deirdre Mulligan, *The Internet and the Law: Privacy in the Digital Age: Work in Progress*, 23 NOVA L. REV. 551, 578 n.76 (1999):

The Electronic Communications Privacy Act of 1986 (ECPA), which updated the 1968 Wiretap Act, was the result of a collaborative public interest/private sector effort. 18 U.S.C. § 2510–2711 (1994). Industry feared that without legal protection against eavesdropping and interception, consumers would be reluctant to use emerging electronic media, such as cellular phones and e-mail, to communicate. The resulting law extended legal protection akin to that provided First Class mail, and was developed and supported by a diverse coalition of business, civil liberties, and consumer advocates who understood that consumers would be unwilling to fully embrace electronic mail and other new technologies without strong privacy protections.

<sup>139</sup> 532 U.S. 318 (2001).

<sup>140</sup> 532 U.S. at 352–53.

<sup>141</sup> *Id.* at 352–53 (“The upshot of all these influences, combined with the good sense (and, failing that, the political accountability) of most local lawmakers and law-enforcement officials, is a dearth of horribles demanding redress.”).

<sup>142</sup> *Id.* at 352 (noting that many states limit arrests for non-jailable misdemeanors and that one reason is that “it is in the interest of the police to limit petty-offense arrests, which carry costs that are simply too great to incur without good reason”).

<sup>143</sup> See Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in Atwater v. City of Lago Vista*, 71 FORDHAM L. REV. 329, 415 (2002) (“For example, in Texas, following the *Atwater* decision, a bill limiting arrests in minor cases passed the legislature despite great police opposition, but was then vetoed by the Governor in response to further police pressure.”) (footnote omitted).

<sup>144</sup> See *People v. McKay*, 41 P.3d 59 (Cal. 2002) (holding that state constitutional provision limiting exclusionary rule to violations of federal Constitution required admitting evidence obtained in

The available evidence shows a significant number of custodial arrests for non-jailable misdemeanors.<sup>145</sup> This record, moreover, does not count at all the likeliest form of abuse. As things stand, the police have an incentive to search the motorist and the passenger compartment after every traffic stop. If contraband turns up, the officer can treat the encounter as an arrest from the start. If none turns up, the officer can treat it as a citation from the start. No motorist is going to complain about *not* being arrested. Only dedicated civil libertarians will sue over the unlawful and purely speculative search.<sup>146</sup>

In this regard, we might recall Justice Harlan's opposition, expressed in *Mapp* and repeated in subsequent opinions, to imposing the exclusionary rule on the states. In his *Terry* concurrence, Harlan laid the foundation for modern stop-and-frisk law by treating the stop as a Fourth Amendment seizure that needed factual justification, albeit less justification than probable cause. If Harlan's views had prevailed in *Mapp*, however, *Terry* could never have come to the Court. Until some hardy soul brought an action to recover damages—whatever a jury found a few minutes of investigative detention to be worth—or until some park patrolman or MP sought to offer evidence found in a stop-and-frisk, the whole area would have been left, given the legislative vacuum, in a largely lawless condition.

By the middle of the seventies—say, 1976, the year *Stone v. Powell*<sup>147</sup> was decided—a majority of the justices believed that the security-liberty balance had swung too far in favor of liberty. Ever since, the Supreme Court has given the Warren Court landmarks narrow interpretations. Yet the modern Court has not turned to Justice Harlan for inspiration.

The totality-of-the-circumstances test controls a few isolated topics under the Fourth and Fifth Amendments,<sup>148</sup> but its most important remaining hold on doctrine is in the area of identifications.<sup>149</sup> This area of the law may be the most consistently

violation of state law).

<sup>145</sup> See Frase, *supra* note 143, at 366 n.172 (Atwater's petition for rehearing claimed that California and Oregon data justified estimate of 250,000 custodial arrests for traffic offenses nationwide).

<sup>146</sup> *Id.* at 366 ("Nor do many arrested traffic offenders have the time, resources, and stamina to pursue a civil damages action.").

<sup>147</sup> 428 U.S. 465 (1976) (holding that federal courts may not adjudicate Fourth Amendment claims raised by state prisoners seeking federal habeas corpus relief if the state courts have considered the claims).

<sup>148</sup> The totality-of-the-circumstances test governs the voluntariness of consent to search. See *United States v. Drayton*, 536 U.S. 194, 207 (2002); *Schneckloth v. Bustamonte*, 412 U.S. 218, 248–49 (1973). It also applies to the standard of probable cause. See *Illinois v. Gates*, 462 U.S. 213 (1983). There is a certain irony in *Gates* adopting a totality test because Justice Harlan wrote the opinion in *Spinelli v. United States*, 393 U.S. 410 (1969), adopting the two-pronged test of probable cause rejected in *Gates*. The totality test also governs the voluntariness of *Miranda* waivers, see *Fare v. Michael C.*, 442 U.S. 707, 728 (1979), a modest role given that no waiver is valid unless the police administer the warnings. The due process test for coerced confessions has survived as a supplement to *Miranda* in cases of police over-reaching that go beyond the failure to follow the *Miranda* rules. See *Mincey v. Arizona*, 437 U.S. 385 (1978).

<sup>149</sup> Under *Manson v. Brathwaite*, 432 U.S. 98 (1977), an out-of-court identification will be

criticized in the entire domain of the Supreme Court's criminal procedure jurisprudence.<sup>150</sup> In my view this is no coincidence.

Elsewhere, selective incorporation, the exclusionary rule, and *Miranda* have all survived, if not entirely unscathed. A variety of causes may be at work, but the most important is probably the need for determinate criminal procedure doctrine. A return to case-by-case adjudication has become unimaginable. In the Fourth Amendment context, the Court explicitly has sought to articulate doctrine in the form of bright-line rules.<sup>151</sup> In the confessions area it has done the same, by retaining what we now routinely have come to call "the *Miranda* rules."<sup>152</sup>

A representative modern case is *Withrow v. Williams*.<sup>153</sup> There the state argued that the federal courts should not hear *Miranda* claims challenging state convictions on federal habeas. The Court had accepted this view regarding Fourth Amendment claims in *Stone v. Powell*.<sup>154</sup> At the time of the decision, moreover, the constitutional status of *Miranda* itself remained very much in doubt.<sup>155</sup>

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suppressed on due process grounds when the defense can show (1) improper suggestiveness in the identification procedure and (2) that the identification was unreliable in light of the totality of the circumstances.

<sup>150</sup> See, e.g., Joseph D. Grano et al., *Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?*, 72 MICH. L. REV. 717 (1974); Randolph N. Jonakait, *Reliable Identification: Could the Supreme Court Tell in Manson v. Brathwaite*, 52 U. COLO. L. REV. 511 (1981); Steven Grossman, *Suggestive Identifications: The Supreme Court's Due Process Test Fails to Meet its Own Criteria*, 11 U. BALT. L. REV. 53 (1981); Wallace Sherwood, *The Erosion of Constitutional Safeguards in the Area of Eyewitness Identification*, 30 HOW. L.J. 439 (1987); George C. Thomas III, *The Criminal Procedure Road Not Taken: Due Process and the Protection of Innocence*, 3 OHIO ST. J. CRIM. L. 169, 189–92 (2005).

<sup>151</sup> For example, in *Atwater*, the majority expressly rejected case-by-case adjudication as providing too little guidance to police and lower courts. See 532 U.S. at 347:

[W]e have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review. See, e.g., *United States v. Robinson*, 414 U.S. 218, 234–235, 94 S. Ct. 467, 38 L. Ed.2d 427 (1973). Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made. Courts attempting to strike a reasonable Fourth Amendment balance thus credit the government's side with an essential interest in readily administrable rules. See *New York v. Belton*, 453 U.S. 454, 458, 101 S. Ct. 2860, 69 L. Ed.2d 768 (1981) (footnote omitted) (Fourth Amendment rules "ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged" and not "qualified by all sorts of ifs, ands, and buts").

<sup>152</sup> A Westlaw search conducted on April 3, 2005 identified fourteen Supreme Court cases in which either a majority, concurring, or dissenting opinion referred to the "*Miranda* rules."

<sup>153</sup> 507 U.S. 680 (1993).

<sup>154</sup> See *Stone v. Powell*, 428 U.S. 465 (1976).

<sup>155</sup> See, e.g., DONALD A. DRIPPS, ABOUT GUILT AND INNOCENCE 93–95 (2002) (Court continued to apply *Miranda* in state cases while saying in some opinions that *Miranda* warnings were not

Despite these factors favoring the state, the Court held that *Miranda* claims could be heard by federal habeas courts. Cutting off *Miranda* claims would have induced state prisoners to resort to the due process, totality-of-the-circumstances test to challenge the same convictions.<sup>156</sup> The state would have lost fewer of these cases with *Miranda* off the table,<sup>157</sup> but the application of the nebulous fundamental-fairness test would have required intrusive federal review that could be mitigated, if not eliminated, by determining the *Miranda* issue first.

Abe Fortas made this very point when he argued *Gideon* before the Court.<sup>158</sup> Even Justice Harlan was persuaded in *Gideon*, but in subsequent cases he clung to the fundamental fairness test. The weight accorded the interest in determinacy, by the Court as well as by Justice Harlan himself in *Gideon*, and by his conservative successors during the Burger and Rehnquist years, are a fair measure of how misguided his adherence to fundamental fairness was during the sixties.

Harlan's misplaced faith in legislatures, finally, exposed a major tension in legal process theory. The commitment to rule of law values on the one hand, and judicial resolution of particular cases on the other, presupposes a body of primary rules for the courts to apply. Absent those primary rules, courts would be acting in the classic common-law tradition of making up the rules according to common-sense assessments of the facts at bar. So long as the legislature can override common-law doctrine, this conception of the judicial role is not very threatening. The constitutional context is different.

We might compare Justice Harlan's commitment to case-by-case adjudication with his view three years later on retroactivity:

Matters of basic principle are at stake. In the classical view of constitutional adjudication, which I share, criminal defendants cannot come before this Court simply to request largesse. This Court is entitled to decide constitutional issues only when the facts of a particular case *require* their resolution for a just adjudication on the merits. *See Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803). We do not release a criminal from jail because we like to do so, or because we think it wise to do so, but only

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constitutionally required).

<sup>156</sup> *See Miranda*, 507 U.S. at 699:

Finally, and most importantly, eliminating review of *Miranda* claims would not significantly benefit the federal courts in their exercise of habeas jurisdiction, or advance the cause of federalism in any substantial way. As one *amicus* concedes, eliminating habeas review of *Miranda* issues would not prevent a state prisoner from simply converting his barred *Miranda* claim into a due process claim that his conviction rested on an involuntary confession.

<sup>157</sup> Another factor that might have been present is that the prosecution does not often lose *Miranda* appeals. *See* George C. Thomas III, *Stories About Miranda*, 102 MICH. L. REV. 1959, 1974 (2004) (finding in sample of 246 *Miranda* claims, mostly from appellate cases, the state lost only 5% of the time).

<sup>158</sup> *See* Brief for the Petitioner at 33, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (No. 155).

because the government has offended constitutional principle in the conduct of his case. And when another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a “new” rule of constitutional law.<sup>159</sup>

I see no way to square this compelling passage—a passage ultimately accepted by the Court as stating the sound law of retroactivity—with Justice Harlan’s dissent in *Miranda*.

The legal process school originated in the study of legislation and statutory interpretation. In that context, the interstitial character of adjudication is clearest, as is the legislature’s superior institutional capacity for primary law-making. Transposing the legal process school’s tenets to constitutional law posed something of a challenge, especially when the constitutional provisions are those magnificent generalities, “due process” and “equal protection.”

The higher the generality of a constitutional provision, the more “reasoned elaboration” of the “purpose” behind the constitutional provision invites the imposition of subjective judicial policy preferences. The legal process theorists responded in several ways. Bickel’s “passive virtues” thesis discouraged constitutional adjudication altogether, aiming to avoid freezing public policy in the form of top-down directives from an unelected court. Wechsler’s neutral principles criterion sought to avoid result-orientation of a partisan sort. Eventually, process theory, building on the *Carolene Products* footnote<sup>160</sup> and early work by Wechsler,<sup>161</sup> provided a basis for John Hart Ely’s and Jesse Choper’s representation-reinforcement theory of judicial review.<sup>162</sup> Despite periodic obituaries,<sup>163</sup> process theory continues to evolve, and, arguably, thrive.<sup>164</sup>

<sup>159</sup> *Desist v. United States*, 394 U.S. 244, 258–59 (1969) (Harlan, J., dissenting).

<sup>160</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4 (1938).

<sup>161</sup> Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 560 n.59 (1954) (distinguishing state from individual capacities for democratic self-defense).

<sup>162</sup> See generally, JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980).

<sup>163</sup> See, e.g., Ronald J. Krotoszynski, Jr., *The New Legal Process: Games People Play and the Quest for Legitimate Judicial Decision Making*, 77 WASH. U.L.Q. 993, 1000 (1999) (“The legal academy has long since moved on, and if one attempted to defend Wechsler’s version of Legal Process Theory at a contemporary scholarly meeting, the best reception that one could hope to receive would be polite chuckles from the audience.”) (footnotes omitted).

<sup>164</sup> See, e.g., NEIL KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994) (arguing that the assignment of policy goals to markets, legislatures or courts can be as important as choosing policy goals in the first place, and that each institutional alternative has weaknesses as well as strengths); CASS SUNSTEIN, *ONE CASE AT A TIME* (1999) (defending theory of “judicial minimalism” that counsels courts to decide controversial issues with narrow holdings and shallow rationales); Michael C. Dorf, *Legal Indeterminacy and Institutional*

When legislatures have left a vacuum, the applicable constitutional provisions are very general, and the volume of litigation is high, the ideal of deciding each case on its own facts conflicts with the ideal of neutral principles. During the fundamental fairness regime, the Supreme Court took only a few criminal procedure cases, concentrating on capital cases. The defense won many of these cases, but, as Harlan conceded in his *Gideon* concurrence, the state courts often failed to take the hint. Even *with* intrusive supervision by the lower federal courts, of the sort that the *Gideon* and *Withrow* courts found disagreeable, similar cases were bound to be resolved differently.

This would offend not only the neutral principles criterion, but also undermine the determinacy of legal doctrine. Bruce Ackerman, for example, cogently points out that Harlan's case-by-case approach could not provide guidance to other actors in the vast bureaucracy that administers the criminal justice system.<sup>165</sup> The point is a compelling one; it explains why justices who are more sympathetic to law enforcement than Justice Harlan have refused to return to the totality-of-the-circumstances test.<sup>166</sup> I add here only this explanation: the case-by-case approach *would have made sense* if the courts were making law interstitially in the criminal field.

Professor Ackerman's point is a powerful argument to the effect that Justice Harlan badly applied legal process theory in the criminal cases. When legal process theorists misunderstand institutional realities, they will misapply their theory. But process theory directs the judges to understand the institutional realities.<sup>167</sup> The

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*Design*, 78 N.Y.U. L. REV. 875 (2003) (drawing on legal-process theory to defend a vigorous but dynamic "experimentalist" role for courts). Professor Dorf and Professor Sunstein draw very different implications from the premise of judicial supremacy; Professor Sunstein would promote self-regulation of the Court's constitutional monopoly, while Professor Dorf would encourage market entry by legislatures. In the criminal procedure field, the volume of behavior regulated by constitutional law, and the political vise-grip pressuring legislatures, makes reliance on legislative responses to constitutional adjudication problematic. For my argument to that effect, see Donald A. Dripps, *supra* note 136. More generally, the work of Professors Sunstein and Dorf, pointing in rather different yet interesting directions, nonetheless suggests that reports of the demise of process theory have been somewhat exaggerated.

<sup>165</sup> See Ackerman, *supra* note 36, at 28 ("won't common law judges simply be overwhelmed by the need to make individualized judgments in the thousands of cases thrown up each year by the modern police states?"). Ackerman goes on to suggest that common-law constitutional methodology cannot generate the sort of bright-line rules required by the criminal procedure context, but that judges following his theory of "constitutional moments" can. See *id.* at 11–12. I see no reason to link inexorably the method of the decision process (common law, originalist, textualist, extra-textualist, or what have you) with the output of the decision process (rule versus standard). Whatever interpretive approach the justices take to the criminal cases, their sheer volume dictates issuing doctrine as bright-line rules when possible, and deferring to lower-court applications of general standards when rules are not possible. The Courts that decided *Miranda* and *New York v. Belton*, 453 U.S. 454 (1980), both adopted bright-line rules. The judicial philosophies of their members, however, varied greatly; and none of the justices who joined the majority in either case openly embraced a theory of constitutional moments.

<sup>166</sup> See *Dickerson v. United States*, 530 U.S. 428 (2000) (reaffirming *Miranda*).

<sup>167</sup> Henry Hart, for instance, faulted the Warren Court for taking too many cases to correct mere errors rather than to make needed law. See Hart, *supra* note 1.

survival of the Warren Court landmarks testifies to the ability of judges to do that tolerably well.

The Warren Court majorities assessed the institutional competence of courts and legislatures regarding criminal procedure more accurately than did Justice Harlan. With the aid of representation-reinforcement theory, we can see that the criminal procedure cases, unlike many other cases coming before even the Supreme Court, call for primary rather than interstitial judicial lawmaking. And if society needs determinate rules for the criminal process, the courts must translate the general terms of the constitution into rule-like doctrine.

The legitimacy deficit attending unelected judges translating “fundamental fairness” into code-like doctrinal formulations raises familiar and important concerns about judicial activism and the normative vacuity of process theory. These same concerns are contributing to the Court’s current move toward common-law history to guide the interpretation of the Fourth, Fifth and Sixth Amendments. Let us turn, then, to a final aspect of the Harlan legacy in criminal procedure.

#### IV. BACK TO THE FUTURE: A NEW LEGAL PROCESS ALTERNATIVE TO THE NEW FORMALISM IN CONSTITUTIONAL CRIMINAL PROCEDURE

One might suppose that my critique of Justice Harlan’s favored approach implicitly defends the Warren Court. Nothing could be further from my intentions. In my view, the saddest consequence of Justice Harlan’s reliance on fundamental fairness was leaving the field to selective incorporation.

Fundamental fairness and selective incorporation are not the only alternatives for criminal procedure. One can equate due process with common-law history,<sup>168</sup> the interpretation behind the incorporation decisions as well as the new originalism of the current Court. One can also equate due process with natural law.<sup>169</sup> Neither of these moves is completely bereft of support in text, history and precedent. The disadvantages of particularity attend one,<sup>170</sup> and the disadvantages of generality attend

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<sup>168</sup> The Court made this move in *Murray v. Hoboken Land & Improv. Co.*, 59 U.S. 272 (1855).

<sup>169</sup> The Court made this move, with respect to the Fifth Amendment, before the Civil War in *Dred Scott v. Sanford*, 60 U.S. 393 (1856), and after the war, with respect to the Fourteenth Amendment, in *Hurtado v. California*, 110 U.S. 516 (1884).

<sup>170</sup> Cf. *Hurtado*, 110 U.S. at 529 (A pure historical approach would be to “deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.”).

the other.<sup>171</sup> If there is another option permitted by authority, we ought, on policy grounds, to at least consider it.

Due process always has meant a prohibition on extra-judicial punishment coupled with procedures that accurately and even-handedly apply the substantive law to particular cases.<sup>172</sup> I have defended this instrumental account elsewhere;<sup>173</sup> what I would add here is an explanation of why this approach could not have guided the Warren Court's criminal procedure revolution given the then-prevailing legal *zeitgeist*.

Harlan looked to tradition and precedent to constrain judicial choice, and cases such as *Hurtado*,<sup>174</sup> *Twining*<sup>175</sup> and *Palko*<sup>176</sup> had taken a natural law, rather than a historical or instrumental, turn. Harlan, moreover, believed that judicial restraint permitted legislatures to develop better reforms than the courts could impose.<sup>177</sup> So it was perfectly predictable that he would put his faith in legislatures, describe the limited judicial role in nakedly normative terms, and override legislative choices on only isolated occasions.

It was just as predictable that Warren, Brennan, Douglas, Goldberg, Fortas, and Marshall saw in Harlan's stance only the discredited substantive due process of the *Lochner* era, yoked to a case-by-case approach that could not deliver urgently needed systemic reforms. Justice Black's vote depended on linking the outcome to incorporation, rather than to some conception of due process more robust than Harlan's. Lost in the shuffle, with some prominent exceptions such as *Brady v. Maryland*<sup>178</sup> and *In re Winship*,<sup>179</sup> was the possibility that procedural due process—a

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<sup>171</sup> See *Adamson v. California*, 332 U.S. 46, 90 (1947) (Black, J., dissenting) (footnote omitted):

It must be conceded, of course, that the natural-law-due-process formula, which the Court today reaffirms, has been interpreted to limit substantially this Court's power to prevent state violations of the individual civil liberties guaranteed by the Bill of Rights. But this formula also has been used in the past, and can be used in the future, to license this Court, in considering regulatory legislation, to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the States as well as the Federal Government.

<sup>172</sup> For example, despite being no devotee of *Lochner*, Justice Black's opinion for the Court in *Thompson v. Louisville* read due process as containing a core requirement of adjudicated wrongdoing, based on proof, before the imposition of punishment. 362 U.S. 199 (1960) (invalidating a loitering and disorderly conduct conviction for lack of any evidentiary support).

<sup>173</sup> DRIPPS, *supra* note 155.

<sup>174</sup> *Hurtado*, 110 U.S. 516.

<sup>175</sup> *Twining v. New Jersey*, 211 U.S. 78 (1908).

<sup>176</sup> *Palko v. Connecticut*, 302 U.S. 319 (1937).

<sup>177</sup> See, e.g., *Miranda*, 384 U.S. at 531 (White, J., dissenting).

<sup>178</sup> *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that prosecution has constitutional duty to disclose material exculpatory information upon timely request by defense). Justice Harlan did not believe the due process issue squarely raised in *Brady*, and so gave no opinion on it. See *id.* at 92 (Harlan, J., concurring).

<sup>179</sup> *In re Winship*, 397 U.S. 358 (1970) (holding that due process requires government to establish,

far more respectable theory than substantive due process—might arrange a happier marriage between ancient values and modern conditions.

Harlan's attachment to fundamental fairness, therefore, was a proximate cause of the Warren Court's turn to selective incorporation. The fundamental fairness test was clearly deficient, Justice Black was pushing incorporation, and there simply was not an available theory that would cope with legislative inaction in criminal justice. If Harlan played a role in bringing incorporation about, he also foresaw some of its deleterious consequences.

In the inevitable project of furthering sensible policy objectives, the justices have done exactly what Harlan predicted they would do in an incorporation regime. They have diluted the Bill of Rights in federal cases, and they have imposed arbitrary limitations on law enforcement in the states.<sup>180</sup> With no procedural advantage for the prosecution in state relative to federal courts, criminal justice has become increasingly federalized, as Harlan feared.<sup>181</sup> Modern observers across the political spectrum lament the trend.<sup>182</sup>

The formalistic turn in the recent criminal procedure cases—the new originalism apparent in *Wilson v. Arkansas*,<sup>183</sup> *Atwater*,<sup>184</sup> *Blakely v. Washington*<sup>185</sup> and *Crawford v. Washington*<sup>186</sup>—is a development Harlan would not have embraced. Yet, this too is to a degree attributable to his commitment to fundamental fairness rather than procedural reliability. Justice Black rightly pointed out that fundamental fairness was just a form of substantive due process.<sup>187</sup> The fear of subjectivity helps explain why the Court has held onto incorporation; there is no majority in favor of openly

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in juvenile court delinquency proceeding based on conduct that would be criminal if committed by adult, proof beyond reasonable doubt that juvenile engaged in the charged conduct). Harlan concurred in *Winship* in one of his justly famous opinions. See *id.* at 368 (Harlan, J., concurring).

<sup>180</sup> Anyone who compares the state of Fourth and Fifth Amendment law before and after *Mapp* and *Malloy* will come to this conclusion. For my own views, see Donald A. Dripps, *On the Costs of Uniformity, and the Prospects of Dualism, in Constitutional Criminal Procedure*, 45 ST. LOUIS U. L.J. 433 (2001).

<sup>181</sup> See *id.* at 436–38.

<sup>182</sup> See, e.g., Sanford Kadish, *The Folly of Overfederalization*, 46 HASTINGS L.J. 1247 (1995); Third Branch, Chief Justice Raises Concerns on Federalization (June 1998), <http://www.uscourts.gov/ttb/jun98ttb> (last visited Sept. 30, 2005).

<sup>183</sup> *Wilson v. Arkansas*, 514 U.S. 927 (1995) (finding knock-and-announce requirement in Fourth Amendment based on common law history).

<sup>184</sup> *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (rejecting claim that warrantless misdemeanor arrest violated Fourth Amendment because, *inter alia*, common-law history did not clearly prohibit such arrests).

<sup>185</sup> *Blakely v. Washington*, 542 U.S. 296 (2004) (holding that right to trial by jury includes right to jury finding of facts that control sentence range, relying *inter alia* on common-law history).

<sup>186</sup> *Crawford v. Washington*, 541 U.S. 36 (2004) (holding that Sixth Amendment confrontation clause prohibits use at trial of accusatory hearsay declarations if the defense had no opportunity to cross-examine declarant at trial or before, dying declarations excepted; principal reliance in opinion on common-law history).

<sup>187</sup> See, e.g., *Rochin v. California*, 342 U.S. 165, 174 (1952) (Black, J., concurring).

normative analysis of the sort exemplified by Harlan's opinion in *United States v. White*.<sup>188</sup> But justices who turn away from due process because they fear subjectivity are not likely to take a normative approach to the provisions in the Bill of Rights.

The Bill's provisions are highly open-textured. If such terms as "unreasonable" and "compelled" are not to be treated as incorporating by reference contemporary moral values, the justices must look somewhere else to resolve the mysteries of the text. The only obvious choices are precedent and history, so it is hardly surprising to see the justices milking history for all its worth (and, in my view, then some).<sup>189</sup>

Harlan's view was that the appeals to history rarely controlled real cases, so that the important judgments were normative. These could be distributed across time and so across persons by *stare decisis*, but they could not be avoided. When the gaps or contradictions in the corpus of precedent demanded normative judgments from the justices, Harlan did not flinch or hide the ball. He would consult tradition, but tradition did not come to a screeching, static halt in 1791.

The new originalism suffers by comparison with Harlan's legal process approach, both theoretically and functionally. Theoretically, any thorough-going originalism would need to take some principled approach to the incorporation question. My own view is that the historical case for total incorporation is considerably weaker than the case against it.<sup>190</sup> But originalists who reject incorporation, except as coincident with some interpretation of due process, need an originalist account of due process that yields selective incorporation. The Court, however, never defended selective incorporation on historical grounds; rather, selective incorporation was an application of substantive due process.

A dedicated originalist might buy the case for total incorporation, but that would force the states to use indictment rather than information, generate a wave of litigation over gun control, and imperil both workers' compensation policies under the Seventh Amendment and the juvenile court under the Sixth Amendment. If the Court rejects the historical case for total incorporation, we would deserve some explanation, on originalist grounds, of why the Court was right, in *Malloy v. Hogan*,<sup>191</sup> to overturn old

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<sup>188</sup> *United States v. White*, 401 U.S. 745 (1971). See *infra* notes 203–04 and accompanying text.

<sup>189</sup> Professor Sklansky's excellent article, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739 (2002), traces the origins of the new originalism in Fourth Amendment law with admirable thoroughness and with an admirably sophisticated and restrained critique. Rereading his piece, I was struck by the appearance of the phrase "reasoned elaboration" in the concluding paragraph. If Harlan were on the Court today, I would not be surprised to see him citing Sklansky's article.

<sup>190</sup> See DRIPPS, *supra* note 155, at 27–36. There is some evidence on the other side, but I am reinforced in my views by George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145 (2001) and JAMES E. BOND, *NO EASY WALK TO FREEDOM* (1997). Much could be said on the subject, but I would ask those with a view opposed to mine to consider Professor Thomas's assessment of the debates in Congress, Dean Bond's assessment of the ratification process in the South, and my own analysis of the earliest court decisions treating constitutional challenges to state criminal procedures.

<sup>191</sup> *Malloy v. Hogan*, 378 U.S. 1 (1964).

cases rejecting the claim that due process contained a right not to be compelled to be a witness against oneself.<sup>192</sup>

A majority of the pragmatic types we can expect to secure posts on the Supreme Court is not likely to find either choice attractive. But so long as the Court does not give some historical account of incorporation, the new formalism will be theoretically groundless. In *Atwater*, for instance, the Court canvasses the eighteenth century tort-law in search of prevailing practice.<sup>193</sup> There is not a word about why the Fourth Amendment applies to the Lago Vista police.

If the incorporation question were subject to the sort of inquiry undertaken in *Atwater*, the result might well unhinge fifty years of legal developments. If we were seriously interested in the original understanding, we would look for cases in which the plaintiff sued the defendant for trespass, the defendant admitted the taking but gave justification based on a state statute, and the plaintiff countered that the state statute authorizing the seizure violated the Fourth and Fifth Amendments to the federal Constitution.

Just such a case came before the Michigan Supreme Court six years after the adoption of the Fourteenth Amendment. Judge Cooley wasted no time in dismissing the constitutional claim: “There is nothing in this objection. It is settled beyond controversy, and without dissent, that these amendments are limitations upon federal, and not upon state power.”<sup>194</sup>

Leave aside, for a moment, the uphill claim that Judge Cooley did not know nineteenth century law as well as we do. An unloaded historical inquiry—one that is willing to accept as the correct reading of the Constitution whatever the history turns up—might turn up anything. Why should we overthrow functional bodies of law based on an inquiry whose whole attraction is that it is arbitrary from an outcome point of view? The historical inquiry, moreover, is never settled. When some clever graduate student comes upon a new trove of sources, or a compelling reinterpretation, should we really change otherwise efficient and humane police patrol or interrogation practices? You might think that the current state of historical research gives your policy program comfort, but that could change if history holds policy hostage.

The only kind of originalism that has any chance of influencing doctrine is *loaded* originalism. No lawyer goes into the sources looking to force bad policy on the country. But an honest historian doesn’t impute modern values to her subjects. The new originalism, by contrast, rarely dictates a result the judge-turned-historian really dislikes.<sup>195</sup> The common-law backdrop to the Fourth Amendment was tort law, and on important questions there was either a shortage or a surplus of common-law authority. When plaintiffs rarely sued in tort (the search incident to lawful arrest

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<sup>192</sup> *Malloy* overruled *Adamson v. California*, 332 U.S. 46 (1947), and *Twining v. New Jersey*, 211 U.S. 78 (1908).

<sup>193</sup> *Atwater v. City of Lago Vista*, 532 U.S. 318, 327–40 (2001).

<sup>194</sup> *Weimer v. Bunbury*, 30 Mich. 201, 208 (1874).

<sup>195</sup> See *Atwater*, 532 U.S. at 529–30 (conceding that *Atwater*’s position had the support of East, Stephens, and Blackstone, but nonetheless finding history either uncertain or in favor of the state).

context, for instance), there was a shortage. When there were conflicting cases and commentators, as in the *Atwater* context, there was a surplus. Either way, the answer you get depends on the question you ask or on whom you choose to put the burden of proof.

Instead of giving candid answers to the normative questions that have to color, and may control, the historical inquiry, the new originalism treats us to an exegesis of a question the founders gave a debated answer to in a profoundly different institutional context (no police departments; few serious offenses; slow communications; etc.). Those who pounce on one side of the historical debate and demand agreement from those who favor, on policy grounds, a different outcome, are unlikely to persuade anyone but themselves. The old realist critique of formalism returns to us, in the context of the criminal justice system, where functional considerations have even more significance than usual.

Harlan's focus on precedent offers a more promising approach to constraining judicial subjectivity. If the reader worries that precedent constrains less than history, I point to two items from the record of the Warren Court. The first is that the Warren Court overruled precedent, and indeed received considerable criticism for doing so.<sup>196</sup> Judges don't overrule cases they can distinguish. So when we see a judicial majority overruling a precedent, we witness an obstacle determinate enough to avoid circumvention.

Second, Harlan repeatedly followed cases in which he had filed a dissenting opinion.<sup>197</sup> His practice of concurrence-under-protest became a familiar feature of the later Warren Court. Yet Harlan was also a very adept lawyer. Clearly, he acted against his impulses under the duress of precedent far more often than under the duress of history.

As I have argued elsewhere, this scrupulous respect for *stare decisis* is vital in the criminal procedure cases.<sup>198</sup> If each justice votes according to her own lattice-work of preferred outcomes, the doctrinal output is likely to be incoherent. Individual justices can satisfy their personal consciences about constitutional meaning (a privilege the Court denies other officials under *Cooper v. Aaron*<sup>199</sup>), but only at the expense of neutral principles and determinate guidance for other officials.

The upshot is that Harlan was wrong about the prospects of constructive legislation in the criminal justice field, and so also wrong about the utility of the fundamental fairness test applied on a case-by-case basis. Harlan was right, however,

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<sup>196</sup> *Mapp* overruled *Wolf*; *Gideon* overruled *Betts*; *Malloy* overruled *Adamson v. California* and *Twining v. New Jersey*; *Miranda* overruled *Cicenia v. LaGay*, 357 U.S. 433 (1958), and *Crooker v. California*, 357 U.S. 504 (1958).

<sup>197</sup> See *Orozco v. Texas*, 394 U.S. 324, 327 (1969) (Harlan, J., concurring); *Coolidge v. New Hampshire*, 403 U.S. 443, 490 (1971) (Harlan, J., concurring); *North Carolina v. Pearce*, 395 U.S. 711, 744 (1969) (Harlan, J., concurring).

<sup>198</sup> See *Dripps*, *supra* note 136, at 59–74.

<sup>199</sup> 358 U.S. 1 (1958). For some thoughts on the context in which *Cooper* arose, see George C. Thomas III, *Islands in the Stream of History: An Institutional Archeology of Dual Sovereignty*, 1 OHIO ST. J. CRIM. L. 345 (2003).

about the primacy of precedent, the functional disadvantages of the incorporation theory, and the distraction of history in this same field. This assessment will generate reasoned disagreement. A less debatable claim holds that Harlan's most impressive achievement may well be that whether we agree or disagree with his judgments, we know from his candid and reasoned opinions what they were and the reasons behind them.

#### V. AN EXAMPLE FOR COMPARISON

If we were to test alternative approaches to constitutional criminal procedure with a single illustration, government monitoring of private conversations with the connivance of a participant to the conversation offers a good test case. Modern police forces routinely exploit informants, and often but not always equip them with hidden microphones, permitting other government agents to monitor and/or record what is said. The practice certainly furthers enforcement of the criminal law, and just as clearly invades personal privacy.

Prior to *Katz*, the Warren Court decided a series of cases involving informants, hidden microphones, or both.<sup>200</sup> The upshot of these cases was that the government's use of a spy did not constitute a search. Absent an illegal entry onto private premises, there was no common-law trespass and so no search. Even when consent to enter was obtained by false pretenses, the Court rejected, on pure policy grounds, the argument that the common-law doctrine of trespass *ab initio* converted the entry into a search.<sup>201</sup>

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<sup>200</sup> See *United States v. Lewis*, 385 U.S. 206 (1966) (holding that it is not a search to obtain entry by false pretenses); *Hoffa v. United States*, 385 U.S. 293 (1966) (holding that it is not a search for federal authorities to recruit informant, facing charges, to spy on suspect's old friend); *Lopez v. United States*, 373 U.S. 427 (1963) (holding that it is not a search for IRS agent to record conversation with suspect in suspect's premises); *On Lee v. United States*, 343 U.S. 747 (1952) (holding that it is not a search when informant, wearing hidden microphone monitored by government agent, enters suspect's business and converses with suspect).

<sup>201</sup> See *On Lee*, 343 U.S. at 752:

If we were to assume that Chin Poy's conduct was unlawful and consider this argument as an original proposition, it is doubtful that the niceties of tort law initiated almost two and a half centuries ago by the case of the *Six Carpenters*, 8 Coke 146(a), cited by petitioner, are of much aid in determining rights under the Fourth Amendment. But petitioner's argument comes a quarter of a century too late: this contention was decided adversely to him in *McGuire v. United States*, 273 U.S. 95, 98 (1927) where Mr. Justice Stone, speaking for a unanimous Court, said of the doctrine of trespass *ab initio*: "This fiction, obviously invoked in support of a policy of penalizing the unauthorized acts of those who had entered under authority of law, has only been applied as a rule of liability in civil actions against them. Its extension is not favored." He concluded that the Court would not resort to "a fiction whose origin, history, and purpose do not justify its application where the right of the government to make use of evidence is involved." This was followed in *Zap v. United States*, 328 U.S. 624, 629 (1946).

The *On Lee* opinion's treatment of the cases is not entirely fair; in *McGuire* the government agents had a warrant, and the defendant argued that their destruction of the liquor seized under the warrant made them a trespasser *ab initio*. But trespass, whether *ex ante* or *ab initio*, is justified by warrant. *Zap* is still farther afield; there, government agents were admitted to business premises by an agent of defendant, and

*Olmstead*'s holding that electronic eavesdropping, absent a trespass against the suspect, was not a search meant that the government could electronically monitor and record the informant's conversations with the suspect.<sup>202</sup>

*Katz* called these cases into question by shifting the focus of the Fourth Amendment from property to privacy. In *United States v. White*,<sup>203</sup> however, a plurality of the Court adhered to the earlier series of cases based on property concepts despite the intervention of *Katz*. Justice Black adhered to his dissent in *Katz*, adding a fifth vote for the plurality's ruling.<sup>204</sup> As a result, government agents may infiltrate the private life of a target and record their conversations with the target without reasonable suspicion, let alone a warrant.

In his opposition to eavesdropping Harlan went further than any of his colleagues with the exception of Douglas. Harlan did not characterize undercover operations as searches,<sup>205</sup> but he saw a difference of constitutional importance when conversations with undercover agents were electronically monitored.<sup>206</sup> A famous passage is worth quoting in full:

Since it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society. The critical question, therefore, is whether under our system of government, as reflected in the Constitution, we should impose on our citizens the risks of the electronic listener or observer without at least the protection of a warrant requirement.

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the claim was that the government's seizure of a check made their entry *trespass ab initio*. The *On Lee* Court dealt with an undercover operative wired for sound, a situation not present in either *McGuire* or *Zap*.

<sup>202</sup> The Court's resistance, on policy grounds, to the trespass theory when it worked to the advantage of the defense is evident from the majority opinion in *Olmstead*; similar concerns likely were at work in *On Lee*. *Katz* was, in a sense, nothing more than the other shoe dropping. See *Olmstead v. United States*, 277 U.S. 438, 463–64 (1928):

*Gouled v. United States* carried the inhibition against unreasonable searches and seizures to the extreme limit. Its authority is not to be enlarged by implication, and must be confined to the precise state of facts disclosed by the record. A representative of the Intelligence Department of the Army, having by stealth obtained admission to the defendant's office, seized and carried away certain private papers valuable for evidential purposes. This was held an unreasonable search and seizure within the Fourth Amendment. A stealthy entrance in such circumstances became the equivalent to an entry by force. There was actual entrance into the private quarters of defendant and the taking away of something tangible. Here we have testimony only of voluntary conversations secretly overheard.

<sup>203</sup> *United States v. White*, 401 U.S. 745 (1971) (plurality opinion).

<sup>204</sup> *Id.* at 754 (Black, J., concurring).

<sup>205</sup> Harlan joined the majority in *Hoffa v. United States*, 385 U.S. 293 (1966) (holding that there is no Fourth Amendment violation when authorities recruit an old friend of the suspect to spy on him in his home).

<sup>206</sup> *White*, 401 U.S. at 768 (Harlan, J., dissenting).

This question must, in my view, be answered by assessing the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement. For those more extensive intrusions that significantly jeopardize the sense of security which is the paramount concern of Fourth Amendment liberties, I am of the view that more than self-restraint by law enforcement officials is required and at the least warrants should be necessary.<sup>207</sup>

The difference between spying without and spying with a hidden microphone lies in the sense of freedom from surveillance that Harlan saw as crucial to both free expression and the quiet enjoyment of private life.<sup>208</sup>

The solution, according to Harlan, was to treat electronic monitoring, but not the government spying itself, as a Fourth Amendment search subject to the warrant requirement.<sup>209</sup> Precedent had washed away the trespass doctrine, and turned the focus of Fourth Amendment law onto the systemic reasonableness of government intrusions onto privacy.<sup>210</sup> Nonetheless, Harlan would not accept either the *Terry* standard of justification, or a *Camara*-type administrative warrant for electronic surveillance. Only the traditional warrant, supported by probable cause, would do.<sup>211</sup>

In a revealing about-face, Harlan read Title III's exemption for consensual surveillance as an invitation to the Court.<sup>212</sup> He expressed the desire to leave room for

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<sup>207</sup> See *id.* at 786–87 (Harlan, J., dissenting).

<sup>208</sup> See *id.* at 790 (Harlan, J., dissenting):

[T]he expectation of the ordinary citizen, who has never engaged in illegal conduct in his life, that he may carry on his private discourse freely, openly, and spontaneously without measuring his every word against the connotations it might carry when instantaneously heard by others unknown to him and unfamiliar with his situation or analyzed in a cold, formal record played days, months, or years after the conversation.

<sup>209</sup> See *id.* at 787 (Harlan, J., dissenting):

The impact of the practice of third-party bugging, must, I think, be considered such as to undermine that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a free society. It goes beyond the impact on privacy occasioned by the ordinary type of “informer” investigation upheld in *Lewis* and *Hoffa*. The argument of the plurality opinion, to the effect that it is irrelevant whether secrets are revealed by the mere tattletale or the transistor, ignores the differences occasioned by third-party monitoring and recording which insures full and accurate disclosure of all that is said, free of the possibility of error and oversight that inheres in human reporting.

<sup>210</sup> See *id.* at 773–80 (Harlan, J., dissenting).

<sup>211</sup> *Id.* at 789–90 (Harlan, J., dissenting) (“Abolition of *On Lee* would not end electronic eavesdropping. It would prevent public officials from engaging in that practice unless they first had probable cause to suspect an individual of involvement in illegal activities and had tested their version of the facts before a detached judicial officer.”).

<sup>212</sup> *Id.* at 790–92 (Harlan, J., dissenting):

I reach these conclusions notwithstanding seemingly contrary views espoused by both

legislative action, but his Fourth Amendment rationale would have foreclosed legislatures from permitting consensual surveillance on any terms less rigorous than a warrant supported by probable cause. He seemed to think that judicial intervention would prompt thorough-going legislative regulation, just as *Berger* and *Katz* had done with wiretapping and bugging. In *Miranda*, Harlan wanted to wait for legislatures to make the first move; by the time of *White* he had begun to reassess the institutional competence of legislatures in this area.

Had the Court agreed with Harlan in *White*, the result would have been lamentable. The Fourth Amendment requires probable cause for warrants, so until probable cause had emerged from an undercover investigation, recording would be prohibited. But spying would not be prohibited, and so law enforcement agents would have a strong incentive to skip the recording, which typically adds an extra element of danger to the informant anyway. Trials would turn on the uncorroborated testimony of informants, posing serious risks of both unjust convictions and unjust acquittals.<sup>213</sup>

There is a significant privacy concern here, but it lies with the spying, not with making accurate records of what the spying turns up. I regard Harlan's patrician concern for plausible deniability—immunity from accountability to anyone the actor knows will lose a swearing contest with him<sup>214</sup>—as quaint, if not sinister. Indeed, my own view is the reverse of Harlan's; electronic recording by informants should be required, not prohibited, in the interest of truth.<sup>215</sup> Undercover operations that target specific individuals, however, should be subject to the reasonable suspicion standard, whether under the rubric of Fourth Amendment "reasonableness" or a due-process based requirement of proportion between the intrusiveness of the investigation and the degree of justification *ex ante*.<sup>216</sup>

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Congress and an American Bar Association study group. Both the ABA study and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 212, 18 U.S.C. § 2510 et seq. (1964 ed., Supp. V), appear to reflect little more than this Court's prior decisions. Indeed, the comprehensive provisions of Title III are evidence of the extent of congressional concern with the impact of electronic surveillance on the right to privacy. This concern is further manifested in the introductory section of the Senate Committee Report. Although § 2511(2)(c) exempts consensual and participant monitoring by law enforcement agents from the general prohibitions against surveillance without prior judicial authorization and makes the fruits admissible in court, see § 2515, congressional *malaise* with such conduct is evidenced by the contrastingly limited endorsement of consensual surveillance carried out by private individuals. While individual Congressmen expressed concern about and criticized the provisions for unsupervised consensual electronic surveillance contained in § 2511, the Senate Committee Report comment, to the effect that "[i]t [§ 2511(2)(c)] largely reflects existing law," S. Rep. No. 1097, 90th Cong., 2d Sess., 93–94 (1968), followed by citations to *On Lee* and *Lopez*, strongly suggests that the provisions represent not intractable approval of these practices, but rather an intention to adopt these holdings and to leave to the courts the task of determining their viability in light of later holdings such as *Berger*, *Osborn*, and *Katz*.

<sup>213</sup> On the risks of informant testimony to innocent defendants, see for example DRIPPS, *supra* note 155, at 177–78.

<sup>214</sup> The male pronoun is used here by design.

<sup>215</sup> See DRIPPS, *supra* note 155, at 178.

<sup>216</sup> Cf. Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLAL. REV. 1 (1991)

As Harlan recognized in *White*, the Fourth Amendment jurisprudence had changed even since the time of the earlier spying cases. When those cases were decided, the choice was stark; if undercover spying was held to be a search, it would require authorization by warrants supported by probable cause. But by the time of *White*, *Terry* had held that some searches and seizures could be reasonable if supported by reasonable suspicion, and *Camara* had held that some warrants could issue without traditional probable cause.

Harlan's hostility to recording gives too little weight to the constitutional interest in reliable evidence at criminal trials. His appeal to the systemic consequences of secret recordings for an open society seem, at least in retrospect, overblown. Ultimately the open society depends on substantive tolerance rather than informational privacy. The latter substitutes for the former only with serious risks to public security as well as the tendency to entrench social prejudices by exempting the privileged from the sanctions otherwise attaching to unpopular thoughts or behaviors.<sup>217</sup> This is to qualify, not deny, the value of privacy relative to other values. If police need a warrant founded on probable cause to open a UPS package addressed to the suspect, they ought to be able to show reasonable suspicion before turning intimate friends against him.

These are differences of degree about the outcome, not about judicial method. Harlan's opinion in *White* is admirably thorough, meticulous about precedent, and remarkably honest. Harlan admits that text and history permit, but do not require, a ruling for either party. The choice is therefore normative rather than formal, and Harlan deserves great credit for openly declaring his values and for explaining how he balances their conflicts in the case at hand. His assessment of the prospects of legislative reform had become more realistic.

We might have wished for a theory of due process in criminal cases less vacuous than "fundamental fairness," some theory that could have supported "reasoned elaboration" and come closer to the ideal of neutral principles. We can be thankful that we were not treated to a tendentious claim that text and history "require" the result Harlan desired. At least *I* am thankful, after comparing Harlan's legal-process approach to third-party monitoring, with Justice Scalia's neo-originalist approach to the use of the thermal-imaging technique.

In *United States v. Kyllo*, Justice Scalia's opinion intimates a turn to some founding-era understanding of the Fourth Amendment's threshold categories, independent of modern notions of reasonable expectations of privacy.<sup>218</sup> Any return

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(arguing that even without a Fourth Amendment, search and seizure law ought to require prior approval of police actions and justification based on factual suspicion proportionate to the intrusiveness of the police practice).

<sup>217</sup> For a fuller exposition, see Donald A. Dripps, *Terror and Tolerance: Criminal Justice for the New Age of Anxiety*, 1 OHIO ST. J. CRIM. L. 9 (2003).

<sup>218</sup> *Kyllo v. United States*, 533 U.S. 27, 34–35 (2001):

While it may be difficult to refine *Katz* when the search of areas such as telephone booths, automobiles, or even the curtilage and uncovered portions of residences is at issue, in the case of the search of the interior of homes—the prototypical and hence most commonly

to the common-law trespass understanding of “searches” would be unfortunate. The trespass *ab initio* doctrine would mean that informants would need warrants to enter private premises, but not to spy on the target outside his own premises. If trespass *ab initio* applied to conveyances as well as real estate, the informant would need no justification for conversing with the target on the sidewalk, probable cause (but no warrant) for the conversation in the target’s car, but probable cause and a warrant for a conversation in the target’s apartment. If, however, the conversation took place in the informant’s apartment, neither warrant nor probable cause would be required, even when the target had standing based on a reasonable expectation of privacy in the informant’s premises. “My place or yours” would acquire constitutional significance.

The Court would need to decide whether recording a conversation, without informing the target, would have constituted a search in 1791. Accepting the invitation given in *Kyllo*, defendants surely would argue that the only way to have reliable proof of a conversation in 1791 would be to smuggle reliable witnesses into the target’s house to listen to the conversation, and this would have been a trespass. When the government offered recordings of conversations between informant and suspect in the suspect’s home, defendants would argue both that *On Lee* went astray by rejecting trespass *ab initio* and that in 1791 only a bevy of hidden witnesses could have produced the same effect. The trespass *ab initio* doctrine, which Holmes regarded as specious formalism, whether the subject was larceny or wiretapping,<sup>219</sup> would return to (putatively) control modern constitutional doctrine. Modern technology that did not work a trespass in fact, but revealed details of life within the home, would be a search if the activity took place near an exterior wall, where in 1791 hidden witnesses could have monitored conversations without a trespass; but if the

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litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*. To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment. We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical “intrusion into a constitutionally protected area,” *Silverman*, 365 U.S., at 512 constitutes a search—at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. On the basis of this criterion, the information obtained by the thermal imager in this case was the product of a search.

<sup>219</sup> Compare *Commonwealth v. Rubin*, 43 N.E. 200 (Mass. 1896) (Holmes, J.) (treating trespass *ab initio* rule as presumption of felonious intent *ex ante* in larceny prosecution), with *Olmstead v. United States*, 277 U.S. 438, 469 (1928) (Holmes, J., dissenting) (dissenting from the Court’s holding that wiretapping does not constitute a search because wiretapping involves no trespass against the parties to the conversation):

While I do not deny it, I am not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant, although I fully agree that Courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them.

*Olmstead*, 277 U.S. at 469 (Holmes, J., dissenting).

activity took place in a more central area of the home, a reliable record could have been made only by witnesses who secretly trespassed.

These are the sort of arbitrary results that drove the Court away from common-law methodology in the first place. The Court is drifting back toward it because the justices fear subjectivity, the appearance of subjectivity, or both. Justices skeptical of legislatures but hesitant to impose subjective preferences might do better by coupling Harlan's legal process discipline with a less formalistic view of the Bill of Rights, a more robust view of due process, or both.

## VI. CONCLUSION

No foreseeable majority of the Supreme Court is going back to Harlan's assumption that legislatures will commit political and financial resources on behalf of those populations from whom police and prosecutors select "the usual suspects." Nor is any foreseeable majority of the Supreme Court going back to case-by-case adjudication; the pragmatic need for determinacy is too great for that.

But if we set aside Harlan's commitment to testing fundamental fairness on a case-by-case basis, we can find in his opinions the seeds of a better course than we seem to be on now. Harlan's concurring opinion in *Gideon* shows the potential of a doctrinal commitment to instrumental reliability, expressed in rule-like form for the benefit of other actors in the system. His opinion in *Winship* offers another excellent example of this basic approach. Yet another Harlan classic, the concurring opinion in *Terry*, shows—without so much as a bow to the common law of torts prevailing in 1791—how to interpret open-ended constitutional terms to require some proportion between the end of discovering crime and the means of coercive police practices. Harlan's willingness to follow decisions he dissented from, and his willingness to reconsider precedents as other changes in the law put their premises in doubt, reflects precisely the scrupulous regard for *stare decisis* demanded of what is, in reality, an important system of judge-made law.

I have defended these approaches elsewhere. The obvious, and indeed powerful, objections to them are the usual objections to judicial activism of the sort that have long been lodged against the Warren Court. Those who direct such objections to the Court's practice of issuing opinions with rule-like characteristics, however, should remember that this practice has become more, rather than less, common as the Court has become more pro-government in the criminal cases. The pragmatic force behind the turn to rules is so great that conservative justices see no prospect of a return to case-by-case adjudication. The question then is whether the judge-made rules should be based on the Bill of Rights historically construed, or by more general provisions read as requiring proportionate police practices and reliable trial procedures. Those who accept the desirability but question the legitimacy of the latter course, might be moved by the proposition that the opinions of Justice Harlan—the justice thought by so many to personify legitimacy in adjudication—give considerable support to this alternative.