

# Through a Glass Darkly: Seeing the Real Warren Court Criminal Justice Legacy

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It was once fashionable to see the Warren Court as radical. The Warren Court, after all, extended the right to counsel to all indigents charged with felonies; it created a new right to counsel in the Fifth Amendment to protect the self-incrimination rights of suspects being interrogated; and it forced the states to suppress evidence seized in violation of the Fourth Amendment.<sup>1</sup> One could approve or condemn the radicalism but, at the time, it seemed that the Court was fundamentally re-ordering the power structures that had controlled the state criminal justice systems for two centuries. Some worried that interrogation would disappear as a tool to solve crimes.<sup>2</sup> Some applauded the egalitarianism that underlay the decision in *Miranda v. Arizona*<sup>3</sup> to give poor suspects the same right as rich people to have counsel help decide whether to answer police questions.<sup>4</sup>

In the 1970s and early 1980s, it was fashionable to think that the Burger Court made few major changes in the Warren Court criminal law and procedure legacy.<sup>5</sup> Perhaps the Warren Court ideas were just too powerful in their appeal to American values about fair play, privacy, and even-handed treatment. Perhaps the conservative justices appointed by Nixon did not want to overrule precedents. Or, more likely, some combination of these and other factors explained why the Warren Court's criminal procedure legacy looked pretty much the same in 1983 as it did in 1969.

In later years, as it became apparent that some of the Warren Court victories were being undone, it was fashionable to say that if only Justices Brennan, Marshall, and Stevens could have been writing majority decisions rather than dissents, the Warren Court legacy would have been just fine.<sup>6</sup> In 1984, for example, Brennan, Marshall,

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<sup>1</sup> See *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>2</sup> *Miranda*, 384 U.S. at 541–42 (White, J., dissenting).

<sup>3</sup> 384 U.S. 436 (1966).

<sup>4</sup> See, e.g., Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure: From Powell to Gideon, from Escobedo to . . .*, in *CRIMINAL JUSTICE IN OUR TIME* 79–80 (A.E. Dick Howard ed., 1965).

<sup>5</sup> See Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 *GEO. L.J.* 185, 189–97 (1983) (describing, but rejecting, this view).

<sup>6</sup> Cf. *id.* at 247 (applauding the “Warren Court’s generous interpretation of regulatory fair process norms, like the fourth and fifth amendment, and its willingness to remedy their violation by

and Stevens dissented in *United States v. Leon*,<sup>7</sup> which held that a police officer's good faith, reasonable reliance on a constitutionally defective warrant permitted the evidence to be used. It was, and remains, a startling proposition that a police officer's objective good faith somehow sanitizes an admittedly unconstitutional act by the government.<sup>8</sup> In the same year, the same justices, along with Justice O'Connor, dissented from the Court's judgment that a police officer who believed the public safety was threatened did not have to provide *Miranda* warnings.<sup>9</sup> In this case, the belief need not even be objectively reasonable. Once again, a police officer's belief structure somehow makes a violation of the Constitution disappear. If only those dissents could have been law, one might have believed, the Warren Court's criminal procedure legacy would still have life.

It is now thirty-six years since Earl Warren resigned from the Court. We can now see through the glass more clearly. As the articles in this symposium demonstrate, the Warren Court's criminal law and procedure jurisprudence cannot be neatly cabined by any kind of political or ideological label. The Court created some new procedural rights, but snuffed out or allowed to go into desuetude some old substantive rights. As long as the Warren Court liberals were pretty much in control of the Court, the procedural rights could be made robust enough that the lack of substantive rights was not noticeable. But once the worm turned, once Nixon appointed four new justices, the liberal belief in procedure rather than substance began to appear naive. Moreover, the Warren Court itself began to retreat from its own "revolution," apparently not willing to face the consequences of some of its expanded procedural doctrines. Soon, there was no place to hide from the police and prosecutors.

No one doubts the vast contributions to individual liberty that the Court made in resisting the national fever manifested in McCarthyism. No one doubts the immeasurable gains that followed the brave decision in *Brown v. Board of Education*,<sup>10</sup> as well as the Court's willingness to stretch precedent to uphold the Civil Rights Act of 1964.<sup>11</sup> No one doubts the fundamental change in democracy created by the "one-man one-vote" cases.<sup>12</sup> And while the results were less pronounced, no

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excluding reliable evidence").

<sup>7</sup> 468 U.S. 897 (1984).

<sup>8</sup> Donald Dripps in 1986 proposed seeing *Leon* in an entirely new and more satisfying light. Dripps argued that one could say that the act of the police officer in attempting to secure a warrant makes the search reasonable, and thus constitutional, even if the warrant itself turns out not to meet Fourth Amendment standards. See Donald Dripps, *Living with Leon*, 95 YALE L.J. 906 (1986). This is, to me, more coherent than saying that objective good faith excuses a violation of the Fourth Amendment. But the latter is clearly the Court's explanation for why the evidence is admissible.

<sup>9</sup> *New York v. Quarles*, 467 U.S. 649 (1984).

<sup>10</sup> 349 U.S. 294 (1955).

<sup>11</sup> See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Daniel v. Paul*, 395 U.S. 298 (1969); *United States v. Johnson*, 390 U.S. 563 (1968); *Georgia v. Rachel*, 384 U.S. 780 (1966).

<sup>12</sup> See *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Allen v. State Bd. of Elections*, 393 U.S. 544

one doubts that the Warren Court undertook to create a strengthened doctrine of church and state,<sup>13</sup> and a new understanding of First Amendment rights in areas as diverse as pornography,<sup>14</sup> free exercise,<sup>15</sup> and symbolic speech.<sup>16</sup>

When the scoreboard is fairly read, however, the Warren Court's criminal law and procedure achievements are less important and less likely to endure (as noted above, some have already been gutted). In 1998, Harvard historian Morton Horwitz published a book entitled *The Warren Court and the Pursuit of Justice*.<sup>17</sup> The "justice" pursued by the Warren Court, in Horwitz's view, was not much about *criminal* justice. He devoted seven of 115 pages to the Warren Court's criminal justice achievements, pages that are buried in a chapter titled "The Evolving Concept of Democracy."<sup>18</sup>

Why so little lasting success in criminal justice? That question is complicated, and even the excellent articles presented here can provide only a partial answer. Begin with the idea that earlier thinkers were right, and the Warren Court wrong, in assessing public attitudes about criminal justice. The received wisdom, from the founding of the Republic until June 18, 1961,<sup>19</sup> was that criminal justice questions were local issues. As long as the states provided a fair trial, and did not coerce confessions from suspects, the nuances of how states investigated crimes and processed criminal defendants were left to them.<sup>20</sup> After all, states had, and still have, crime control problems that were in many ways more severe than the federal government because states must solve and prosecute the everyday crimes that frighten us the most: murder, rape, robbery, and burglary.

In the 1950s, the Warren Court decided a series of cases that must have made plain to the justices the need for greater supervision of state criminal processes. In

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(1969); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964).

<sup>13</sup> See *Engel v. Vitale*, 370 U.S. 421 (1962); *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203 (1963).

<sup>14</sup> See *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

<sup>15</sup> See *Gallagher v. Crown Kosher Super Market, Inc.*, 366 U.S. 617 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961).

<sup>16</sup> See *United States v. O'Brien*, 391 U.S. 367 (1968); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

<sup>17</sup> MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* (1998).

<sup>18</sup> See *id.* at 91–98.

<sup>19</sup> On that day, the Court announced *Mapp v. Ohio*, 367 U.S. 643 (1961), holding that states must suppress evidence seized in an unreasonable search.

<sup>20</sup> To be sure, in 1949 and again in 1952, the Court had found or suggested limits beyond which even state police could not go and still be in compliance with the Due Process Clause. But these limits were not easily reached. In *Wolf v. Colorado*, 338 U.S. 25, 28 (1949), the Court suggested that if a State were "affirmatively to sanction" unreasonable searches "it would run counter to the guaranty of the Fourteenth Amendment." In *Rochin v. California*, 342 U.S. 165 (1952), the Court condemned, as a violation of due process, police behavior that included taking the handcuffed suspect to a hospital and forcing him to have his stomach pumped.

*Irvine v. California*,<sup>21</sup> a case that Yale Kamisar discusses in this issue,<sup>22</sup> police illegally entered a suspect's home three times to position a microphone with which they monitored his conversations for more than a month. Justice Jackson, in his plurality opinion, wrote: "Few police measures have come to our attention that more flagrantly, deliberately and persistently violated the fundamental principle declared by the Fourth Amendment."<sup>23</sup> Yet the Court refused to reverse the conviction, considering itself bound by its prior holding that the exclusionary rule was not obligatory on the states.<sup>24</sup> Or consider the confessions cases that came to the Court involving huge power imbalances in the interrogation room.<sup>25</sup> The Court strove mightily to provide determinate content to the "voluntariness" test that had evolved from the Due Process Clause. But the Court's most ambitious attempt to provide guidance to lower courts, decided five years before *Miranda*, was an obvious failure. Justice Frankfurter's opinion delivering the Court's judgment, along with many pages of detailed observations (and ninety-seven footnotes) about the meaning of "voluntariness," was joined only by Justice Stewart.<sup>26</sup>

As the 1950s turned into the 1960s, it was clear that the Court needed a bolder and more comprehensive approach to controlling the state criminal processes. Creating the right controls for state systems facing crimes that threaten our daily life required a thoughtful, measured approach. The Court could have asked itself what aspects of the investigation and prosecution of crime were in need of control, and what kind of control would be most effective at the least cost to legitimate investigation and prosecution. But the Warren Court rejected the scalpel in favor of a blunderbuss, creating state criminal procedure protections almost entirely as carbon copies of the Bill of Rights criminal guarantees.

Rather than develop controls based on principles of fairness, equality, and the protection of innocence found in the Due Process Clause of the Fourteenth Amendment, the Court took the tempting road of "incorporating" most of the criminal procedure rights of the Bill of Rights into the Fourteenth Amendment. Thus, the due process required of states in criminal cases became co-extensive with the largely procedural requirements of the Bill of Rights. The Court's thinking must have been that these rights were fairly well developed in federal case law, they seemed to have

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<sup>21</sup> 347 U.S. 128 (1954) (plurality opinion).

<sup>22</sup> 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, 19-20 (2005).

<sup>23</sup> *Irvine*, 347 U.S. at 132.

<sup>24</sup> See *Wolf v. Colorado*, 338 U.S. 25 (1949).

<sup>25</sup> See, e.g., *Blackburn v. Alabama*, 361 U.S. 199 (1960) (suppressing confession of mentally ill black suspect interrogated for eight or nine hours in tiny room filled with white police officers); *Payne v. Arkansas*, 356 U.S. 560 (1958) (suppressing confession of "mentally dull" nineteen-year-old black suspect who was told that the sheriff would prevent the mob outside from coming to get him if he told the truth).

<sup>26</sup> See *Culombe v. Connecticut*, 367 U.S. 568 (1961) (plurality opinion).

worked well enough, and what was good for the federal goose was good for the state ganders.

Justice Black argued in favor of incorporation on the ground that judges should not be permitted to roam at large through the vague corridors of due process “fundamental fairness,” substituting their judgment of fairness and justice for that made by the Framers of the Bill of Rights. But later cases made plain that some of the specific guarantees themselves are about as gauzy as “fundamental fairness.” What is an “unreasonable” search or seizure anyway? What is “cruel and unusual punishment”? The Court has even had difficulty understanding the specific right of a defendant to “be confronted with the witnesses against him.”<sup>27</sup> Despite Black’s high hopes, the Bill of Rights could not constrain the Court’s discretion to “do justice” as it saw fit. No better example of that exists than *Katz v. United States*,<sup>28</sup> where the Court, over Black’s dissent, held that a conversation was protected by the Fourth Amendment. The Court did not rely on the language of the Fourth Amendment at all, instead substituting the gloriously indefinite notion that the Fourth Amendment protected our “reasonable expectation of privacy.”<sup>29</sup>

If the incorporation of criminal procedure rights had little effect in constraining the Court, it had profound and, I think, distorting effects in other areas. One effect that Justice Harlan tirelessly predicted is that later cases, even later Warren Court cases, tended to read the specific guarantees narrowly rather than broadly in the interest of permitting state and local police to investigate crime effectively. In *Terry v. Ohio*,<sup>30</sup> for example, Earl Warren admitted that “[n]o judicial opinion can comprehend the protean variety of the street encounter” between an officer and a suspect.<sup>31</sup> Moreover, to enact “a rigid and unthinking” rule that a police officer can seize a suspect and search only if she has probable cause “may exact a high toll in human injury and frustration of efforts to prevent crime.”<sup>32</sup> The Warren Court, by a vote of eight to one, thus approved the *Terry* “stop and frisk” doctrine whereby a police officer, based on suspicion that does not rise to the level of probable cause, can forcibly detain a suspect and frisk the outside of his clothing.

As Justice Douglas pointed out in his lonely dissent in *Terry*, the Court permitted a police officer to do on the street what a magistrate would be forbidden to authorize if the officer sought a warrant. Warrants cannot be issued without probable cause but

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<sup>27</sup> U.S. CONST. amend. VI. The Court solved a piece of the confrontation puzzle in 2004, holding that testimonial evidence against a defendant can be admitted only if the witness is available for cross-examination. See *Crawford v. Washington*, 541 U.S. 36 (2004). The Court deliberately left open the definition of what constitutes “testimonial evidence,” however, so the picture is still far from clear. *Id.*

<sup>28</sup> 389 U.S. 347 (1967).

<sup>29</sup> This particular phrase comes from Justice Harlan’s concurrence and became a specific test only in later cases. Justice Stewart’s opinion for the Court in *Katz* did not attempt to explain what part of the Fourth Amendment protected a conversation. The Amendment protects “persons, houses, papers, and effects.” Presumably, a conversation is protected because it comes from a person.

<sup>30</sup> 392 U.S. 1 (1968).

<sup>31</sup> *Id.* at 15.

<sup>32</sup> *Id.*

*Terry* permits a police officer to stop, detain, and frisk without probable cause. Time has, in my view, proved Douglas right on stop-and-frisk. Morgan Cloud's article in this symposium shows that Douglas was often right when he dissented in the Warren Court's Fourth Amendment cases.<sup>33</sup>

Another effect of viewing criminal procedure through the lens of the Bill of Rights is that the Court abandoned any serious effort to develop an account of fundamental fairness in the investigation and prosecution of crime. As Tracey Meares demonstrates in this issue, when earlier Courts labored to develop an account of fundamental fairness that was protected by due process, the jurisprudence was "replete with . . . the 'public-regarding' vision of fairness" that "includes the public, as well as the defendant, in the articulation of constitutional values relevant to the fair operation of criminal justice."<sup>34</sup>

One example of the Warren Court's lack of interest in free-standing due process or fundamental fairness is another case that Yale Kamisar discusses.<sup>35</sup> In *Hoffa v. United States*, the government had planted a spy named Edward Partin inside Jimmy Hoffa's inner circle while Hoffa was being prosecuted for a violation of the Taft-Hartley Act.<sup>36</sup> Partin reported to federal agents that Hoffa was bribing jurors. When the jury hung, causing a mistrial, the Government relied almost exclusively on Partin to convict Hoffa for jury tampering.

Because Hoffa could not fit this government spying into a box labeled "Fourth Amendment violation," or one labeled "Fifth Amendment violation," or one labeled "Sixth Amendment violation," the Court affirmed his conviction. Chief Justice Warren was the only member of the Court to conclude that Hoffa's conviction should be overturned. Warren was not interested in the Court's sterile waiver analysis. To Warren, what was critical is that we should not want our government to solve crimes in this fashion. It demeans us all. But Warren wrote alone. Not even Justice Douglas joined Warren's opinion (Justices Douglas and Clark voted to dismiss the writ of certiorari as improvidently granted). It was as if the Warren Court had turned its back on principles of fairness and substantive justice in the particular case when it chose to incorporate the Bill of Rights criminal procedure guarantees into the Fourteenth Amendment.

Professor Meares offers a broader example of the Court's lack of a "public-regarding vision of fairness": the modern Court's treatment of race in criminal justice. Prior to incorporation, race was often the "elephant in the room," the unspoken reason

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<sup>33</sup> Morgan Cloud, *A Liberal House Divided: How the Warren Court Dismantled the Fourth Amendment*, 3 OHIO ST. J. CRIM. L. 33, 50–54 (2005).

<sup>34</sup> Tracey L. Meares, *Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 3 OHIO ST. J. CRIM. L. 105, 105–06 (2005).

<sup>35</sup> Kamisar, *supra* note 22, at 13–15.

<sup>36</sup> The Government contested this fact, insisting that Partin went to Hoffa for help with his own legal difficulties and contacted federal agents only when he learned that Hoffa was attempting to tamper with the jury. The Court, however, assumed the facts as stated in the text for purposes of deciding the case. *Hoffa v. United States*, 385 U.S. 293, 298–99 (1966).

that the Court granted certiorari and reversed state court judgments, often of a Southern court. Even though race was almost never the articulated reason that the Court reversed criminal convictions, merely stating the facts of the torture endured by the African-American defendants in *Brown v. Mississippi*,<sup>37</sup> for example, opened a small window into the interrogation procedures of some Southern law officers. This was grist for the mill as the nation, the Court, and the Congress struggled toward *Brown v. Board of Education* and the Civil Rights and Voting Rights Acts.

But once incorporation brought the Fifth Amendment privilege against compelled self-incrimination into play in local police interrogations,<sup>38</sup> quickly producing the *Miranda* rules, there was no need to think about race in deciding interrogation cases. The question today is almost never whether there was a power imbalance in the interrogation room, a question that makes race always relevant, but instead whether the police gave the *Miranda* warnings and whether the suspect waived his *Miranda* rights. In sum, procedure has replaced substance in the interrogation room and an important dimension of justice has been lost in the translation. Moreover, as Richard Frase notes in his article for this symposium,<sup>39</sup> the Court avoided tackling issues of substantive criminal law and sentencing, most particularly the death penalty. Indeed, Frase demonstrates that both earlier and later Courts were more involved with these issues and more progressive in their treatment than the Warren Court.

So, by 1968, the Warren Court had given us a revolution that minimized substantive justice and maximized reliance on the procedural protections in the Bill of Rights, protections that were far less definite than Justice Black appeared to believe. The revolution thus quickly became ragged and disorganized. Broad interpretations of the criminal procedure rights had evolved when federal agents investigated defendants suspected of federal crimes, such as gambling and counterfeiting, but those broad rights could not withstand the “hydraulic pressures” created when the crimes being investigated were instead murder, rape, and robbery. Instead of bestowing broad rights on state suspects and defendants, the federal rights would become truncated.<sup>40</sup>

Truncated rights were not the only cost of incorporation. In my article for this issue, I argue that, with the public-regarding vision of fundamental fairness eclipsed by incorporation, the Court lost sight of the problem of innocent suspects and defendants.<sup>41</sup> Anyone who was designing a criminal justice process from scratch

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<sup>37</sup> 297 U.S. 278, 281–82 (1936). For details of the torture, see George C. Thomas III, *The Criminal Procedure Road Not Taken: Due Process and the Protection of Innocence*, 3 OHIO ST. J. CRIM. L. 169, 179–80 (2005).

<sup>38</sup> See *Malloy v. Hogan*, 378 U.S. 1, 6–11 (1964).

<sup>39</sup> Richard Frase, *The Warren Court’s Missed Opportunities in Substantive Criminal Law*, 3 OHIO ST. J. CRIM. L. 75 (2005).

<sup>40</sup> I develop this point in George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers’ Criminal Procedure*, 100 MICH. L. REV. 145 (2001).

<sup>41</sup> Thomas, *supra* note 37.

would, I think, worry less about the privacy rights of guilty suspects and more about protecting the innocent from being convicted. But the last forty years have witnessed precisely the opposite approach. The Court tears itself apart over the privacy and autonomy rights of criminal suspects who have been found with evidence of a crime or confessed in ways that make their guilt clear, and when time comes to find innocence-protecting features in the Constitution, the Court appears uninterested. It either substitutes more procedure or develops substantive doctrines so flabby that they are virtually worthless.<sup>42</sup>

The Court did not have to go down the incorporation road. Due process could be, and was once, understood to require substantive justice along the lines of fundamental fairness. The Court could have strengthened and revitalized the Due Process Clause protection of life, liberty, and property. But as Donald Dripps demonstrates in his article, part of the Court's problem was that the Due Process Clause approach lacked the kind of effective advocate needed to keep the Court from taking the easy road of incorporation.<sup>43</sup> Justice Harlan has enjoyed quite a renaissance in the last twenty years or so, and "[s]everal of the current justices have pointed to him as a model."<sup>44</sup> He did have the finest legal mind on the Warren Court, at least after Frankfurter retired. But Dripps shows that Harlan's unyielding insistence that most fundamental fairness questions could be left to legislative grace doomed his approach and left incorporation the only realistic candidate for imposing federal controls over state criminal justice.

There is much to chew on in this symposium. Morgan Cloud argues that the Warren Court placed too much trust in its procedural warrant requirement as a way of providing protection from unreasonable searches and seizures.<sup>45</sup> He points out that the Court, in two opinions by Justice Brennan, severed the eighty-year-old link between the privacy protected by the Fourth Amendment and the autonomy protected by the right against compelled self-incrimination.<sup>46</sup> Until that link was severed, some searches were simply unconstitutional even when conducted with a warrant. Justice Brennan, and the Warren Court majorities, seemed to think that a robust rule that searches conducted without warrants were per se unreasonable made it unnecessary to wall off certain conduct from the prying eyes of the police. But the robust search warrant rule is dead and no substantive rights remain to constrain the police.

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<sup>42</sup> One case can serve as an example of both types of failures. A careful review of convictions for sufficiency of evidence would be fertile ground for uncovering wrongly convicted innocent defendants. When faced with the question of federal review of state convictions, the Supreme Court required more procedure (yes, federal courts have to resolve sufficiency claims) but used a test so flabby that convictions are almost never reversed. See *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) ("the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt").

<sup>43</sup> Donald A. Dripps, *Justice Harlan on Criminal Procedure: Two Cheers for the Legal Process School*, 3 OHIO ST. J. CRIM. L. 125 (2005).

<sup>44</sup> *Id.* at 128.

<sup>45</sup> Cloud, *supra* note 33.

<sup>46</sup> *Id.* at 54–64.

Yale Kamisar shows us that Chief Justice Warren had a view of policing that the other members of the Court lacked, a view that was formed while “working in the criminal justice trenches,” mostly as a prosecutor.<sup>47</sup> This experience explains why Warren wrote *Miranda v. Arizona*<sup>48</sup> as a stinging condemnation of police trickery and deception. It explains, at least in part, why Warren was willing to read the Fourth Amendment to permit police to “stop and frisk” based only on suspicion. It explains why Warren was the only member of the Court to conclude that Jimmy Hoffa’s conviction should be overturned.

Richard Frase discusses the puzzling absence of substantive criminal law cases from the Warren Court docket.<sup>49</sup> It is not as if there was no controversy about the death penalty in the 1960s. It is not as if major reforms in sentencing laws were not happening. It is not as if the question of the proper scope of substantive criminal law had not been debated for decades. Yet for reasons that Frase describes, the Court did not believe these issues were important enough to address. Some of that reluctance to get involved probably had no effect. The death penalty doctrine would probably be the same today if the Warren Court, rather than the Burger Court, had decided *Furman v. Georgia*.<sup>50</sup> But, Frase argues, the Warren Court might have developed doctrines from the Eighth Amendment that could have been used to limit extraordinarily long sentences for relatively trivial offenses. The Warren Court let the opportunity pass.

After demonstrating the “public-regarding” quality of the pre-incorporation fundamental fairness doctrine, Tracey Meares argues that this type of analysis still has the potential to “address lingering vestiges of racial injustice in the criminal justice system.”<sup>51</sup> To illustrate that potential, she focuses on two thorny areas that often implicate race—petit jury composition and selective prosecution claims. It is fair to say that the Warren Court did almost nothing to address these issues and that the Court has since tried, and failed, to come up with meaningful procedural doctrines to provide fairness without unduly burdening the system. A public-regarding fundamental fairness analysis could not fail to do better than the Court has done.

Both Donald Dripps and I, in separate articles, argue that it is not too late to resuscitate due process doctrine, and that the Court should develop doctrines from principles of due process rather than be content with the mindless incorporation of criminal guarantees from the Bill of Rights. The current Court, unlike Justice Harlan, recognizes that legislatures are not going to undertake systemic reform of criminal justice systems. If we adjust Harlan’s approach to take account of the reality that the judiciary must assume a primary law-making role in the criminal procedure context, Dripps argues that Harlan’s legal-process approach offers a “better path for criminal

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<sup>47</sup> Kamisar, *supra* note 22.

<sup>48</sup> 384 U.S. 436 (1966).

<sup>49</sup> Frase, *supra* note 39.

<sup>50</sup> 408 U.S. 238 (1972).

<sup>51</sup> Meares, *supra* note 34, at 105.

procedure's future than the formalistic new originalism evident in some of the Court's recent decisions."<sup>52</sup>

My article in this issue argues that the focus of due process should be on innocence-protecting rights.<sup>53</sup> Thus, a better system for delivering the right to counsel must be devised, a mechanism for obtaining accurate eyewitness identifications must be imposed on the police, and courts must begin to look more closely at confessions to see if they are false. These kinds of rights are more important, to my mind, than the eternal argument about what constitutes an unreasonable search or seizure.

So what is the judgment about the Warren Court's criminal justice legacy? Because Professors Cloud, Dripps, Frase, Kamisar, and Meares are among the most able and thoughtful scholars of criminal law in the country, it is no surprise that the judgment is nuanced and multi-layered. Was the Warren Court "liberal" on criminal procedure? The answer, surprisingly, is "it's not so clear" when one examines its body of work as a whole. It certainly was not radical. The "revolution" in criminal justice turned out to be something less than revolutionary. Of course, no one label, no one philosophy, no one political vision can capture a single justice and certainly not the entire Warren Court as it changed membership while accomplishing its criminal justice "revolution."<sup>54</sup> Perhaps the closest we can come is to say that the Court wanted to impose meaningful federal controls on state criminal justice systems. It scored a few modest successes. But we are coming up on half a century since *Mapp v. Ohio* was decided, and I think it is fair to say that the Warren Court's failures in this context are more glaring than its successes. I learned a lot editing these articles. I hope you learn from them as well.

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<sup>52</sup> Dripps, *supra* note 43, at 125.

<sup>53</sup> Thomas, *supra* note 37.

<sup>54</sup> From *Mapp v. Ohio*, 367 U.S. 643 (1961), to Warren's retirement, a total of thirteen justices served on the Court. The one that surprised me was Justice Whittaker. I did not associate him with the Warren Court, perhaps because he served only five years total and less than a year after *Mapp* was decided.