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Reflections on the Warren Court's Criminal Justice Legacy, Fifty Years Later: What the Wings of a Butterfly and a Yiddish Proverb Teach Me

Joshua Dressler
Michael E. Moritz College of Law

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Reflections on the Warren Court’s Criminal Justice Legacy, Fifty Years Later: What the Wings of a Butterfly and a Yiddish Proverb Teach Me

Joshua Dressler*

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I. INTRODUCTION

I want to reflect today on the criminal justice legacy of the Warren Court, which formally ended slightly more than a half-century ago, on June 23, 1969, the day that Chief Justice Earl Warren officially retired from the United States Supreme Court. That day brought a formal end to what was the most progressive United States Supreme Court in our Nation’s history. For those of us who see ourselves as civil libertarians, it was a bright and exciting moment in our Nation’s history in terms of protecting free speech,¹ press freedom,² separation of Church

* Distinguished University Professor Emeritus, Michael E. Moritz College of Law, The Ohio State University. This is a fuller version of my October 11, 2019 luncheon presentation at “The Warren Court Criminal Procedure Revolution: A 50-Year Retrospective” conference held at the University of Pacific, McGeorge School of Law. I thank Mike Vitiello for organizing the conference and inviting me to participate. He remains a long and good friend.

1. *E.g.*, *Yates v. United States*, 354 U.S. 298 (1957) (holding that, under the First Amendment, the Smith Act, which criminalized membership in organizations promoting the overthrow of the government, cannot apply to abstract advocacy of revolution, as distinguished from active incitement).

2. *E.g.*, *New York Times, Co. v. Sullivan*, 376 U.S. 254 (1964) (holding that, under the First Amendment, newspapers may not be sued for libel by public figures in the absence of proof of intentional falsehood or reckless disregard of the truth).

and State,³ civil rights,⁴ and criminal justice reform.

A legacy is something “transmitted by or received from an ancestor or predecessor or from the past.”⁵ Inevitably, therefore, we must ask: How much of the law and values that Earl Warren and his colleagues transmitted to us remain a part of our constitutional fabric today? Put more bluntly, was the Warren Court successful or a failure in meeting its criminal justice goals?

Of course, we cannot realistically answer that question unless we can agree on what the Warren Court's criminal justice goals were. And, we cannot talk about the goals of the Warren Court with precision because that would suggest, falsely, that all nine justices shared the same goals. For that matter, the “Warren Court” presumably began when Earl Warren became Chief Justice, which means that we are actually talking about seventeen justices (including Warren), some of whom were already sitting on the Court when Warren joined it,⁶ and others of whom joined in the middle or near its completion.⁷ As I see it, however, the goal of Earl Warren and his most progressive colleagues during his 15+ years on the high court was to reshape the criminal justice system by placing restrictions on those with the greatest power, primarily the police and prosecutors, and by providing greater rights to the rest of us (particularly the most vulnerable amongst us) when we are confronted by the awesome power of government in our homes, streets, police stations, and courts.

If those were, indeed, the amorphously described criminal justice goals of the Warren Court, and if we are evaluating it by looking at where we are today in regard to those goals, I am forced to conclude that the Warren Court was to a significant extent a failure. And yet, as the title of this article hopefully suggests, there may be another way to look at the Warren Court's efforts. Indeed, I will ultimately conclude that, at least for civil libertarians, we owe a debt to Earl Warren and his Court.

3. *E.g.*, *Engel v. Vitale*, 370 U.S. 421 (1962) (holding that, under the First Amendment, state officials may not compose an official state prayer and require that it be recited in the public schools of the State at the beginning of each school day, even if the prayer is denominationally neutral and even if pupils may remain silent or be excused from the room while the prayer is being recited).

4. *E.g.*, *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) (declaring unconstitutional laws establishing separate public schools based on race).

5. *Definition of Legacy*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/legacy> (last visited Feb. 23, 2020) (on file with *The University of the Pacific Law Review*).

6. Earl Warren joined the Supreme Court on October 5, 1953. At that time, the other justices were: Hugo Black; Stanley Reed; Felix Frankfurter; William Douglas; Robert Jackson; Harold Burton; Thomas Clark; and Sherman Minton.

7. After Warren joined the Court and before he retired, the following justices were members of the “Warren Court”: John Marshall Harlan II (judicial oath taken in 1955; service ended in 1971); William Brennan (1956-1990); Charles Whittaker (1957-1962); Potter Stewart (1958-1981); Byron White (1962-1993); Arthur Goldberg (1962-1965); Abe Fortas (1965-1969); and Thurgood Marshall (1967-1991).

II. THE MOMENT THAT MATTERED

Let me start, however, by expressing the negative: The Warren Court was, to a not insignificant extent, a failure. If this is so, the question is, why? I don't pretend to have *the* answer. I think some of the Court's efforts were flawed—either too cautious or perhaps unwise. But, even if this is so, there is more. And that “more” involves another date in our past that requires mention when we evaluate the Warren Court's legacy. It is a date, indeed a split second in time, that changed the direction of our country in countless ways. Relevant to this conference, it is that moment that we now know guaranteed that whatever long-term Warren Court successes might have been possible would be largely short-lived.

That moment was slightly after midnight, Pacific Daylight Time, Wednesday, June 5, 1968, a little more than a year before Warren's retirement. I am old enough to remember that moment, watching it on television, as if it were yesterday. It was the split second when “[o]ne [.22 caliber] bullet entered [Robert Fitzgerald] Kennedy's brain through the soft tissue behind the right ear.”⁸ Kennedy was declared dead at 1:44 a.m. on June 6, 1968.⁹ That bullet, apparently fired by Sirhan Sirhan, ended the candidacy of the person many historians and political analysts believe would likely have been elected President,¹⁰ if only he had not left the Ambassador Hotel in Los Angeles (where he had just spoken to his supporters after his primary victory in California) by way of the hotel kitchen, where Sirhan was waiting to murder him. Kennedy had not planned to leave that direction, but, boxed in by screaming supporters, he veered from his intended route to his death.¹¹ If all of that is so, that moment—that last moment detour—not only changed the future

8. EVAN THOMAS, ROBERT KENNEDY: HIS LIFE 391 (2000).

9. *Id.* at 392.

10. Of course, one cannot prove that Robert Kennedy would have defeated Richard Nixon to become President. (It is noteworthy that Earl Warren, too, thought Kennedy would be elected. *See infra* note 12.) Ironically, had he survived, Kennedy's biggest obstacle would not have been defeating Nixon, but rather was in receiving his party's nomination for President in the first place. Unlike today, in which Presidential primaries are the means by which one becomes a party's nominee, in 1968 the political party establishment dominated the selection process, and Vice President Hubert Humphrey was the establishment's first choice to replace Lyndon Johnson. However, Kennedy's primary victory in California, the likely support of most of the anti-war forces in the country thereafter, and the Kennedy name with its charismatic power at that time (particularly among African Americans), would quite possibly have convinced the power brokers to go with him as their nominee. Power brokers want to win, and Humphrey was tainted by his exuberant support for the unpopular Vietnam War. With Kennedy dead, however, the Democratic Party establishment had to go with war-tainted Humphrey, who nonetheless nearly defeated Richard Nixon, losing the popular vote 31,710,470 to 30,898,055. *United States Presidential Election of 1968*, ENCYCLOPEDIA BRITANNICA <https://www.britannica.com/event/United-States-presidential-election-of-1968> (last visited Apr. 23, 2020) (on file with *The University of the Pacific Law Review*). Kennedy, the anti-war candidate, would surely have received the votes of many anti-war voters who sat out the election or (as I stupidly did) proved their “purity” by voting for a meaningless third-party antiwar candidate. Yes, we will never know for sure if things would have happened as I am suggesting here, but it is a highly plausible—indeed, the most plausible—scenario. On this subject, well worth reading is Jeff Greenfield, *How RFK Could Have Become President*, DAILY BEAST (June 4, 2018, 5:26 AM), www.thedailybeast.com/how-rfk-could-have-become-president (on file with *The University of the Pacific Law Review*).

11. THOMAS, *supra* note 8, at 391.

of Robert Kennedy and his family but also of the Nation, a country at war in Vietnam and at home. And, it is that moment that guaranteed that the Warren Court's criminal justice goals would be unfulfilled. Indeed, but for that moment, we might have experienced an even more robust civil-libertarian federal judiciary than the one Warren left behind.

Why did the 1968 election mean so much to the Warren Court's legacy? The answer, as we know, is that Nixon had the opportunity to fill four vacancies on the Supreme Court before he was forced out of office because of his crimes. In 1969, Nixon chose Warren Burger to replace Earl Warren, who ironically had wanted to retire early to allow Lyndon Johnson to replace him rather than risk the possible election of Nixon.¹² A year later, Nixon replaced Abe Fortas with Harry Blackmun. And, in 1972, Lewis Powell and William Rehnquist took over the seats of Hugo Black and John Marshall Harlan.¹³ Indeed, but for Watergate, Nixon would have finished his second term and had the opportunity to fill still a fifth seat on the Court, replacing William Douglas. As it is, he replaced two of the most liberal members of the Warren Court with justices unsympathetic to most of the Warren Court's criminal justice values, and he replaced two justices who sometimes dissented from the Warren Court's more progressive decisions with younger, more law-and-order oriented, judges. Had Kennedy become President, it is probable that the new post-Warren Court would have been considerably more civil libertarian in its direction than the one it replaced, and the seeds Earl Warren and his colleagues planted would have borne far more fruit than it did.

III. INTERROGATION LAW

Of course, we must look at the world the way it is and not as some of us would have wanted it to be. So, let me speak in broad strokes about where we are now and maybe how we got here. Let me start with the interrogation field.

Whenever one writes about interrogation law arising from the Warren Court, *Miranda v. Arizona*¹⁴ is what first comes to mind. However, before turning to

12. Warren's desire to not let Nixon choose his successor is ironic because Warren and Nixon were both California Republicans. Warren, however, disliked Nixon and did not trust him. On June 1, 1968, Warren told one of his law clerks that he believed Robert Kennedy would be elected President. Days after Kennedy's assassination, however, he decided to retire from the Court because, Warren now felt, "there was nothing to stop Richard Nixon from becoming President." BERNARD SCHWARTZ, *SUPER CHIEF* 680 (1983). Warren sent an undated resignation letter to the President requesting that Johnson appoint a successor, "someone who felt as [he] did." *Id.* at 681 (and cite therein). Johnson sought to replace Warren by promoting Justice Abe Fortas to the position, but the Republicans in the Senate filibustered the nomination on ideological grounds and because of a developing mini-scandal relating to money Fortas received as a consultant to a foundation caught up in a Security and Exchange Commission fraud investigation. *Id.* at 760. As a result, Warren put off his retirement at Johnson's request until after the election. The rest, as they say, is history.

13. As an entirely irrelevant footnote: I always tell my students that, although I disagreed with his positions most of the time, John Marshall Harlan II was the epitome of what a Justice should be: possessed of a sophisticated legal mind and open-minded.

14. 384 U.S. 436 (1966).

Miranda, it is vital to understand that the Warren Court believed, as no Court before or since, in the importance of the defense bar in making the adversarial system work more fairly. Warren and his colleagues guaranteed defense lawyers to indigents at trial in *Gideon v. Wainwright*,¹⁵ and they were the first to provide a Sixth Amendment right to counsel pre-trial, post-indictment, in *Massiah v. United States*.¹⁶ And, of course, in *Miranda*, they guaranteed custodial suspects a right to an attorney, nowhere expressly found in the text of the Constitution, circuitously through the Fifth Amendment self-incrimination clause.

This was also the Court that expressed the view that the criminal process should not rely heavily on confessions to prove guilt. The words of Justice Abe Fortas in *Escobedo v. Illinois*¹⁷ are words we may never hear from a majority opinion of the Supreme Court ever again. He wrote:

We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the “confession” will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation. . .

We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens’ abdication through unawareness of their constitutional rights. No system worth preserving should have to fear that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.

And, it was the Warren Court in *Miranda* that cobbled together prior Supreme Court observations of the Fifth Amendment privilege against compelled self-

15. 372 U.S. 335 (1963). Due to under-funding of Public Defender systems in the United States, most indigent defendants still do not receive the quality of representation that wealthy defendants receive from private counsel. For one recent example of the problems confronting public defenders, see *The Louisiana Project: A Study of the Louisiana Public Defender System and Attorney Workload Standards*, INDIGENTDEFENSE.ORG (Feb. 2017),

https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_louisiana_project_report.pdf (on file with *The University of the Pacific Law Review*); see also Richard A. Oppel, Jr. & Jugal K. Patel, *One Lawyer, One Day, 194 Felony Cases*, N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html> (on file with *The University of the Pacific Law Review*) (describing a random day in the legal work of a Louisiana Public Defender representing 194 defendants).

16. 377 U.S. 201, 205–06 (1964).

17. 378 U.S. 478, 488–90 (1964).

incrimination, giving it almost majestic significance. The Chief Justice wrote in *Miranda*:

As a “noble principle often transcends its origins,” the [Fifth Amendment] privilege has come right-fully to be recognized in part as an individual’s substantive right, a “right to a private enclave where he may lead a private life. That right is the hallmark of our democracy.” We have recently noted that the privilege against self-incrimination—the essential mainstay of our adversary system—is founded on a complex of values. All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a “fair state-individual balance,” to require the government “to shoulder the entire load,” to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. In sum, the privilege is fulfilled only when the person is guaranteed the right “to remain silent unless he chooses to speak in the unfettered exercise of his own will.”¹⁸

This is heady stuff and, for me, inspiring language. We have the Warren Court to thank for this. But, in thinking about these quotes and the Warren Court’s holdings, it sometimes feels a little like when I remember my days growing up watching Sandy Koufax pitch or Maury Wills steal bases for the Los Angeles Dodgers: wonderful memories but not particularly relevant when the Dodgers play their games today.

Many hoped (others feared) that *Miranda* warnings would result in most suspects determining that what was in their self-interest is to have someone in the interrogation room—a lawyer—to help them decide whether or when to speak to the police. In turn, this would mean that confessions that were obtained would be secured in a non-coercive manner, enhancing their reliability. And, to the extent that confessions were *not* obtained as often, this would incentivize the police, again using Fortas’s words, to “depend[] on extrinsic evidence independently secured through skillful investigation” (and, today, to depend on the great advances in forensic science).

Has that happened? We have little solid current empirical evidence regarding

18. *Miranda*, 384 U.S. at 460 (citations omitted).

Miranda's effects. The best research was conducted by Richard Leo about a quarter century ago. Some of *Miranda*'s most significant teeth have been extracted since then, but assuming today is as it was then, we learn: (1) *Miranda* warnings are almost always given when required; (2) many of the police techniques criticized in *Miranda* continue to be used; (3) police departments have developed more sophisticated and effective ways to negotiate a waiver and de-emphasize the *Miranda* warnings; and perhaps most significantly, (4), 78.29% of suspects waive their constitutional rights to silence and an attorney. In the interrogations Professor Leo observed, incriminating statements were secured in 64% of the cases, and full confessions in 24% of the interrogations.¹⁹

So, does that make *Miranda* a success or a failure? Well, it is a success in that more people know their rights today than they did before *Miranda* (and, actually, *have* more rights than they did before *Miranda*). But, does it seem realistic to think that 78.29% of the persons interrogated in custody genuinely thought that their best interests were served by rejecting the opportunity to have a lawyer counsel them at that critical moment? I doubt it. And, to that extent, one may say that *Miranda* has not been a full success or even close to one.

Why have there been so many waivers? We can blame the post-Warren Court for some of the situation. Look at what has happened to *Miranda* after 1969. The Court created exceptions to *Miranda*.²⁰ Far more significantly, the waiver rules announced by Warren have been grossly eroded. *Miranda* required the government to meet a "heavy burden" to prove that a suspect's waiver of her rights to silence and counsel were secured properly.²¹ That "heavy burden," the post-Warren Court announced, turned out to be the lightest burden, "preponderance of evidence."²² We also know now that a waiver may be implied.²³ And, a suspect's invocation of her right to counsel and/or her wish to remain silent must be made unambiguously.²⁴ If an invocation is ambiguous, the police don't even have to clarify the suspect's wishes; they may keep on interrogating. And, remarkably, even after a suspect is told that she has a right to remain silent, if she wishes to assert *that* right and end the interrogation, even temporarily, she must ordinarily *not* be silent, but rather she must invoke the right to silence unambiguously. All of this means that once the requisite warnings are given and supposedly understood, the police may start interrogating the suspect, and wait for the suspect unequivocally to bring an end to the interrogation by asserting her desire to be

19. See generally, Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266 (1996); see also Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621 (1996).

20. *Miranda* warnings do not need to be given, although a suspect is about to undergo custodial interrogation, in situations posing a threat to the public safety, *New York v. Quarles*, 467 U.S. 649, 655-56 (1984), or if the interrogator is an undercover police officer, *Illinois v. Perkins*, 496 U.S. 292, 300 (1990).

21. *Miranda*, 384 U.S. at 475.

22. *Colorado v. Connelly*, 479 U.S. 157, 168 (1986).

23. *North Carolina v. Butler*, 441 U.S. 369 (1979).

24. *Davis v. United States*, 512 U.S. 452, 462 (1994) (right to counsel); *Berghuis v. Thompkins*, 560 U.S. 370 (2010) (right to remain silent).

silent and/or speak to an attorney. Surely these post-Warren Court decisions undermined *Miranda*.

The *Miranda* opinion itself, however, created the opening for some of this. After asserting that custodial interrogation is inherently coercive, the *Miranda* opinion permits the police to secure a waiver, most notably a waiver of the right to an attorney, *in that very environment*. Yes, telling a suspect that she has rights potentially renders the atmosphere a tad less intimidating, but it was unrealistic for the Warren Court to believe that the pressures of being held incommunicado in a police interrogation room would sufficiently be reduced by the quick reading of the rights, such that a subsequent waiver would be deemed voluntary in the great majority of cases. The sensible approach of the Court would have been to require a lawyer in the interrogation room *before* any Fifth Amendment waiver could be secured. Of course, *that* would have been truly radical. *That* would almost certainly have significantly reduced the waiver rate, at least at the early stages of an investigation, and this would have put far more pressure on police to search for “extrinsic evidence . . . independently secured through skillful investigation.”

Why didn't the Court take this step? The answer is that Earl Warren couldn't have gone that far, even if he wanted to. *Miranda*'s basic holding, decided during the Warren Court's most progressive stage, was a mere 5-4 decision. Warren would have lost his majority if he had gone that far. He had to move incrementally. The 1966 Warren Court wasn't ready for that dramatic a change in police practices. But, returning to my earlier point, what if Robert Kennedy had become President? With the chance to fill four, perhaps five, vacancies, isn't it reasonable to imagine that the new Court, with the replacement of two *Miranda* dissenters with more progressive replacements, would have had the votes required to strengthen *Miranda* rather than conduct its gradual dismantling?

IV. FOURTH AMENDMENT JURISPRUDENCE

Let me shift now to the Fourth Amendment. It was the Warren Court that most regularly supported the principle that warrantless searches are presumptively unreasonable. As stated in *Katz v. United States*, “searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”²⁵ And, it is the Warren Court that recognized a Fourth Amendment exclusionary rule that applies to the states.²⁶ *That* was a big deal.

Today, where are we? The exclusionary rule has been deconstitutionalized.²⁷

25. 389 U.S. 347, 357 (1967).

26. *Mapp v. Ohio*, 367 U.S. 643 (1961).

27. *United States v. Calandra*, 414 U.S. 338, 348 (1974) (“the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional

One of its primary reasons for existing—“the imperative of judicial integrity”²⁸—has been extinguished,²⁹ leaving the exclusionary rule’s justification for existence dependent on a judicially-conducted cost-benefit calculus of the rule’s ability to deter police violations of the Fourth Amendment. That calculation by the post-Warren Court has resulted in the new rule that evidence obtained unconstitutionally will only be excluded if the trial judge—often an elected trial judge³⁰—determines that the police purposely, recklessly, or grossly negligently violated the person’s Fourth Amendment rights.³¹ As a consequence, unconstitutionally obtained evidence will increasingly be admissible in local courts. *Mapp v. Ohio* is now largely a shell.

Moreover, the exclusionary rule presupposes a constitutional violation, and violations have become harder to prove because the “few specifically established and well-delineated exceptions” to the warrant requirement are now neither few nor narrowly delineated. The great majority of police searches conducted without a warrant today fall within one warrant exception or another, most notably, consent.³² And, today, even the textual requirement of probable cause often gives way to constitutionally acceptable searches and seizures based on little more than a hunch³³ or on no suspicion at all.³⁴

And, here too, the Warren Court planted some of the seeds that the later anti-warrant justices were able to harvest. One might pick through the Warren Court’s Fourth Amendment cases for those seeds, but one case jumps out: *Terry v. Ohio*.³⁵

right of the party aggrieved”).

28. *Mapp*, 367 U.S. at 659 (quoting *Elkins v. United States*, 364 U.S. 206, 220 (1960)).

29. *Calandra*, 414 U.S. at 360 (Brennan, J., dissenting) (“For the first time, the Court today discounts to the point of extinction the vital function of the rule to insure that the judiciary avoid even the slightest appearance of sanctioning illegal government conduct.”).

30. This is a matter of significance. Although it might seem that a judge who is prone to excluding evidence on the ground that the police overreached should be rewarded for protecting the rights of the citizenry (including the voting citizenry), a judge is often prone to election defeat for “letting criminals go free.”

31. *Herring v. United States*, 555 U.S. 135, 144 (2009).

To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.

Id.

32. “[M]ultiple scholars have estimated that consent searches comprise more than 90% of all warrantless searches by police. . . .” Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 FL. L. REV. 509, 511 (2016).

33. The “reasonable suspicion” standard that legally justifies supposedly less-than-full searches and seizures must be “something more than an inchoate and unparticularized suspicion or hunch.” *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (internal quotation marks omitted).

34. *E.g.*, *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (upholding highway sobriety checkpoints if they are conducted in a random, nondiscriminatory manner).

35. 392 U.S. 1 (1968).

Professor Akhil Amar has written of a “good *Terry*” and a “bad *Terry*.”³⁶ One may agree or disagree with him, or with me, as to what are the good and bad portions of *Terry*, but it is surely not an unabashed success. As Professor Tracey Maclin has observed, it is ironic that the Warren Court, which played an instrumental role in ending *de jure* racial discrimination in the United States, would write the Fourth Amendment opinion that has served as a potent legal tool for racial profiling and discriminatory treatment of people of color on the streets.³⁷ Justice Douglas, who dissented in *Terry*, warned that “to give the police power greater than a magistrate”—that is, to allow searches and seizures on less than probable cause—”is to take a long step down the totalitarian path.”³⁸ Douglas was known for exaggerated statements, but he was surely right that *Terry* gave the police constitutional authority to do something they were already doing but without constitutional authority. Professor Maclin suggests that Warren and his fellow justices “succumbed to pressure”³⁹ because of criticisms of the Court’s expansion of the constitutional rights of the poor and minorities. Perhaps. And, thus, again, maybe a Kennedy Presidency might have ameliorated the situation. With greater progressive numbers, it might have determined, for example, that a body frisk is really as great, or at times a greater, invasion of our bodily security than some full searches and, thus, that probable cause, albeit no warrant, should be required for such street invasions.⁴⁰

It is also important for us to recognize that *Terry* is the case that opened the door in criminal investigations to a cost-benefit government-weighted “reasonableness” balancing test that the Court could use to avoid the warrant requirement or to create exceptions to it. And, if we agree that *Terry* opened that door, it was kicked wide open once Warren and his most liberal cohorts departed. Consider *Dunaway v. New York*.⁴¹ In *Dunaway*, Warren Court alum William Brennan described the law announced in *Terry* as a limited exception to the general rules requiring warrants and probable cause. *Terry*, he wrote, “departed from traditional Fourth Amendment analysis.”⁴² He reminded the reader of what Warren said in *Terry*, namely that it was intended to deal with a limited factual scenario: “a limited, on-the-street frisk for weapons.”⁴³ *Dunaway* tried to cabin *Terry*. Of

36. Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN’S L. REV. 1097, 1097 (1998).

37. Tracey Maclin, *Terry v. Ohio’s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN’S L. REV. 1271, 1275 (1998).

38. *Terry*, 392 U.S. at 36.

39. Maclin, *supra* note 37, at 1287.

40. It is noteworthy that Justice Antonin Scalia observed that he “frankly doubt[ed] . . . whether the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected , on mere suspicion . . . , to such indignity” as a frisk. *Minnesota v. Dickerson*, 508 U.S. 366, 381 (1993) (concurring opinion).

41. 442 U.S. 200 (1979).

42. *Id.* at 209.

43. *Id.* at 210.

course, if that effort had succeeded, it would not have resolved the problems of profiling and community distrust of the police that *Terry* exacerbated. That would have required a more sympathetic court to reconsider aspects of *Terry*. But, Brennan's cabining would have meant that the balancing process used in *Terry* would have remained a narrow exception. As a result, the number and breadth of the warrant exceptions might have been cabined a tad. Instead, the post-Warren Court has expanded the *Terry* balancing test to justify extended, hardly brief, detentions,⁴⁴ and also to justify "weapons frisks" of the entire passenger compartment of automobiles,⁴⁵ and to justify protective sweeps of homes for dangerous people while conducting an arrest,⁴⁶ all based on mere "reasonable suspicion," i.e., something more than a hunch. And the balancing approach used in *Terry* has migrated to other areas, justifying some suspicionless searches and seizures.⁴⁷ One can't blame *Terry* for all of this, of course, but it started there. And, however we got where we are today, I believe that what the Warren Court transmitted to us in Fourth Amendment jurisprudence, as we watch it play out on a daily basis on the streets and in the trial courts, has been seriously eroded, just as we have seen with its interrogation law legacy. We are back, if you will, to fond memories. "Where have you gone, Joe DiMaggio"—or, for me, Sandy Koufax—"our nation turns its lonely eyes to you."⁴⁸

V. SUBSTANTIVE CRIMINAL LAW

Finally, I want to shift from the Warren Court's criminal procedure legacy⁴⁹

44. *E.g.*, *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985) (justifying holding the suspect incommunicado in a small room for more than sixteen hours in the hope that she would defecate and, therefore, excrete illegal drugs they reasonably suspected she had swallowed).

45. *Michigan v. Long*, 463 U.S. 1032, 1050–51 (1983).

46. *Maryland v. Buie*, 494 U.S. 325, 336–37 (1990).

47. *E.g.*, *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (justifying random drug testing of federal customs officers who carry weapons or are involved in drug interdiction); *see also* *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 452–55 (1990).

48. PAUL SIMON, *Mrs. Robinson, on BOOKENDS* (Columbia 1968). Another way of showing my age.

49. I will note here, only in footnote, the Warren Court's "legacy" in regard to the single most common reason for wrongful convictions, namely, unreliable eyewitness identifications. *See* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 60 (2008) (in a study of 200 DNA exonerations, faulty eyewitness identifications accounted for nearly 80% of the improper convictions); Samuel R. Gross, et al., *Exonerations in the United States 1989 Through 2003*, 93 J. CRIM. L. & CRIMINOLOGY 523, 542 (2005) (of 340 exonerations, at least one eyewitness misidentified the defendant in 64% of the cases). It deserves only a footnote because the Warren Court did little to help. Professor George Thomas rightly wrote that the Warren Court demonstrated "indifference to the threat to innocent suspects." George C. Thomas III, *The Criminal Procedure Road Not Taken: Due Process and the Protection of Innocence*, 3 OHIO ST. J. CRIM. L. 169, 191 (2005).

The Warren Court *did* hold that a person has a right to counsel during a physical lineup, *United States v. Wade*, 388 U.S. 218 (1967), although it never explained whether the lawyer could do anything more than observe the process. That holding was "clarified"—narrowed—post-Warren Court, in *Kirby v. Illinois*, 406 U.S. 682 (1972) (holding that the right to counsel only applies after formal adversarial proceedings have commenced). And, in *Stovall v. Denno*, 388 U.S. 293 (1967), the Warren Court held that admission at trial of an undeniably suggestive pre-trial identification procedure does not violate the Due Process Clause if the suggestive procedure was necessary. Finally, in *Simmons v. United States*, 390 U.S. 377, 384 (1968), it limited the inadmissibility of an

and touch upon one other area, and ask: what is the Warren Court's legacy regarding *substantive* criminal law? On this, the Warren Court barely spoke, and when it put a toe in the constitutional pool, it backed away. Let's look at what it did and did not do.

The Warren Court applied the Due Process Clause to criminal trials, holding that a defendant may not be convicted of a crime unless the government persuades the factfinder "beyond a reasonable doubt of every fact necessary to constitute the crime charged."⁵⁰ This holding, however, may fairly be characterized as a procedural, rather than a substantive, constitutional protection. The Warren Court also stated that the Due Process Clause places some vague, still undefined, limit on the common law maxim that "ignorance of the law will not excuse."⁵¹

And, then there is the toe-in-the-water approach. In *Robinson v. California*,⁵² the Warren Court, 7-2, applied the Eighth Amendment to declare unconstitutional a statute that made it a criminal offense to "be addicted to the use of narcotics." "Even one day is prison," Justice Stewart wrote, "would be cruel and unusual punishment for the 'crime' of having a common cold,"⁵³ or, as here, suffering from addiction. But, six years later, in *Powell v. Texas*,⁵⁴ the Supreme Court backed away from what was the most plausible implications of *Robinson*, namely, that "[i]f it cannot be a crime to have an irresistible compulsion to use narcotics . . . it [can't] constitutionally be a crime to yield to such a compulsion."⁵⁵ Instead, the *Powell* Court held that even if a person suffers from alcoholism, it does not violate the Constitution to make it an offense to "be found in a state of intoxication in a public place." Writing for the Court, Justice Marshall was candid when he observed that *Robinson* brought the Court

but a very small way into the substantive criminal law. And unless *Robinson* is so viewed it is difficult to see any limiting principle that would serve to prevent this Court from becoming, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country.⁵⁶

unnecessarily suggestive identification to procedures "so suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

50. *In re Winship*, 397 U.S. 358, 364 (1970).

51. In *Lambert v. California*, 355 U.S. 225 (1957), the Court overturned Lambert's conviction for violating a Los Angeles ordinance that required "any convicted person" who remained in Los Angeles for more than five days to register as a convicted person. Lambert claimed she was unaware of the ordinance.

52. 370 U.S. 660 (1962).

53. *Id.* at 667.

54. 392 U.S. 514 (1968).

55. *Id.* at 548 (White, J., concurring in the result).

56. *Id.* at 533.

And, so when one looks to the Warren Court and how it applied the Constitution to the so-called “general part of the criminal law,” there is little to see. Few seem surprised by this. After all, some would say, the substantive criminal law *is* a matter for legislative action, not judicial interference. But, that was said about police practices before Warren joined the Court. It was supposedly up to police departments and maybe—only just maybe—a matter for legislative oversight. So, that explanation cannot entirely explain the Court’s reticence. And, yes, the Constitution does expressly provide certain criminal procedural rights in the criminal justice field while it nowhere expressly provides substantive criminal law rights. But, surely a Court as activist as the Warren Court could have used the Due Process Clause and the Eighth Amendment—which it *did* use on rare occasion in substantive criminal law—to more broadly secure substantive rights for people prosecuted for crimes. Instead, it sat back and ultimately allowed legislatures increasingly to enact strict liability laws, often with severe penalties, rather than rule that punishment in the absence of culpability constitutes disproportional punishment.⁵⁷ It could have, but didn’t, take opportunities to develop constitutional principles that might have made it impermissible later, for example, for a legislature to abolish the insanity defense, a matter that only now will be answered by a Court that in no way resembles the Warren Court.⁵⁸ I agree that it may seem foreign to most of us today to think that a court would get involved in these general parts of the criminal law, but it may only seem foreign to us because the Warren Court did not act forthrightly. As to whether they *should* have intervened, I am uncertain.

VI. AND YET. . .

So, to conclude: The criminal justice goals of the Warren Court largely have not been fulfilled. But, despite spending all of this time looking at the negative, I refuse to allow myself, as an admittedly biased civil libertarian, to think of the Warren Court as a failure. We *do* have more rights today, at least on paper, than before Warren joined the Court. And we can all point to real-life people who deservedly benefitted from Warren Court rulings. And, then there is the “butterfly effect.”⁵⁹ It teaches us that the flapping of the wings of a single butterfly has a

57. As Herbert Packer described the judiciary’s approach to the issue at the time he wrote, “[m]ens rea is an important requirement, but it is not a constitutional requirement, except sometimes.” Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 107.

58. Petition for a Writ of Certiorari at *i, *Kahler v. Kansas*, No. 18-6135, 2018 WL 7635903, *cert. granted*, 1 S. Ct. 1318 (Mar. 18, 2019) (“Do the Eighth and 14th Amendments permit a state to abolish the insanity defense?”).

59. The term “butterfly effect” originated “with a famous sentence that Lorenz included in a lecture he gave on December 1972 at a session of the annual meeting of the AAAS (American Association for the advancement of Science): ‘a butterfly flapping its wings in Brazil can produce a tornado in Texas.’” *Lorenz Discovered the Butterfly Effect*, OPENMIND (May 22, 2015), <https://www.bbvaopenmind.com/en/when-lorenz-discovered-the-butterfly-effect/> (on file with *The University of the Pacific Law Review*). The idea came to Lorenz when, in making a weather prediction, he inputted the number “.506” in a computer as shorthand for the number

ripple effect, sometimes even a profound one, on future events.⁶⁰ Thus, we should not ignore the fact that the Warren Court's jurisprudence has had other positive "butterfly" effects on our nation and beyond. As just one example, Warren Court opinions doubtlessly inspired some state courts to enhance their citizens' *state* constitutional rights, and it may have influenced other countries that devised their own exclusionary rules for search-and-seizure cases.⁶¹

And, there is much more. The Warren Court's quest to make our society fairer caused many persons (me included) to become lawyers, motivated to work for a better justice system, and it inspired others (me included) to become members of the teaching academy, in order to educate future lawyers and write and reflect on how we might make the system fairer. In a real sense the Warren Court has been for the law what Bob Woodward and Carl Bernstein were, and I hope still are, to journalism: an inspiration to push forward, to believe that sometimes good but imperfect people—and institutions—can make an imperfect but positive influence on those around us and on the legal system.

Professor Carole Steiker, in writing a positive review of the Warren Court's *Miranda* decision, offered only two—not three—cheers for the Court's approach in *Miranda*, finishing her article by quoting Winston Churchill. She wrote, "I cheer [*Miranda*] in much the same way that Winston Churchill cheered for democracy. It's the worst form of government, he said, until you consider 'all those other forms that have been tried from time to time.'"⁶² Yes, thank you for democracy, imperfect as it may be. Thank you also, Warren Court, imperfect as you were.

As far as I know, Churchill knew no Yiddish. But, there is a Yiddish-ism my grandmother, my *bubbe*, sometimes used, and it applies here just as well as Churchill's observation, when we consider Earl Warren and the other justices on his Court. That Yiddish-ism teaches us, "*far der klenster toiveh vert men a ba'al-choiv*": *for the smallest favor you become a debtor*.

That's it. We *do* owe a profound debt to the Warren Court.

"506127" and saw that this minor change dramatically changed a weather prediction.

60. Unfortunately, Sirhan Sirhan was more than a single butterfly.

61. *E.g.*, Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982; Evidence Act of 2006, s 30 (N.Z.). Both countries legislatively adopted their exclusionary rule after *Mapp v. Ohio*. I thank Professor Bill Pizzi, another speaker at the conference, for reminding me of the positive implications of the Warren Court's jurisprudence on other countries.

62. Carole S. Steiker, *Two Cheers for Miranda*, 97 B.U. L. REV. 1197, 1213–14 (2017) (citing Winston Churchill, Speech, House of Commons, November 11, 1947, in 7 WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES, 1897–1963, at 7563, 7566 (Robert Rhodes James ed., 1974)).