Introducing The Warren Court's Criminal Procedure Revolution: A 50-Year Retrospective

Michael Vitiello*

Why should the Pacific Law Review host a 50-year retrospective about the Warren Court? Apart from the fact that several of our speakers came of age during the Warren Court, or during the early years of the Burger Court, we believe that the Warren Court deserves special attention for many reasons.[1] Let me develop some of those reasons in this introduction.

Students today may have trouble understanding that the discipline called Criminal Procedure is a modern creation. In 1965, Professors Yale Kamisar and Livingston Hall published the first constitutional criminal procedure book.[2] Kamisar and Hall recognized that they were in the middle of a transformation: between 1961 and 1969, the Warren Court revolutionized the law.[3] Effectively, starting with *Mapp v. Ohio*[4] in 1961 and ending when Chief Justice Earl Warren stepped down in 1969,[5] the Court dramatically changed the law. Many of the Court's holdings are now so ingrained in the system that one might assume that they have much deeper roots than the past 50-plus years.[6]

To understand the scope of the revolution, we begin in the 1930s. Until 1932, the Supreme Court had never overturned a judgment arising in a state criminal

* Michael Vitiello, Distinguished Professor of Law, the University of the Pacific McGeorge School of Law; University of Pennsylvania, J.D., 1974; Swarthmore College, B.A., 1969. I want to extend special thanks to Joanne Gothard and Cameron Graber for their capable research assistance with this article.

1. Out of concerns about ageism, I will not identify which scholars came of age during the Warren Court, other than to confess that I began law school in 1971, just as President Nixon was able to make his third and fourth appointments to the Court in a two year period; *see* JOHN W. DEAN, THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT (2001) (Justice Harlan retired from the Supreme Court on September 23, 1971 and President Nixon appointed William Rehnquist to replace him); *see also* The Nation: Nixon's Court: Its Making and Its Meaning, TIME MAG. (Nov. 1, 1971), http://content.time.com/time/magazine/article/0,9171,905464-4,00.html (Nixon nominated Lewis Powell to replace Hugo Black).

2. Prior to that point, one might find a discussion of criminal procedure in a Criminal Law casebook or a chapter on criminal procedure in a Constitutional Law casebook; *see* YALE KAMISAR & LIVINGSTON HALL, MODERN CRIMINAL PROCEDURE (1st ed. 1965); *see also Fifty Years of Criminal Procedure – the Subject and the Casebook*, PRAWFSBLOG (Jun. 24, 2015), https://prawfsblawg.blogs.com/prawfsblawg/2015/06/fifty-years-of-criminal-procedure-the-subject-and-the-casebook.html.

3. Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L. J. 253, 253–54 (1982) (the primary achievement of the Warren Court was the impetus of the criminal justice revolution).

4. 367 U.S. 643 (1961).

5. ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 494–99 (1997).

6. *See Dickerson v. United States*, 530 U.S. 428 (2000) (the roots of *Miranda's* voluntariness test "developed in the common law, as the courts of England and then the United States recognized that coerced confessions are inherently untrustworthy.").

proceeding.[7] For the first time in *Powell v. Alabama*,[8] the Court found that the lack of meaningful representation at the capital trial of several young African-American males for the rape of two white women amounted to a violation of due process guaranteed by the Fourteenth Amendment.[9] Four years later, the Court intervened again in a capital case arising in the South. In *Brown v. Mississippi*[10], the Court held that the Fourteenth Amendment due process right was violated when the police extracted a confession by beating the suspect.[11]

Prior to 1961, numerous litigants argued not only that their more amorphous due process rights were violated, but that specific guarantees in the Bill of Rights applied wholesale as limitations on state power.[12] They were unsuccessful in convincing the Court that the specific guarantees applied to the states.[13] For example, the defendant in *Wolf v. Colorado*[14] argued unsuccessfully that states must exclude evidence resulting from a violation of the Fourth Amendment.[15] Similarly, in *Betts v. Brady*,[16] an indigent defendant failed to convince the Court that the Sixth Amendment required the state to appoint counsel under circumstances where a federal court would have had to appoint counsel.[17] Likewise, the Court rejected the defendant's claim that the state court had to honor the defendant's Fifth Amendment right not to be compelled to be a witness against himself in *Adamson v. California*.[18] That was all about to change.

Beginning with *Mapp*, the Court systematically held that specific guarantees in the Bill of Rights that protected criminal defendants were limitations on state

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7. *See* Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, MICH. L. REV. 1, 48–97 (2000) (providing a discussion of the history of the Supreme Court's treatment of judgments arising in state criminal proceedings).

8. 287 U.S. 45 (1932).

9. *Id.* at 50; *see also* Israel, *supra* note 3, at 281–82 (highlighting the Powell Court's discussion of due process implications of failure to provide counsel for indigent defendants).

10. 297 U.S. 278 (1936).

11. *See* 297 U.S. at 286 ("It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.").

12. Isreal, *supra* note 3, at 283 ("In the years following *Powell*, due process cases considering various Bill of

Rights safeguards used an approach similar to that taken in the right-to-counsel.").

13. *See id.* ("In several other cases decided during the same period, the Court rejected due process claims based upon a particular aspect of a Bill of Rights guarantee, but suggested that other aspects of the guarantee might be encompassed by due process.").

14. 338 U.S. 25 (1949).

15. *Id.* at 28–29.

16. 316 U.S. 455 (1942)

17. *Id.* at 461–62.

18. *Adamson v. California*, 332 U.S. 46, 50–51 (1947) ("It is settled law that the clause of the Fifth Amendment, protecting a person against being compelled to be a witness against himself, is not made effective by the Fourteenth Amendment as a protection against state action on the ground that. . . it is a personal privilege or immunity secured by the Federal Constitution as one of the rights of man that are listed in the Bill of Rights."); *but see id.* at 68–123 (Black, J., dissenting) (arguing in favor of total incorporation of the Bill of Rights, a position never adopted by the Court). Regarding total incorporation, *see* WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE 57–60 (6th ed. 2017).

power, not just limitations on federal power.[19] Largely based on an approach urged by Justice William Brennan in the1960 *Ohio ex rel. Eaton v. Price*[20] opinion, the Court began a process of "selective incorporation"[21] in *Mapp* and beyond. Professor Jerold Israel summarized the process and impact of selective incorporation as follows:

> That theory, simply put, holds that the fourteenth amendment's due process clause fully incorporates all of those guarantees of the Bill of Rights deemed to be fundamental and thereby makes those guarantees applicable to the states. During the decade that followed *Ohio ex rel. Eaton v. Price,* the Court found incorporated within the fourteenth amendment all but a few of the thirteen Bill of Rights guarantees that relate to the criminal justice process. For many observers, these selective incorporation rulings were the Warren Court's primary achievement in the criminal justice field. Measured by the number of prosecutions affected, the selective incorporation rulings had a monumental impact; in a single decade those rulings expanded the reach of constitutional regulation of criminal procedure many times beyond that which had been attained through all of the Court's constitutional rulings over the previous 170 years.[22]

Professor Israel's comment captures the breadth of the Warren Court's revolution in large part. In addition, the Court, in many instances, also gave liberal interpretations to those specific guarantees.[23]

Effectively, the period of "selective incorporation" ended unceremoniously with the end of the Warren Court.[24] Public reception to the Court's revolution varied. While many applauded some of the Court's developments (who could disagree that every defendant was entitled to an attorney in a criminal case?),[25] the Court also inflicted wounds upon itself. Illustrative of that "self-inflicted wound"

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19. The Court had previously held the Fourteenth Amendment extended Bill of Rights protections to states, but not yet in the criminal context. *See Gitlow v. New York*, 268 U.S. 652 (1925) (holding that the Fourteenth Amendment extended First Amendment free-speech protections to apply to the States).

20. 364 U.S. 263 (1960).

21. Israel, *supra* note 3, at 253.

22. *Id.*

23. *See, e.g. Spinelli v. Illinois*, 393 U.S. 410 (1969); *Chimel v. California*, 395 U.S. 752 (1969).

24. In recent years, the Supreme Court has incorporated two rights in the Bill Rights. In *McDonald v. Chicago*, the Court held that the Second Amendment right to bear arms applied to the states. 561 U.S. 742, 779 (2010). In *Timbs v. Indiana*, the Court held that the excessive fines clause is a limitation on state power. 586 U.S. _ (2019).

25. *See* FRED P. GRAHAM, THE SELF-INFLICTED WOUND 64 (1970) (The result [of *Gideon*] was overwhelmingly beneficial: public defender offices sprang up across the country; a new concern for defendants' rights was evident throughout the nation; the Court was relieved of the burden of numerous right-to-counsel appeals; and the Supreme Court was venerated for sounding its call for equal justice for the poor.).

was *Miranda v. Arizona*,[26] the Warren Court's most iconic criminal procedure decision.

As indicated above, the Court reversed the defendant's conviction in *Brown v. Mississippi* in 1936 on the ground that securing a confession from a suspect violated the suspect's right to due process.[27] In effect, the due process clause included a voluntariness provision.[28] Over the next thirty years, the Court frequently revisited the meaning of voluntariness.[29] The cases often involved the death penalty – many of them arising in the South, and many involving African-American defendants.[30] In a thirty-year period, the Court reviewed thirty-five voluntariness cases.[31] Further, the police misconduct in the previous cases was not as obvious as it was in *Brown*. In *Brown*, Police used a host of other techniques, including the "third degree," the use of trickery, good-cop-bad-cop interrogations, threats, and other devices to erode a suspect's confidence even in one's own innocence.[32]

Voluntariness cases posed a variety of problems for the Court. The cases were inevitably fact-sensitive, allowing few general rules to govern lower courts. As one commentator observed, "the case law seemed to create an 'analytical stew.'"[33] Additionally, *Spano v. New York* provided an insight into the complexity (or perhaps, incomprehensibility) of the Court's test.[34] In finding that a young man's confession was involuntary, the Court listed over a dozen facts that supported its conclusion that the statement of involuntary.[35] During this time, the Court's rationales for suppressing confessions varied from case to case.[36] This background helps explain one of the *Miranda* majority's goals.

In *Miranda*, the Warren Court was attempting to set clear guidelines with the hopes of getting the Court out of the business of deciding voluntariness cases.[37] Instead of assessing each case on its facts, the Court established "clear warnings," that in theory would protect a suspect from confessing as a result of compulsion.[38]

As I have argued elsewhere, *Miranda's* goals were worthwhile.[39] Not only did the Court hope to protect against overreaching conduct by the police, but it also

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26. 384 U.S. 436 (1966).

27. *Supra* note 10.

28. 297 U.S. at 463–64.

29. Lawrence Herman, *The Supreme Court, the Attorney General, and the Good old Days of Police Interrogation*, 48 OHIO ST. L. J. 733 (1987).

30. *Id*.

31. *Id*. at 754.

32. *Miranda,* 384 U.S at 447–48 (1966).

33. DRESSLER & THOMAS, CRIMINAL PROCEDURE: INVESTIGATING CRIME 603 (3d ed. 2006).

34. *See generally Spano v. New York*, 360 U.S. 315 (1959).

35. *Id*. at 320–21.

36. *See* Herman, *supra* note 29, at 754–55.

37. *Miranda*, 384 U.S at 441–42.

38. *Id.* at 445.

39. Michael Vitiello, *Arnold Loewy, Ernesto Miranda, Earl Warren, and Donald Trump: Confessions and the Fifth Amendment*, 52 TEX. TECH. L REV. 63 (2019).

hoped to advance equality.[40] Poor and minority suspects were more likely to lack the advice of counsel in a custodial setting than their wealthier and white counterparts.[41] But *Miranda* produced a remarkable backlash, more so than any other Warren Court criminal procedural opinion. The public and professional reaction to *Miranda* was almost universally negative.[42] Law enforcement officials contended that it would limit their ability to solve crimes.[43] Confessions, its critics claimed, would dry up.[44]

The Court's criminal procedure revolution came at a cost. By 1968, 63 percent of Americans believed that the courts were too lenient on criminal defendants.[45] The *Miranda* decision was especially troubling to many Americans.[46] Indeed, in some states this revolution led to the call to "IMPEACH EARL WARREN," as some billboards demanded.[47] Many Americans also blamed the Supreme Court for increasing crime rates during that period.[48] And crime rates were arising rapidly.[49] Members of Congress reacted with numerous committee hearings into the causes of crime.[50] In 1968, Congress purportedly "overruled" *Miranda* in the far-reaching Omnibus Crime Control and Safe Street Act.[51] Not surprisingly, the Supreme Court became a campaign issue during the 1968 Presidential election.[52]

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40. *Vitiello, supra* note 39, at 66.

41. *Id.* at 79.

42. DRESSLER & THOMAS, *supra* note 33, at 646.

43. Victor Li, *50-year story of the Miranda warning has the twists of a cop show*, A.B.A. J. (Aug. 2016), http://www.abajournal.com/magazine/article/miranda_warning_history.

44. William W. Berry, *Magnifying Miranda*, 50 TEX. TECH. L. REV. 97, 100 (2017); Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 NW. U.L. REV. 1084 (1996).

45. GRAHAM, *supra* note 25, at 8.

46. Richard A. Leo, *The Impact of "Miranda" Revisited*, 86 J. CRIM. L & CRIMINOLOGY 621, 622 (1996).

47. MICHAEL J. GRAETZ & LINDA GREENHOUSE, THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT, 2–3 (2016) (including a photograph of such a billboard along a California highway).

48. Hazel Erskine, *The Polls: Causes of Crime*, 38 PUBLIC OPINION QUARTERLY 288, 292 (1974) (listing 1969 Louis Harris & Assoc. poll showing 51% and 23% of Americans believed "Supreme Court decisions protecting rights of accused" were a "Major Cause" and "Minor Cause" of "an increase in crime," respectively), and at 294 (detailing a Gallup poll showing 63% of Americans in 1968, and 75% of Americans in 1969, believed "the courts" were "not harsh enough" when "dealing with criminals."); *see also* James Vorenberg, *The War on Crime: The First Five Years*, The Atlantic Monthly, May 1972.

49. GRAHAM, *supra* note 25, at 299 (detailing increases in frequency of criminal activity during this period); *see also* GRAETZ & GREENHOUSE, *supra* note 47, at 12.

50. NANCY E. MARION, A HISTORY OF FEDERAL CRIME CONTROL INITIATIVES, 1960-1993 90 (1994).

51. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. II, §701(a), 82 Stat. 197, 210 (codified as amended at 18 U.S.C. §§3501(a)-(b) (1994)); *see also* S. REP. NO. 1097, 90th Cong., 2d Sess. 37 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112; GRAHAM, *supra* note 25, at 12 (Congress "overruled" *Miranda* in the Omnibus Crime Control Act §3501, which purported to re-impose the "voluntariness" standard that *Miranda* sought to render unnecessary); *Dickerson v. United States*, 530 U.S. 428 (2000) (Largely through the forbearance of the Department of Justice, the government did not attempt to rely on §3501 until pressured into doing so by Professor Paul Cassell. When the Court finally addressed *Miranda*'s constitutional status, the Court, in an opinion written by *Miranda*-foe Chief Justice Rehnquist, upheld *Miranda* as constitutional).

52. William G. Ross, *The Supreme Court as an Issue in Presidential Campaigns*, 37 J. SUP. CT. HIST. 322, 331 (2012); *see also* KEVIN J. MCMAHON, NIXON'S COURT: HIS CHALLENGE TO JUDICIAL LIBERALISM AND ITS POLITICAL CONSEQUENCES 37–62, 41 (2011).

Sadly, many Americans tied increasing crime rates with the African-American community at a time when racial tensions were already exploding into inner city riots.[53] Segregationist Governor George Wallace, running as a candidate on the American Independent Party ticket, made crime a major issue of his campaign, often using powerful rhetoric.[54] His base could not miss the racial undertones.[55] Only slightly more restrained, Richard Nixon also ran on a platform that included strongly anti-Court Law and Order rhetoric.[56] While Nixon's racial rhetoric was more restrained, his opposition to the Court could not have been clearer.[57] It remains uncertain whether Hubert Humphrey could have gained traction by defending the Court, but he ultimately he made no effort to do so.[58] Not only did Nixon's Law and Order strategy work, but he would quickly have the chance to change the Court's direction.

Once elected, President Nixon was afforded four Supreme Court appointments in a two year period.[59] His appointments started to narrow, if not overrule, the Warren Court precedent, beginning with the inception of the Burger Court.[60] But that was not inevitable--Nixon, and his ability to transform the Court, benefitted from a particularly impactful political gaffe on Lyndon Johnson's part.[61]

During the 1968 campaign, Nixon promised to appoint "judicial conservatives" to the bench.[62] While Nixon and Warren were both California

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53. GRAHAM, *supra* note 25, at 86–101; *see also* MCMAHON, *supra* note 52, at 47–51; GRAETZ & GREENHOUSE, *supra* note 47, at 13; LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS 364–65 (1983).

54. MCMAHON, *supra* note 52, at 41–43 (In Wallace's standard stump speech, he "linked the rise in crime to the Court by telling those assembled, 'If you walk out of this hotel tonight and someone knocks you on the head, *he'll* be out of jail before *you're* out of the hospital, and on Monday morning they'll try the *policeman* instead of the criminal.'") (emphasis in original).

55. *Id.* at 42 ("That's right, we are gonna have a *police* state for folks who burn the cities down. They aren't gonna burn any more cities."), and at 46 (Regarding the Court's desegregation of public schools, Wallace told a group of voters in Toledo, Ohio, "that if he became president 'not a single penny of federal tax money is going to be used to send a little child any place you don't want him.'").

56. BAKER, *supra* note 53, at 224 (During his speech accepting the Republican Presidential nomination, Nixon "promised voters that 'the wave of crime is not going to be the wave of the future in the United States of America,' that the restoration of law and order would be a linchpin of his administration.").

57. MCMAHON, *supra* note 52, at 46–47 (examining the differences between Wallace and Nixon's criticisms of the Supreme Court), and at 57 ("As part of his electoral strategy in the 1968 campaign, Nixon often spoke out against the Warren Court.").

58. DRESSLER & THOMAS, *supra* note 33, at 584.

59. The Supreme Court of the United States, *Justices 1789 to Present*, https://www.supremecourt.gov/about/members_text.aspx (last visited Aug. 6, 2019).

60. *E.g.*, *United States v. Ash*, 413 U.S. 300 (1973) (holding that a defendant's right to counsel did not include photo arrays); *see also Lego v. Twomey*, 404 U.S. 477, 489 (1972) (holding that the state merely had to surpass a preponderance of the evidence standard to prove a suspect waived his *Miranda* rights); *Kirby v. Illinois*, 406 U.S. 682 (1972) (limiting the application of the *Wade-Gilbert* rule to only identifications occurring "at or after the initiation of adversary judicial criminal proceedings.").

61. Had Johnson not attempted to elevate Judge Fortas, the makeup of the Court—and the number of seats open for Nixon nominations—would likely have been much different. *See* discussion *infra; see also* note 78, *infra*.

62. EARL M. MALTZ, THE COMING OF THE NIXON COURT: THE 1972 TERM AND THE TRANSFORMATION OF CONSTITUTIONAL LAW 2 (2016).

Republicans, Warren had developed a deep distrust of Nixon, dating back many years.[63] Apart from personal dislike, Warren had concerns about Nixon's announced conservative judicial philosophy.[64] In June 1968, Warren announced his retirement, in advance of the election, as an effort to ensure that President Johnson could appoint his successor.[65]

Johnson was not interested in appointing a new justice as the next Chief. Instead, he nominated his long-time friend and confidant sitting-Justice Abe Fortas to be the next Chief Justice.[66] Johnson also nominated United States Fifth Circuit Court of Appeals Judge Homer Thornberry, a Texan, to replace Fortas.[67] Revelations about Fortas' relationship with the President and financial dealings resulted in a successful filibuster of his nomination.[68]

Chief Justice Warren remained on the Court as Nixon began his presidency, but he agreed to step down as of June 1969.[69] Nixon appointed Law-and-Order advocate Warren Burger to succeed Earl Warren.[70]

Although Fortas returned to the Court as an associate justice, matters turned worse for him. No doubt, Fortas' critics paid more attention to him because of the revelations that emerged during the hearings regarding his appointment to Chief Justice.[71] And more revelations came out that proved sufficient to force his resignation.[72] Notably, a Life Magazine reporter published an article about a questionable contract that Fortas entered into with Wall Street financier Louis Wolfson, one of Fortas' former clients and longtime friends.[73] Nixon began to push for Fortas' resignation.[74] Fortas did soon resign, at Earl Warren's urging.[75] The net result was to give Nixon two extra appointments to the Court.[76] Two years

63. *See* JIM NEWTON, JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE, 243–46 (2006) (Antagonism between Warren and Nixon was a "barely concealed fact" as early as 1952; both had "plenty of reason to distrust each other.").

64. *Id.* at 488–89 (detailing Warren's concern at the thought of "hand[ing] over his seat to his old enemy."); *see also* MALTZ, *supra* note 62, at 2 (Warren resigned well in advance of the election, "to deprive Nixon of the potential opportunity to appoint the next chief justice.").

65. *See* United States Senate, *Filibuster Derails Supreme Court Appointment*, SENATE STORIES (October 1, 1968), https://www.senate.gov/artandhistory/history/minute/Filibuster_Derails_Supreme_Court_Appointment.htm (Unlike Mitch McConnell's later contention that the Senate should not consider a judicial appointment to the Court during an election year, no one made that particular objection to Fortas' appointment—Johnson's foes had other concerns about Fortas.).

66. PETER CHARLES HOFFER, WILLIAM JAMES HULL HOFFER, AND N.E.H. HULL, THE SUPREME COURT: AN ESSENTIAL HISTORY 344 (2d ed. 2018).

67. MCMAHON, *supra* note 52, at 25.

68. SENATE STORIES, *supra* note 65; *see also* MCMAHON, *supra* note 52, at 25–26.

69. NEWTON, *supra* note 63, at 499–50.

70. MCMAHON, *supra* note 52, at 114.

71. MALTZ, *supra* note 62, at 3.

72. NEWTON, *supra* note 63, at 502–03.

73. *Id.* at 503.

74. MCMAHON, *supra* note 52, at 26.

75. NEWTON, *supra* note 63, at 503.

76. *See* HOFFER ET AL., *supra* note 66, at 369 ("Johnson's botching of Fortas' candidacy gave Nixon the

later, Justices Hugo Black and John Harlan stepped down from the Court for health reasons.[77] As a result, Nixon was able to remake the Court within a short time.

President Johnson's decision to nominate his friend for the Chief Justice position was a blunder, as recognized by a number of commentators.[78] Had he nominated Homer Thornberry to serve as Chief Justice, Fortas would likely have remained on the Court, perhaps until his death in 1982.[79] Thornberry, who had a strong record on civil rights, would almost certainly have been a more liberal justice on criminal matters than the Nixon appointees.[80] Thornberry died in 1995.[81] At a minimum, a post-Warren Court with only two Nixon appointees would have likely provided further evolution of Warren Court precedent. One can only speculate what might have been, had Johnson not blundered in attempting to promote his friend.

Within the first decade of the Burger Court, some scholars argued that the feared counter-revolution against the Warren Court did not take place.[82] From our advantage today, I believe that the Burger Court -- and the subsequent Rehnquist and Roberts Courts -- have effectively eroded much of the Warren Court's revolution. The erosion of Miranda provides one example of that process.

Almost from the start of the Burger's tenure as Chief Justice, the Supreme

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opportunity to fill both the center seat and appoint an associate justice.").

77. *Id.* at 373–74.

78. *See, e.g.*, John Massaro, *LBJ and the Fortas Nomination for Chief Justice*, 97 POL. SCI. Q. 603, 621 (1982) (evaluating ways in which "it was poor presidential management rather than ideology that was the primary factor leading to the Senate's refusal to confirm Abe Fortas."); *see also* MCMAHON, *supra* note 52, at 17–36 (arguing that Johnson's selection of Fortas, "a case of gross political malpractice," tipped the scales in favor of Richard Nixon securing the Republican Party's 1968 Presidential nomination, thereafter the general election and the ability to appoint Justices).

79. HOFFER ET AL., *supra* note 66, at 344–45.

80. For examples of Judge Thornberry's Fifth Circuit opinions around this time, *see, e.g.*, *State of Fla. ex rel. Shevin v. Exxon Corp*, 526 F.2d 266, 274–76 (5th Cir. 1976) (upholding the Attorney General of Florida's authority to bring an antitrust action against seventeen major oil companies via a factor-balancing test); *see also United States v. Greenwood Mun. Separate Sch. Dist.*, 406 F.2d 1086, 1093 (5th Cir. 1969) (invalidating a school district desegregation plan because, in violation of the Civil Rights Act of 1964, the plan's geographic zoning "reinforce[d] the dual system of segregated schools"); *Sheridan v. Garrison*, 415 F.2d 699, 702-706 (5th Cir. 1969) (holding that 28 U.S.C. § 2283, the Anti-Injunction Act, does not bar injunction of state criminal proceedings that would produce a chilling effect on First Amendment speech rights); J. WOODFORD HOWARD, JR., COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS 243 (1981) (showing Thornberry voted in favor of civil rights claimants in 60% of "Civil Rights Cases."); Charles M. Cameron & Jee-Kwang Park, *How Will They Vote - Predicting the Future Behavior of Supreme Court Nominees,* 1937-2006, 6 J. EMPIRICAL LEGAL STUD. 485, 491–93 (2009) (assigning Homer Thornberry, based on his U.S. Court of Appeals decisions and other factors, a highly "liberal" nominate-scaled perception score—far to the left of all Nixon appointees); *but see* ASHLYN K. KUERSTEN & DONALD R. SONGER, DECISIONS ON THE U.S. COURTS OF APPEALS 95 (2001) (finding that Thornberry, while on the 5th Circuit, voted for a "liberal" outcome in 36% of cases overall, and in only 26% of "Civil Liberties Issues" cases and19% of "Criminal Issues" cases [with the small caveat that judges, on average, voted for a "liberal" outcome in only one third of total cases over their careers.]).

81. Federal Judicial Center, *Thornberry, William Homer*, HISTORY OF THE FEDERAL JUDICIARY: JUDGES, https://www.fjc.gov/node/1388791 (last visited Aug. 8, 2019).

82. *E.g.,* VINCENT BLASI, *Preface*, in THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T xii (Vincent Blasi, ed., 1983).

Court began to cabin *Miranda*.[83] Picking up on *Miranda's* suggestion that states or Congress might provide alternative remedies to the *Miranda* warnings,[84] the Burger Court characterized *Miranda's* protections as merely "prophylactic."[85] If only prophylactic, the argument went, the protections were not mandated by the Constitution and could not legitimately be imposed on the states.[86] And because merely prophylactic, the protections were not coterminous with the voluntariness protections: those protections, now recognized as found in the Fifth Amendment, were the core protections.[87] *Miranda* was not part of that core protection.

At times, the Burger Court seemed ready to overrule *Miranda*. For example, in *Brewer v. Williams*,[88] a case involving a brutal murder of a young girl, the Court seemed on the verge of abandoning *Miranda*. In a 5-4 decision, written by Justice Stewart, a *Miranda* dissenter,[89] the Court found that the state violated Williams' Sixth Amendment right to counsel.[90] As a result, the majority did not reach the question of Miranda's constitutional status. The Chief Justice took for him the unusual step of reading his emotional dissent from the bench, which, in part, was aimed at Justice Powell, whose vote in favor of Williams, gave Justice Stewart his

83. *See e.g., Lego v. Twomey*, 404 U.S. 477, 489 (1972) (holding that the state merely had to prevail based on a preponderance of the evidence standard to show a suspect waived his Miranda rights); *see also* Geoffrey R. Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 106–113 (1977) (arguing, inter alia, that the Burger Court "disregarded a clear command from *Miranda*" when deciding *Harris v. New York*, its first confrontation with *Miranda*, and therefore provided "the potential to seriously undercut the incentive of police to comply with the dictates of *Miranda*."); Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 423 (1974) (arguing that the "Burger Court intend[ed] to reverse the trend of the past decade and to constrict rather than expand the rights of the accused.").

84. *Miranda*, 384 U.S. at 467 ("It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States. . . We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws.").

85. *See Oregon v. Elstad*, 470 U.S. 298, 309 (1985) ("If errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement on the Fifth Amendment itself."); *see also New York v. Quarles*, 467 U.S. 649, 654 (1984) ("The prophylactic Miranda warnings therefore are 'not themselves rights protected by the Constitution but [are] instead measures to ensure that the right against compulsory self-incrimination [is] protected.'") (quoting *Michigan v. Tucker*, 417 U.S. 433, 444 (1974)).

86. *See Dickerson*, 530 U.S. at 446 (Scalia, J., dissenting) (arguing the majority decision was asserting a "power, not merely to apply the Constitution but to expand it, imposing what it regards as useful "prophylactic" restrictions upon Congress and the States. That is an immense and frightening undemocratic power, and it does not exist.").

87. *See Quarles*, 467 U.S. at 654 ("Requiring Miranda warnings before custodial interrogation provides 'practical reinforcement' for the Fifth Amendment right.") (quoting *Tucker*, 417 U.S. at 444*); compare Harris v. New York*, 401 U.S. 222 (1971) (holding a confession elicited in violation of *Miranda* may be used to impeach a defendant's testimony in defense of himself at trial) *with New Jersey v. Portash*, 440 U.S. 450, 459 (1979) (holding that a "defendant's compelled statements, as opposed to statements taken in violation of *Miranda*, may not be put to any testimonial use whatever against him in a criminal trial."). *Harris* and *Portash*, taken together, thus draw a doctrinal distinction between a *Miranda* violation and a violation of the underlying Constitutional privilege against involuntary self-incrimination.

88. 430 U.S. 387 (1977).

89. *Miranda*, 384 U.S. at 526 (White, J., Harlan, J., & Stewart, J. dissenting).

90. *Brewer v. Williams*, 430 U.S. 387, 401 (1977).

majority.[91]

Even before Nixon took office, Congress passed legislation that included a provision aimed at overruling *Miranda*.[92] Section 3501 of the Omnibus Crime Control and Safe Streets Act of 1968 stated, in effect, that courts were to apply the voluntariness standard, not the *Miranda* protections.[93] During the next 32 years, courts paid no attention to the Omnibus provision.[94] Through efforts of anti-*Miranda* Professor Paul Cassell, the government finally urged application of §3501.[95]

In 2000, Chief Justice Rehnquist, appointed in large part to overrule *Miranda*[96] and a settled *Miranda* foe, wrote the majority opinion in *Dickerson v. United States*.[97] The decision was noteworthy for several reasons beyond Rehnquist's authorship. He wrote for 7 justices; he also wrote a remarkably tepid "endorsement" of *Miranda's* constitutional foundation.[98] Nonetheless, *Miranda* survived. It survived largely because the Court had so thoroughly eroded *Miranda* that it bore almost no relationship to *Miranda* as authored by Chief Justice Warren.[99]

Miranda is hardly the only Warren Court decision that the subsequent Courts narrowed recognition. My paper in this symposium focuses on the Warren Court's eyewitness identification cases, notably *United States v. Wade*[100] and *Gilbert v. California.*[101] In those cases, the Court held that post-indictment eye-witness identification was a critical stage of criminal proceedings, requiring the presence of counsel.[102] *Gilbert* also held that, even if a witness made an identification at a lineup without counsel present, the witness could still make an in-court

91. *Justices Spurn States'*, NY TIMES (Mar. 24, 1977), https://www.nytimes.com/1977/03/24/archives/justices-spurn-states-plea-to-void-miranda-ruling-justices-spurn.html.

92. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, tit. II, §701(a), 82 Stat. 197, 210 (codified as amended at 18 U.S.C. §§3501(a)-(b) (1994)). *See also* S. REP. NO. 1097, 90th Cong., 2d Sess. 37 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112.

93. Yale Kamisar, *Can (Did) Congress Overrule Miranda?*, 85 CORNELL L. REV. 883, 884–85 (2000) ("Section 3501 makes the pre-*Escobedo*, pre-*Miranda* "due process"— "totality of the circumstances"— "voluntariness" rules the sole test for the admissibility of confessions in federal prosecutions. . .").

94. Section 3501 was never enforced by the Justice Department. Pierre Thomas, *Justice seeks to overturn recent Miranda ruling,* CNN (Mar. 10, 1999), http://www.cnn.com/ALLPOLITICS/stories/1999/03/10/miranda/.

95. Paul Cassell, *The Statute That Time Forgot: 18 U.S.C. §3501 and the Overhauling of* Miranda, 85 IOWA L. REV. 175, 225 (1999).

96. Yale Kamisar, *The Miranda Case Fifty Years Later*, B.U. L. REV. 1293, 1294–95 (2017).

97. *Dickerson*, 530 U.S. at 444 (2000).

98. *Id.* at 431; *see also* Erwin Chemerinsky, *The Court Should Have Remained Silent: Why The Court Erred in Deciding* Dickerson v. United States, 1 U. PA. L. REV. 287 (2000).

99. Kit Kinports, *The Supreme Court's Love-Hate Relationship with Miranda*, 101 J. CRIM L. & CRIMINOLOGY 375, 376 (2011).

100. 388 U.S. 218 (1967).

101. 388 U.S. 263 (1967).

102. *Wade*, 388 U.S. at 236–37 (holding "there can be little doubt that for Wade the postindictment lineup was a critical stage of the prosecution at which he was 'as much entitled to such aid (of counsel) as at the trial itself'") (quoting *Powell v. State of Alabama*, 287 U.S. 45, 57 (1932)) (ellipsis in quotation omitted).

identification as long as the prosecution could establish an independent basis for such evidence.[103] Almost immediately, the Burger Court cabined those decisions in ways that have rendered them largely an afterthought.[104]

Yet another example is *Mapp*. Not long after the onset of the Burger Court, the Court began chipping away at *Mapp*. The post-Warren Courts ignored concerns about judicial integrity: the theory that courts should not participate in violations of the Fourth Amendment.[105] Instead, the Court shifted its focus to the deterrent effect of the exclusionary rule, and ruled in case after case that the exclusionary rule did not apply because on the facts of each case before the Court, application of the rule would not have a meaningful deterrent effect.[106] In more recent years, the Roberts' Court has hinted that the rule should apply only in instances of reckless or intentional violations of the Fourth Amendment.[107]

The foregoing examples are hardly the only cases where the Court has chipped away at Warren Court precedent.[108] Despite the erosion of so many Warren Court decisions, the Warren Court's revolution has changed the law. Examine any Criminal Procedure casebook. Most chapters begin with Warren Court precedent and then develop post-Warren Court case law.[109] It is too late in the day to go back to the pre-Warren Court era of due process. The protections in the Bill of Rights continue to limit state power. But efforts to erode, and perhaps eventually to overrule, some of those decisions continue.

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103. *Gilbert*, 388 U.S. at 272.

104. *E.g., Kirby v. Illinois*, 406 U.S. 682 (1972); *see also Neil v. Biggers*, 409 U.S. 188 (1972); *United States v. Ash*, 413 U.S. 300 (1973); *Manson v. Brathwaite*, 432 U.S. 98 (1977).

105. *See United States v. Calandra*, 414 U.S. 338, 351 (1974) (Brennan, J., dissenting) ("The Court today discounts to the point of extinction the vital function of the rule to insure [sic] that the judiciary avoid even the slightest appearance of sanctioning illegal government conduct. This rejection of the imperative of judicial integrity openly invites [t]he conviction that all government is staffed by hypocrites.") (internal quotation marks and ellipsis omitted).

106. *See United States v. Janis*, 428 U.S. 433, 446 (1976) (affirming the Court "has established the 'prime purpose' of the [exclusionary] rule, if not the sole one, 'is to deter future unlawful police conduct'") (quoting *United States v. Calandra*, 414 U.S. at 347) and at 458 ("The imposition of the exclusionary rule sought in this case is unlikely to provide significant, much less substantial, additional deterrence. . . The extension of the exclusionary rule would be an unjustifiably drastic action by the courts. . ."); *see also, e.g., Calandra*, 414 U.S. at 351 (holding the exclusionary rule did not apply to a grand jury witness because "any incremental deterrent effect. . . is uncertain at best"); *United States v. Peltier*, 422 U.S. 531, 542 (1975) (holding search evidence should be suppressed only if "it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment"); THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION 856-875 (3d ed. 2017).

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

108. In the right-to-counsel context, s*ee, e.g., Ross v. Moffitt*, 417 U.S. 600 (1974) (changing course from the Court's earlier movement in *Douglas v. California*, 372 U.S. 353, requiring that States provide indigent defendant with appointed counsel during their initial appeal, to hold appointment of counsel is not required by the Fourteenth Amendment for discretionary state appeals and for application for review in the Supreme Court).

109. *See e.g.,* DRESSLER & THOMAS, *supra* note 33, at 75 (Chapter 3 "Passing the Threshold of the Fourth Amendment" beginning with *Katz v. United States*, 389 U.S. 347 (1967)), and at 132 (Chapter 4 "Substance of the Fourth Amendment" beginning with *Spinelli v. United States*, 393 U.S. 410 (1969)), and at 680 (Chapter 8 "Police Interrogation: The Sixth Amendment Right to Counsel" beginning with *Massiah v. United States*, 377 U.S. 201 (1964)).

This brief history leads to the topic of the symposium: Was the Warren Court right in making criminal procedural reform the centerpiece of its agenda? Participants in this symposium differ in their views of the legitimacy of the Court and in their views of wisdom of the Court's rapid and revolutionary change in the law. Indeed, those differences should make for an exciting symposium. Read on.