Racial Justice: The Failure of the Warren Court’s Criminal Procedure

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Abstract

For seventy years after the Civil War Amendments were ratified, the Supreme Court sought to nudge Southern courts and legislatures toward racial justice. But the case-by-case messaging was largely lost on the relevant actors. In 1954, the Warren Court struck a systemic blow for racial justice in Brown v. Board of Education. State legal mandates that segregated public schools were unconstitutional. A few years later, the Court sought systemic solutions to racial injustice in the state criminal justice systems. Although reforms like requiring states to provide counsel for indigent defendants would benefit all races, this article argues that the Court saw Black Americans as particularly affected by injustices in state criminal justice systems. From 1961 to 1968, the Court decided five landmark criminal procedure cases that sought to advance racial justice. The problem? States found “work-arounds” for most of those guarantees. Defendants, including Blacks and other minorities, might be slightly better off today than they were in 1960, but only at the margin. Could the Warren Court have done better? Can courts do better today? The answer is a modest yes, at least as to some protections.

Introduction

Stretching almost all the way back to the ratification of the Civil War Amendments, the Supreme Court of the United States has been trying to shock state justice systems, particularly in the South, into improved racial justice. The problem is that the effort was case-by-case, sporadic, and with no follow-through. We will see some of those cases in Part I.

Beginning with Brown v. Board of Education1 in 1954, the Warren Court was on record acknowledging that at least some aspects of life in America systematically discriminated against Black Americans. Systemically disparate treatment in other walks of life was not limited to Black Americans, of course, but also affected Latin Americans. That there are “two Americas”

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is to some “an ancient tale” because “[t]here’s a long history of black and brown communities feeling unsafe in police presence.”

Racial minorities might feel unsafe because they live “[i]n a society where some are considered dangerous even when they are in their living rooms eating ice cream, asleep in their beds, playing in the park, standing in the pulpit of their church, birdwatching, exercising in public, or walking home from a trip to the store . . . .” The feeling of being unsafe arises because “[a]t every level of policing in the United States, one sees a massive amount of police-citizen interaction, visited disproportionately on Black people, other minorities and the poor.”

We have seen this harsh treatment play out in many individual cases recently. To name only a few, police killed Breonna Taylor in Louisville, Kentucky; George Floyd in Minneapolis; Daunte Ward in a suburb of Minneapolis; Michael Brown in Ferguson, Missouri; Tamir Rice in Cleveland. Racism has been a plague in this country for four centuries despite many efforts to mitigate its effects. One effort has been aimed at criminal justice. “Since Reconstruction, subordinated communities have endeavored to harness the criminal justice system toward recognition that their lives have worth.”

As Herbert Packer noted, “the most powerful propellant” of Supreme Court lawmaking in the policing domain was the gross abuse of power by law enforcement officers in the South, usually aimed at Black citizens . . . . With Congress moribund, and with local legislatures and courts silent—if not sympathetic to—police malfeasance, the Supreme Court of the 1960s felt it had to enter the legal vacuum in the policing realm, as it had done with school segregation in 1954.

One aspect of the Warren Court criminal procedure “revolution” in the 1960s was to advance what we might call, for lack of a better term, racial justice. The revolution sought to provide tools that would benefit poor, disadvantaged suspects, most of whom were racial minorities. Three of the

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3 Id.
justices who would be part of the revolution had been on the Brown Court (Chief Justice Warren and Justices Black and Douglas). The revolution was cheered by many and criticized by some.

The Warren Court created several doctrines designed to mitigate the harm caused by state criminal justice systems. While these doctrines would serve all suspects and defendants, the Court that decided Brown v. Board of Education must have been aware of the harm caused by state justice systems to minorities. The Court must also have intended to help minorities, and particularly Blacks, deal with unjust criminal justice systems. The benefit would be especially large in the Southern courts. The Supreme Court, after all, was aware of Brown v. Mississippi, Powell v. Alabama, Norris v. Alabama, and other cases where Southern courts had failed Blacks in ways that today seem unimaginable. I will turn to those cases shortly.

Today it is clear that the justice project largely failed. Any changes to the 50-state justice system have been marginal or non-existent. To be sure, there is no accurate way to measure how well any justice system serves the disadvantaged in its midst, let alone how the aggregate of 50 justice systems performs. But no one who observes the mass processing of poor defendants

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9. See, e.g., Tracey L. Meares, Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice, 3 Ohio St. J. Crim. L. 105 (2005) (criticizing incorporation for losing the focus on fundamental fairness and racial injustice in the context of criminal justice); Eric J. Miller, The Warren Court’s Regulatory Revolution in Criminal Procedure, 43 Conn. L. Rev. 1 (2010) (critiquing the Warren Court for its negative effects on policing); Corinna Barrett Lain, Countermajoritarian Hero or Zero? Rethinking the Warren Court’s Role in the Criminal Procedure Revolution, 152 U. Pa. L. Rev. 1361, 1364 (2004) (“For all the credit the revolution has received, however, no one yet has paused to consider whether the Warren Court’s criminal procedure decisions were truly the bastion of countermajoritarianism decision making they have been made out to be.”); Pizzi, supra note 7, at 825 (“[N]ot everything the [Warren] Court did turned out well.”). See also Justin Driver, The Constitutional Conservatism of the Warren Court, 100 Cal. L. Rev. 1101 (2012) (summarizing the debate).

10. See Lain, supra note 9, at 1364; Barry Feld, Race, Politics, and Juvenile Justice: The Warren Court and the “Conservative” Backlash, 87 Minn. L. Rev. 1447 (2003).

11. See infra notes 55-87 & accompanying text.


15. See generally Pizzi, supra note 7 (describing the failure of the Warren Court’s criminal procedure revolution); George C. Thomas III, The Warren Court, Idealism, and the 1960s, 51 U. Pac. L. Rev. 843 (2020) (concluding that failure was inevitable because states would neutralize many of the reforms).
could possibly think that justice was being thoroughly served. No one who watches suspects being tricked and manipulated by police interrogators could possibly think that *Miranda v. Arizona*\(^{16}\) leveled the playing field for suspects. False eyewitness identifications are present in over 60% of wrongful conviction cases uncovered by the Cardozo Innocence Project, disproportionately affecting Black defendants;\(^{17}\) how could one think that the Warren Court’s solution to the identification problem is working? No one who watches defense lawyers stumble through cases without investigating defendants’ best defenses could possibly think that the promise of *Gideon v. Wainwright*\(^{18}\) has been realized.

And what caused this massive disappointment? It is of course a complicated story. There are many causes. But I will argue that the main cause is that the Court did not anticipate the consequences of its revolution. The Warren Court seemed to think it could provide more procedural protections to suspects and defendants, and thus make convictions harder to obtain, while all the other levers in the system remained static. They did not. Criminal justice is certainly about justice but it is also about criminals. People who have committed serious crimes—who have murdered, raped, or robbed—are viewed by legislatures, judges, and voters as deserving of punishment.\(^{19}\) Legislatures, prosecutors, and judges reacted in ways that blunted much of the Warren Court’s reform. In some cases, the problem was just larger than the Court seemed to realize.\(^{20}\)

First, I provide background into the Court’s earlier attempts to prod Southern justice systems into providing basic justice to Black suspects and defendants. Then in Part II, I offer some examples of the disconnect between the Warren Court’s idealism and the gritty reality on the ground. Part III

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provides more detail about the failures. In Part IV, I will sketch some ideas about how the Warren Court could have done more to mitigate the harm caused by state justice systems to Black suspects and defendants as well as other disadvantaged groups.

I. THE OPENING ACT

Fourteen years after the Fourteenth Amendment was ratified, the Supreme Court began a sporadic, but determined, effort to bring at least a modicum of justice to Black defendants in Southern justice systems. In *Strauder v. West Virginia*, the Court struck down, over two dissenting votes, a West Virginia statute that forbade Blacks from serving on grand or petit juries. Basic fairness supports the Court’s judgment here. In addition, Black defendants are more likely to be judged fairly if grand juries and petit juries include Blacks. Having Blacks on juries judging Black defendants would help counter stereotypes and prejudices. In concluding that the statute violated the Equal Protection Clause of the Fourteenth Amendment, the Court said:

> It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy . . . . The framers of the [Fourteenth] amendment must have known full well the existence of such prejudice and its likelihood to continue against the manumitted slaves and their race, and that knowledge was doubtless a motive that led to the amendment . . . . [that] bestow[s] upon the national government the power to enforce the provision that no State shall deny to them the equal protection of the laws.

The Supreme Court would go on to decide some high profile cases of Southern injustice against Black defendants, and I will turn to those in a moment, but I begin with an early case that did not make it to the Court on the merits: *Johnson v. Tennessee*. The rape of a young white woman, Nevada Taylor, by a Black man in 1906 unleashed a storm of fury and racism in

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21 *100 U.S. 303* (1879).
22 *Id.* at 312.
23 *Id.* at 309.
24 *See Johnson v. Tennessee, 214 U.S. 485 (1909).*
Chattanooga, Tennessee. The sheriff presented Taylor with two suspects. She said that Ed Johnson to her “best knowledge and belief . . . was the one [who] assaulted me.”

At trial, the defense team, comprised of three white lawyers, mounted an aggressive alibi defense that put the State’s case in doubt. The State lacked a key piece of evidence. Despite “severe sweating” at the hands of the sheriff, a former Confederate officer, Ed Johnson steadfastly insisted that he was innocent. Lacking a confession, the State had only Taylor’s eyewitness identification.

But Taylor refused to say for certain that Johnson was her attacker; she would only testify that she “believed he was the man.” After Taylor was excused from the stand, the jurors requested that she be recalled. Juror J. L. Wrenn asked her

“Miss Taylor, can you state positively that this Negro is the one who assaulted you?” Taylor answered, “I will not swear he is the man, but I believe he is the Negro who assaulted me.” Wrenn, still not satisfied, asked again: “In God’s name, Miss Taylor, tell us positively—is that the guilty Negro? Can you say it? Can you swear it?” With tears streaming down her face and in a quivering voice, Taylor replied, “Listen to me. I would not take the life of an innocent man. But before God, I believe this is the guilty Negro.”

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28 See CURRIDEN & PHILLIPS, supra note 25, at 39 (quoting an unidentified newspaper account).


The jury initially voted 8–4 for conviction, and the judge sent them home for the evening. When the jury returned the next day, the doubts of the four dissenting jurors had somehow been laid to rest. Ed Johnson was found guilty and sentenced to hang. The United States Supreme Court granted a hearing on a writ of habeas corpus to examine whether the trial met due process fairness standards. The order “stayed all proceedings against Johnson, and required [the sheriff] to retain custody of Johnson pending determination of the appeal . . . .” But the intervention by the federal court proved too much for some in the community.

The headlines in the Chattanooga Times the next day, March 20, 1906, told the whole story:

“God Bless You All—I am Innocent” Ed Johnson’s Last Words Before Being Shot to Death By a Mob Like a Dog, Majesty of the Law Outraged by Lynchers, Mandate of the Supreme Court of the United States Disregarded and Red Riot Rampant, Terrible and Tragic Vengeance Bows City’s Head in Shame.

President Theodore Roosevelt condemned the lynching as “an affront to the highest tribunal in the land . . . .” Using the bloodless language of formal judicial opinions, the Court dismissed Johnson’s appeal on the ground that it was “abated by the death of the appellant.” But prior to dismissing the appeal, the Court did something extraordinary. It ordered a federal criminal trial that resulted in contempt convictions, and short federal prison sentences, for the Chattanooga sheriff and five other law enforcement officers.

The next volley in the Court’s quest to prod Southern courts toward racial justice is the well-known case of Powell v. Alabama. Nine young Black men were accused of raping two white women. As James Goodman makes

31 Id.
32 Id.
34 Shipp, 214 U.S. at 404.
35 God Bless You All—I am Innocent, CHATTANOOGA TIMES, Mar. 20, 1906, reprinted in Linder, supra note 26.
36 Linder, supra note 26.
39 287 U.S. 45 (1932).
plain in his gripping account of this case, the defendants were innocent, but eight were convicted and sentenced to hang; the Alabama Supreme Court affirmed the convictions of seven. These seven defendants pressed on the United States Supreme Court three grounds for reversal: “(1) [T]hey were not given a fair, impartial, and deliberate trial; (2) they were denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial; and (3) they were tried before juries from which qualified members of their own race were systematically excluded.”

The Court chose ground (2), holding that the failure to appoint counsel for these indigent defendants in a capital case violated the Fourteenth Amendment Due Process Clause. It is impossible, at least today, to argue against the Court’s judgment, though two justices dissented, partly on the ground that the Court could have simply held that the trial judge erred in not giving the defendants enough time to secure counsel. The dissent is correct, but the Court obviously wanted to prescribe more powerful “medicine” to Southern justice when indigent Black defendants were charged with a capital crime.

Even more powerful medicine would have been to prohibit the exclusion of Blacks from jury pools, but the Court was not (yet) willing to require that medicine, probably because it anticipated a strong pushback from Southern states. The right to counsel for indigent capital defendants was a narrow protection that did not require systemic changes in the Southern justice systems. Also, it was not explicitly directed at protecting Black defendants, though the Court surely had Black defendants uppermost in its mind when it thought about Southern injustice.

Did it work? Michael Klarman said it likely did not, and it is difficult to disagree with his assessment:

Even if Powell did ensure better legal representation for southern black defendants, how much this affected actual case outcomes is uncertain . . . . [The Communist International Labor Defense] accused the Court of simply providing Alabama with instructions on how properly to Lynch the defendants. Even if appointed days before trial and afforded adequate opportunity to prepare a defense, counsel generally could do little to assist clients like the Scottsboro Boys. Black lawyers, who might have been willing aggressively to pursue their

40 JAMES GOODMAN, STORIES OF SCOTTSBORO 4-7 (1995).
42 Powell, 287 U.S. at 50.
43 Id. at 76-77 (Butler, J., dissenting) [joined by McReynolds, J.).
clients’ defense, were few and far between in the South, and in any event were distinct liabilities owing to the prejudice they aroused among white judges and juries. White lawyers, on the other hand, generally refrained from pressing defenses that raised broader challenges to the Jim Crow system, such as race-based exclusion from juries. In any event, even the most earnest advocacy rarely could influence case outcomes when the system was so pervasively stacked against fair adjudication of the legal claims of black defendants. The Scottsboro Boys did enjoy outstanding legal representation in their retrials, yet it made absolutely no difference to the outcomes.\footnote{44}

As Klarman notes, all of the Powell defendants were retried, some more than once, and five received convictions that withstood appellate review.\footnote{45} These were innocent defendants represented by excellent lawyers. In one case on retrial, one of the victims testified that “the defendants did not rape, touch, or even speak to her and [the other putative victim].”\footnote{46} Despite this testimony, it took the jury only moments to vote unanimously to convict (it took eleven hours to persuade one juror to vote for the death penalty).\footnote{47} The Powell solution ran aground.

A mere three years after Powell, the Court seemed to recognize that Powell was, at best, not an ideal solution for Southern injustice against Black defendants. Norris v. Alabama\footnote{48} was an appeal from a second conviction of one of the Powell defendants. Norris was once again sentenced to death.\footnote{49} In Norris, the Court went the extra step that it avoided in Powell and extended Strauder v. West Virginia\footnote{50} to include de facto discrimination against Blacks when empaneling grand juries and petit jury pools. The obvious goal of Norris was to include Blacks in jury decision-making to make it fairer to Black defendants.

Did this work or did the Southern states find ways around Norris? One does not have to be a thorough cynic to imagine that Southern jury systems still managed to minimize Black participation.\footnote{51} It was easy enough to add

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\item \footnote{45} Goodman, supra note 40, at 395-96.
\item \footnote{46} Id. at 132.
\item \footnote{47} Id. at 145.
\item \footnote{48} 294 U.S. 587 (1935).
\item \footnote{49} Id. at 588.
\item \footnote{50} 100 U.S. 303 (1879).
\end{itemize}
a few names of Blacks to the various lists and then find ways to avoid empaneling them or only empaneling one or two Blacks. It was easy enough to require a literacy test for voting. Mississippi required a literacy test eleven years after *Strader* held unconstitutional state laws banning Blacks from juries. A literacy test in the hands of a Southern white registrar could easily be manipulated to keep Blacks off the voting rolls and thus off any jury lists based on voting rolls. In Mississippi, for example, the registrar could choose the section of the state constitution that the prospective voter had to read and interpret. As a result, nonwhite voter registration in Mississippi fell from 70% in 1867 to roughly 6% prior to the Voting Rights Act of 1965.

One effect of *Norris* in the South, ironically, was to exclude Blacks from voting as a way of not including Blacks in jury pools. Think lose-lose.

*Powell* and *Norris* involved attempts to impose fairer procedures on the Southern justice systems. A year after *Norris*, the Court was faced in *Brown v. Mississippi* with convictions and death sentences imposed on Mississippi defendants who had been tortured into confessing. It is perhaps not surprising that the trial judge permitted the jury to consider these confessions, despite uncontradicted evidence of the torture. Perhaps the judge hoped the jury would do the right thing. Or perhaps the judge did not care. What is surprising is that the Mississippi Supreme Court affirmed the convictions.

This is surprising at two levels. First, the sheer inhumanity of the treatment of the suspects transcends anything in American law, at least any conduct that was held to produce a voluntary confession. In *Hector (A Slave)* v. *State*, the suspect was treated about as horribly as the suspects in *Brown*. The difference was that the Missouri Supreme Court held that Hector’s confession was involuntary. The case was in 1829. Missouri was a slave

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55 297 U.S. 278 (1936).


57 2 Mo. 166 (1829).

58 *Id.* at 167-168. The court also ruled that the voluntariness issue was a matter of law for the trial court and could not be referred to the jury. *Id.* at 168. While that is the rule today, as late as 1964, at least fourteen states permitted juries to rule on voluntariness of confessions in some
state. Hector was a slave. The suspects in Brown were tried in 1934, seven decades after the Civil War Amendments were ratified. That Hector won his involuntary confession claim while the suspects in Brown lost theirs is a sad commentary on racial justice in Mississippi in 1934.

The second level of surprise is that, as the Brown dissent points out, the Mississippi Supreme Court had repeatedly found confessions to be involuntary on facts far less extreme than those in Brown. In 1887, the Mississippi Supreme Court created a framework for trial judges to decide the admissibility of a confession: “unless it plainly appears that it was free and voluntary, if there is a reasonable doubt against its being free and voluntary, it should be excluded from the jury.” It is difficult to imagine that a confession wrung from suspects by torture could be held free and voluntary beyond a reasonable doubt.

Closer in time, and closer on the facts, to Brown is Matthews v. State. In Matthews, a 14-year-old Black youth confessed after he was whipped. The Mississippi Supreme Court held that the trial court erred in admitting the confession because it was “surely not free and voluntary.”

But the majority on the Brown state court ignored those precedents, and seized on a procedural technicality to rule against the Brown defendants. Perhaps there was political pressure attending the case. The dissent from the denial of a rehearing noted that the case had aroused “the flaming indignation of a whole community.” The supposition that the state supreme court was influenced by public opinion is supported by an odd procedural twist during the Brown appeal. First, the context. John Clark was one of the white lawyers appointed to defend the men at trial. It seems that he initially believed that the defendants were guilty, but the testimony about

\[\text{circumstances. See } \text{Jackson v. Denno, 378 U.S. 368, 396-99 (1964) (Appendix to Opinion of Court) (noting fourteen states that permitted this practice). However, } \text{Jackson held that this practice violated the Due Process Clause. Id. at 391.}\]

\[\text{59 See } \text{Brown v. State, 158 So. 339, 343 (Miss. 1935) (Anderson, J., dissenting) (citing, inter alia, Williams v. State, 16 So. 292 (Miss. 1894) (finding a confession involuntary and therefore inadmissible when a mob tied up a suspect, carried him into the woods, and demanded a confession).}\]

\[\text{60 Ellis v. State, 3 So. 188, 189 (Miss. 1887).}\]

\[\text{59 So. 842 (Miss. 1912).}\]

\[\text{62 Id.}\]

\[\text{63 Id.}\]

\[\text{64 Brown v. State, 158 So. 339, 342 (Miss. 1935).}\]

\[\text{65 Brown v. State, 161 So. 465, 472 (Miss. 1935) (Griffith, J., dissenting).}\]

\[\text{66 RICHARD C. CORTNER, A "SCOTTSBORO" CASE IN MISSISSIPPI, 43 (1986).}\]
the torture and the admissions made by the state’s own witnesses “seared”
his conscience and ultimately caused him to have an emotional breakdown.\textsuperscript{67}

Clark’s breakdown might explain the crucial procedural mistake in the trial, a mistake that gave the majority a way to affirm the convictions: after the testimony about the torture, he failed to move to exclude the confessions.\textsuperscript{68} Because the defense had objected to the admissibility of the confessions when they were initially offered,\textsuperscript{69} it is unclear why a later motion to exclude was necessary, but an earlier Mississippi Supreme Court case, \textit{Loftin v. State},\textsuperscript{70} had required a motion to exclude after testimony about how the confession was obtained. But the differences in the two cases are obvious:

In \textit{Loftin}, the Black defendant made a non-specific, conclusory claim that he confessed because of “fear and the promises of assistance” given by two private parties.\textsuperscript{71} It was easy enough to reject that claim on procedural grounds, rather than reach the merits, but the testimony about the torture in \textit{Brown} was detailed and was admitted by a deputy sheriff. It would be easy enough, as the \textit{Brown} dissent said, to hold that admitted torture is an exception to the \textit{Loftin} principle.\textsuperscript{72} But when asked to reverse the convictions on account of the torture, the majority cited \textit{Loftin}, and like Ulysses tied to his mast, insisted that “we cannot reverse upon that point.”\textsuperscript{73}

Clark’s first mistake probably cost the \textit{Brown} defendants their chance at a reversal in the state supreme court, though a nagging doubt persists: could the court have found another way to affirm the convictions? The following mistake almost cost the \textit{Brown} defendants their lives. His second mistake was not raising a federal constitutional claim in the appeal to the state supreme court. Whether the state supreme court was right or wrong to follow \textit{Loftin} in \textit{Brown}, the United States Supreme Court was not going to hear a federal constitutional claim not raised in the state courts.

A lawyer in 1935 probably had limited access to a law library; for that lawyer not to know about the \textit{Loftin} twist on the earlier state involuntary confessions cases is understandable. But for a lawyer who lived in Mississippi to bet his client’s life on the Mississippi Supreme Court, without a backup plan to reach the United States Supreme Court, is unforgiveable. But that is

\begin{footnotes}
\item[67] Id. at 43, 59-60.
\item[69] Id. at 340.
\item[70] 116 So. 435 (Miss. 1928).
\item[71] Id. at 437.
\item[72] \textit{Brown}, 158 So. at 343 (Anderson, J., dissenting).
\item[73] Id. at 342.
\end{footnotes}
where the Brown defendants found themselves on January 7, 1935. This is when a remarkable event saved the lives of the Brown defendants.

John Clark’s wife, Matilda Floyd Tann Clark, recognized that her husband (and his clients) needed help.74 She was the Democratic National Committee representative from Mississippi and was “well connected in Mississippi politics.”75 She persuaded a close friend and former governor, Earl Brewer, to take over the case and file a suggestion of error in the state supreme court.76 A suggestion of error under Mississippi procedure was essentially a motion for a rehearing, and they were usually summarily dismissed.77 But not this time.

Governor Brewer in his suggestion of error raised federal constitutional issues, including the failure of the state courts to exclude the Brown defendants’ confessions as involuntary under the Fourteenth Amendment Due Process Clause.78 Here, the plot thickens. If the state supreme court had summarily dismissed the suggestion of error, it would not have reached the merits of the due process claim, and the Brown defendants would not have been able to get a hearing in the United States Supreme Court. But four months after the state supreme court affirmed the Brown convictions, the state supreme court heard five suggestions of error that were not raised below.79 The court considered the issues rather at length, devoting five pages to them.80

One of the suggestions of error was that admitting the confessions violated “the first section of the Fourteenth Amendment to the Federal Constitution.”81 The state supreme court once again relied on the failure of counsel to move to exclude the confessions after hearing the evidence of coercion and dismissed the federal claim.82 The dissent in the rehearing case was even more insistent that Loftin should be distinguished than in the original appeal:

The case of Loftin v. State, when carefully examined, is not the case now before us, and ought not to be forced into service under the facts

74 CORTNER, supra note 66, at 64.
75 Id. at 46.
76 Id. at 64.
77 Id. at 64-65.
78 Id. at 74.
79 Brown v. State, 161 So. 465, 467 (Miss. 1935).
80 Id. at 465-70.
81 Id. at 467.
82 Id. at 468.
now being considered. No officer of the state had any part in the confessions in that case, the prosecuting officer of the state did not use the confession, knowing it was coerced, the weight of the testimony was that the confession was actually and in fact voluntary. The case now before us is thus separated from the *Loftin* Case, in vital principle, as far as the east from the west.\(^{83}\)

The mystery here is why the state court heard the Fourteenth Amendment argument. The state justices would have known that summarily dismissing the constitutional claim would have been the end of the line for the *Brown* defendants. Why did the justices leave open the door for reversal? I can think of only one reason the court would reach an argument that had been forfeited: the justices in the majority\(^ {84}\) recognized the fundamental unfairness perpetuated on the defendants by a combination of the terrible torture that produced the confessions and John Clark’s mistake in not preserving the federal constitutional claim.

The evidence thus suggests that the *Brown* majority wanted the United States Supreme Court to intervene and correct the dual injustices that infected *Brown*. This might strike modern readers as cowardly but remember this was Mississippi in 1935 and state supreme court judges were elected.\(^ {85}\) So, on my theory, the *Brown* majority was hoping for intervention from a court that did not have to worry about Mississippi politics. And intervene the United States Supreme Court did. The Court brushed aside the failure to move to exclude:

> It is a contention which proceeds upon a misconception of the nature of petitioners’ complaint. That complaint is not of the commission of mere error, but of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void.\(^ {86}\)

Once the procedural failure was brushed aside, there could be no doubt about the outcome. As the Court put it, “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

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\(^{83}\) *Id.* at 471 (Griffith, J., dissenting).

\(^{84}\) Oddly enough, the 1935 Mississippi Supreme Court had six justices. MISS. CONST. of 1890, art. VI, § 145, 145A (1916). Justices Griffith and Anderson dissented from the overruling of the suggestion of error, *Brown v. State*, 161 So. 465, meaning that four justices comprised the majority.

\(^{85}\) MISS. CONST. of 1890, art. VI, § 145 (amended 1915) (“[T]here shall be elected one judge for and from each district by the qualified electors thereof at a time and in the manner provided by law.”).

\(^{86}\) *Brown*, 297 U.S. at 286 (citing Moore v. Dempsey, 261 U.S. 86, 91 (1923)).
obtained as the basis for conviction and sentence was a clear denial of due process.\textsuperscript{87}

The picture presented in this Part is of the United States Supreme Court over a half century attempting to instill a modicum of racial justice in state criminal processes. But it was a sporadic case-by-case approach and, at least by some measures, mostly ineffective. It is a truism that the United States Supreme Court cannot review cases from all 50 state supreme courts, let alone the thousands of intermediate appellate and trial level state courts. All it can do is offer guidance, the more precise the better. When the guidance is vague, as it was when the Court told state courts to suppress involuntary confessions, the effort flounders.\textsuperscript{88}

The Warren Court decided to go after bigger game. It wanted to impose systemic change that would benefit disadvantaged suspects and defendants, particularly Black suspects and defendants. How well did the Court do? I turn to that issue now, first presenting a preview of what the Court achieved and then, in Part III, digging deeper to see how well the changes worked.

II. A PREVIEW OF THE REVOLUTION

A. Right to a Jury Trial

Before the Supreme Court intervened, Louisiana denied the right to a jury trial in a case where the authorized punishment was a maximum of two years.\textsuperscript{89} This was more restrictive than the federal jury trial right that the Court had found in the Sixth Amendment. The federal rule required the right to a jury trial if the potential penalty is more than six months.\textsuperscript{90} Misdemeanors in most states are punishable by up to one year in jail.\textsuperscript{91} Thus, to impose the federal rule on the states would benefit most misdemeanor defendants, potentially creating congestion in lower state courts.

\textsuperscript{87} Id.
\textsuperscript{88} See infra text accompanying note 274.
\textsuperscript{89} See Duncan v. Louisiana, 391 U.S. 145, 146 (1968).
\textsuperscript{91} See Wex Definitions Team, Misdemeanor, Cornell Law School (last updated Aug. 2021), https://www.law.cornell.edu/wex/misdemeanor [https://perma.cc/VC3V-9YZG] (“A misdemeanor is typically a crime punishable by less than 12 months in jail”). At the time of Duncan, however, Louisiana law provided that misdemeanors were punishable by up to two years. Duncan, 391 U.S. at 146 (“Under Louisiana law simple battery is a misdemeanor, punishable by a maximum of two years’ imprisonment and a $300 fine.”).
Should the Court create these potential problems just to achieve symmetry with the federal rule? Seven members of the Warren Court answered that question in the affirmative in Duncan v. Louisiana, holding the Louisiana system unconstitutional under the Fourteenth Amendment Due Process Clause. What is only indirectly referenced in the opinion is that this case is a rank example of Southern racism. One wonders if that is not the reason the Court struck down the Louisiana jury trial law.

The veiled reference to Southern racism that infected Gary Duncan’s trial is found in the Court’s passing remark that “the right to be tried by a jury of his peers gave [the accused] an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.” Two pages later, the Court wrote, “We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury.” The rhetorical “space” between those statements is the possibility that in a particular case, a judge might be “compliant, biased, or eccentric.”

Meet the Louisiana trial of Gary Duncan. Nancy King has told the story in fascinating detail, but the summary is that in 1966, the Louisiana public schools were operating under a desegregation order that continued to cause unrest and controversy among many whites. Two Black youths, each 12 years old, were walking home from a formerly all-white school when they were accosted by four white boys, roughly the same age. Gary Duncan, 19 years old and cousin to the two Black boys, happened to be driving by. He stopped, got out, and “encouraged his cousins to break off the encounter and enter his car.” While they were doing that, one of the white boys, Herman

92 Duncan, 391 U.S. at 146, 171 (Justice Harlan, dissenting) (joined by Justice Stewart).
93 Id. at 156.
94 Id. at 158.
95 Id. at 156.
97 Id. at 264-65.
98 King, supra note 96, at 265.
99 Duncan, 391 U.S. at 147.
100 Id.
Landry, Jr., said, “You must think you’re tough.”

Duncan touched his arm and urged him to go home.

From about 250 feet away, Bert Latham, president of the new private school association established to avoid integration, saw the incident and immediately called the sheriff’s office to report that Duncan had slapped Landry’s arm. A deputy stopped Duncan’s car and took him back to the scene. There the deputy questioned the white boys. Landry was not hurt and displayed no bruise. The deputy released Duncan, telling him that he did not believe that he’d struck the boy. Landry’s father had other ideas. He sought out a justice of the peace and swore out an affidavit supporting Duncan’s arrest.

No local lawyer would represent Duncan because the parish was in the “iron grip” of Louisiana’s “most ardent segregationist,” Leander H. Perez, Sr., who “was convinced that Jews were Communists who wanted to conquer America for the Soviet Union by undermining Caucasian stock with miscegenation.” His son, Leander H. Perez, Jr. was the chief prosecutor in the parish, the man who made the decision to prosecute Duncan for misdemeanor battery, punishable by up to two years imprisonment and a fine. Duncan turned to a civil rights defense committee with an office in New Orleans. Duncan’s lawyers requested a jury trial, probably sensing that they had no chance with the local judge. But Louisiana law was against them on that point and the trial judge “denied the request.”

At the trial, Duncan and his cousins testified that he barely touched Landry, and did it just as a manner of expression, but Latham testified that he saw a hostile slap. The judge chose to believe the white witnesses and convicted Duncan, imposing a severe sentence for a simple battery: 60 days in jail. The judge later explained why he sentenced Duncan to 60 days for a single touching, telling the civil rights lawyers that they had descended on the parish because of the “integration of the parish school system” and that

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101 KING, supra note 96, at 266.
102 Id.
103 Id.
104 Id. at 261.
105 Id. at 262 (quoting John G. Warner, Sheriff’s Aide Among 17 Seized in New Orleans School Fracas, WASH. POST, Nov. 16, 1960, at A3).
106 KING, supra note 96, at 262.
107 Duncan, 391 U.S. at 146.
108 KING, supra note 96, at 267.
109 Duncan, 391 U.S. at 146.
110 Id.
111 KING, supra note 96, at 269.
112 Id.
their intent was not to defend Duncan but to have the jury trial part of the Louisiana Constitution declared unconstitutional.\textsuperscript{113}

A 60-day jail sentence would not normally be cause for the United States Supreme Court to grant certiorari to review a state conviction. But the context here—the segregationists resisting school integration and taking it out on a peacemaker, Gary Duncan, and his civil rights lawyers—did cry out for a remedy. The only conceivable way to provide justice for Gary Duncan was to do precisely what the trial judge feared—declare that part of the Louisiana Constitution to be in violation of the federal Constitution. One wonders if the Court would have left standing the more restrictive right to a jury trial in several states, including New York,\textsuperscript{114} if the Louisiana segregationists had not forced the Court’s hand.

The key question for my purpose is whether jury trials offer Black defendants a better shot at “justice” than trials to judges. If not, then Duncan was just a one-off designed to right a wrong in a single case. I will briefly explore that question in the next Part.

\textbf{B. Fourth Amendment}

The Warren Court criminal procedure revolution began in 1961 with \textit{Mapp v. Ohio}\textsuperscript{115} where the Court held that state courts had to suppress evidence seized in violation of the Fourth Amendment. In some ways, \textit{Mapp} was an odd place to start the criminal procedure revolution because in 1961 fifteen states did not routinely provide counsel to indigent defendants.\textsuperscript{116} What was a right to suppress evidence worth to defendants who had no lawyer? Roughly nothing. But we know that the Court’s decision to apply the exclusionary rule to the states in \textit{Mapp} was a fortuity. The Court granted certiorari to consider, and the briefs and oral argument focused exclusively

\textsuperscript{113} \textit{Id.}

\textsuperscript{114} See \textit{Baldwin v. New York}, 399 U.S. 66, 69 (1970) (applying \textit{Duncan v. Louisiana} to hold that the possibility of a one-year sentence is enough to require the right to a jury trial) (stating that authorized sentences of more than six months will trigger a right to trial by jury).

\textsuperscript{115} See \textit{Mapp v. Ohio}, 367 U.S. 643, 655 (1961) (“We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.”).

\textsuperscript{116} See \textit{McNeal v. Culver}, 365 U.S. 109, 119-20 (1961) (Douglas, J. concurring) (appendix to Justice Douglas’s opinion) (“15 States either make no explicit provision for appointment of counsel or make provision therefor only in capital cases or leave appointment of counsel to the discretion of the trial judge.”).
on, the issue of whether the First Amendment protected the right to possess obscenity in one’s home.

But the Warren Court was eager to overrule *Wolf v. Colorado*, which had held only twelve years earlier that states did not have to suppress evidence seized in violation of the Fourth Amendment. The *Mapp* Court probably recognized that it would need the perfect case to overrule a precedent only twelve years old. *Mapp* was that case. The conduct of the officers was such a flagrant violation of privacy that the Ohio Supreme Court considered ruling that the police methods shocked the conscience and thus offended a sense of justice, which would have made the evidence inadmissible under the Fourteenth Amendment Due Process Clause without regard to the Fourth Amendment. *Mapp* was a Black female, who on the advice of counsel refused to allow the police to enter her house without a warrant; when the police forced their way inside, she demanded to see the search warrant they claimed to have. She grabbed the piece of paper they showed her, and a “struggle ensued in which the officers recovered the piece of paper” from her “bosom.” To make the case even better as a vehicle to overrule *Wolf*, the conviction that the Court would reverse by ruling in her favor was not murder, robbery, or burglary but the possession of obscene material in her home. “Freeing” her on a “technicality” would not be seen as a threat to public safety!

117 The ACLU amicus brief devoted one sentence to *Wolf v. Colorado*, asking the Court to “re-examine this issue” and hold that due process requires suppression of illegally seized evidence. See Brief for American Civil Liberties Union et. al. as Amici Curiae Supporting Respondent, *Mapp v. Ohio*, 367 U.S. 643 (1961) WL 101785 at *20. The lonely sentence appears to be more an afterthought than a serious request.

118 The Court would decide that issue in favor of the right to possess obscenity in the home eight years later in *Stanley v. Georgia*, 394 U.S. 557, 559 (1969) (“[T]he mere private possession of obscene matter cannot constitutionally be made a crime.”).

119 See *Wolf v. Colorado*, 338 U.S. 25, 33 (1949) (“[I]n a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure.”).

120 This was the due process standard created in *Rochin v. California* as an argument that could be deployed in states that did not apply the exclusionary rule. *Rochin v. California*, 342 U.S. 165, 172 (1952) (finding the police officers conduct in obtaining evidence, including “the forcible extraction of [petitioner’s] stomach’s contents,” as “shock[ing] the conscience.”). The Ohio Supreme Court ultimately ruled against applying *Rochin*, and because Ohio did not follow the exclusionary rule, the evidence was admitted at Mapp’s trial.

121 See *Mapp*, 367 U.S. at 644-45 (detailing Mapp’s encounter with police officers and the subsequent dispute regarding the existence of a search warrant necessary to enter her home).

122 *Id.* at 644.

123 *Id.* at 645 (“The obscene materials for possession of which she was ultimately convicted were discovered in the course of that widespread search.”).
What has *Mapp* been worth to defendants? We know that defendants win only a few motions to suppress evidence in cases of serious felonies. In James Spiotto’s study, defendants were successful in only 13% of motions to suppress evidence in murder cases.\(^\text{124}\) Thomas Davies’s study concludes that non-prosecution or non-conviction of defendants charged with felonies occurred in 0.6% to 2.35% of cases.\(^\text{125}\) The limited effect of the exclusionary rule in cases of serious felonies could, of course, be due to the police being extra careful not to violate the Fourth Amendment when the stakes are so high. But one suspects that courts bend over backwards to find a way around suppression when ruling in a defendant’s favor might free a dangerous criminal. Craig Bradley’s experience as an Assistant United States Attorney prosecuting criminal cases for seven years led him to make the same observation.\(^\text{126}\)

The Spiotto study was published in 1973; the Davies study in 1983. Developments since then, as we will see, provide many more opportunities for judges to avoid suppressing evidence.

### C. Right to Counsel

Two years after *Mapp*, the Court would provide a means by which all indigent defendants could avail themselves of *Mapp*. In *Gideon v. Wainwright*,\(^\text{127}\) the Court rejected the case-by-case approach to the right to counsel for indigent state defendants and adopted a one-size-fits-all rule that indigent criminal defendants, at least all indigent felony defendants, have a right to counsel at state expense. Justice Black (a firm believer that rigid procedure was the best solution to all rights-based problems) wrote movingly for the Court that

\(^{124}\) James E. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives*, 2 J. LEGAL STUD. 250, tbl.2 (1973) (explaining the limited opportunity defendants have to achieve success in their motion to suppress evidence in serious felony cases).

\(^{125}\) Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the “Costs” of the Exclusionary Rule: The NIJ Study and Other Studies of “Lost” Arrests*, 8 AM. BAR FOUND. RSCH. J. 611, 621 (1983) (suggesting that “illegal searches are a marginal factor in the disposition of felony arrests.”).

\(^{126}\) Craig M. Bradley, *Reconceiving the Fourth Amendment and the Exclusionary Rule*, 73 L. & CONTEMP. PROBS. 211, 212 & n.9 (2010) (stating his belief that “the reluctance of trial judges to suppress evidence in all but the most egregious cases” led to him succeeding in about 100 motions to suppress in a thirty-day period).

\(^{127}\) See *Gideon*, 372 U.S. at 344 (holding that the right to counsel is “fundamental and essential to fair trials” and thus counsel must be appointed for indigent defendants).
reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.\textsuperscript{128}

That is the ideal. Those who have seen Perry Mason operate on television have some idea of what was apparently in Justice Black’s mind when he wrote those words. And what is the reality, at least in large urban areas? Try New York City three decades after \textit{Gideon}. In the words of a law student working for a Legal Aid lawyer assigned to represent criminal defendants held in “disgusting pens,”

The holding pens were filled with huddling defendants, most of whom were standing because there was only one bench. Virtually the entire population of the pens was nonwhite and poor, without the resources or stable families to allow them bail. Most were in shock or panic, yelling questions and begging for help. “What am I charged with?” “When will I ever get out?” “Can you call my mother?” “What if I didn’t do it; will they still keep me?” “Will you call my boss because if I don’t show up I’ll lose my job?”

I came to see that most of them were not really represented at all. Not only would they not make bail, but most would ultimately plead guilty to something, anything, just to move out of the system. I realized that with a lawyer who had a few days to spend with the client instead of a few minutes, a proper fight could be waged, both to get the defendant out on bail and ultimately, to get a favorable disposition. In many cases defendants would not have ended up with criminal records, a millstone that serves to keep the underclasses as underclasses.\textsuperscript{129}

This grim reality explains why the rate of plea bargained convictions is as high as 97\%.\textsuperscript{130} It also explains the mysterious fact that innocent

\textsuperscript{128} Id.
defendants sometimes plead guilty. How is that possible, you might ask? The New York City holding pens provide a depressing and moving answer. They plead guilty to get out of jail. To be sure, to be fair, some states have recently moved away from cash bail, and poor defendants in those states should not face pressure to plead guilty to get out of jail. However, it remains true that prosecutors have many other tools at their disposal to pressure defendants to plead guilty.

D. Interrogation

The failure of *Miranda v. Arizona* is subtler than the failures we have seen to this point. The *Miranda* warnings and waiver regime, we will see, sought to enable suspects to make free choices about whether to answer police questions. But suspects waive their *Miranda* rights in roughly 70%-80% of the interrogations. In Richard Leo’s observational study, 64% of suspects who were interrogated made incriminating statements. Are all of those suspects making a free choice to waive and then to incriminate themselves? It seems doubtful. More evidence that these choices are not free in any robust sense is that detectives employed an average of five interrogation techniques in Leo’s study, and 65% of the interrogations lasted longer than 30 minutes; “8% lasted more than two hours.” Leo found that the most significant factors in whether police obtained incriminating statements were the number of strategies used and the length of the interrogation. I wonder whether the *Miranda* Court would consider lengthy interrogation and multiple strategies likely to produce free choices. I will discuss later whether decline/ (emphasizing the significantly high rate of criminal cases “resolved through plea bargains.”).


132 *384 U.S. 436 (1966).*


134 Leo, *supra* note 133, at 280 tbl.7 (1996) (“If an interrogation is successful when the suspect provides the detective(s) with at least some incriminating information, then almost two-thirds (64%) I observed produced a successful result.”).

135 *Id.* at 279 tbl.6 (describing the length of the interrogations in the sample).
the police pressure to make statements might affect minority suspects more than non-minority suspects.

E. Eyewitness identifications

The Court has known for a very long time that eyewitness identifications are “riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial.”\(^\text{136}\) As Felix Frankfurter put it in 1927,

What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure.\(^\text{137}\)

We have also known for a long time that cross-racial identifications are even less reliable than identifications of persons of the same race.\(^\text{138}\) What to do about the potential for unreliable eyewitness identification? Here, the Court adopted a two-prong strategy. On the one hand, *United States v. Wade*\(^\text{139}\) held that defense lawyers should be available to assist when their client is in a lineup. How exactly this was going to help with the reliability of identifications was never made clear. And, in any event, *Wade* was rendered largely superfluous by *Kirby v. Illinois*,\(^\text{140}\) which held that *Wade* applied only to post-indictment lineups.\(^\text{141}\) Post-indictment lineups are likely quite rare, as a random sample of 30 cases involving eyewitness identifications showed; all


\(^{137}\) Id. (quoting FELIX FRANKFURTER, THE CASE OF SACCO AND VANZETTI 30 (1927)).

\(^{138}\) See Stephanie J. Platz & Harmon M. Hosch, Cross-Racial/Ethnic Eyewitness Identification: A Field Study, 18 J. OF APPLIED SOC. PSYCH. 972, 972-73 (1988) (summarizing five studies and a meta-analysis of identifications); Id. at 978 tbl.1 (showing that 53% of Anglos correctly identified an Anglo subject in a field study but only 40% of Anglos correctly identified a Black subject).

\(^{139}\) 388 U.S. 218, 227–37 (1967) (reasoning that the post-indictment lineup is a critical stage which merits counsel).

\(^{140}\) 406 U.S. 682, 690 (1972) (plurality opinion) (declining to require right to counsel when identification procedures take place before prosecution started).

\(^{141}\) Though the opinion announcing the judgment in *Kirby* was joined by only four justices, Justice Powell’s opinion concurring in the result can only be read as agreeing with this principle. Id. at 691 (Powell, J. concurring in the result) (“I would not extend the *Wade-Gilbert* rule.”).
30 took place before charges were filed.\textsuperscript{142} Wade does nothing to help these defendants.

The more important prong was to create a due process right not to have an identification admitted at trial if there was “a very substantial likelihood of an irreparable misidentification.”\textsuperscript{143} But what does that standard mean in practice? “[V]ery substantial” sounds like a high bar. “[I]rreparable misidentification” sounds like it leaves open the possibility that the defendant might lose the identification issue if there is other evidence of his guilt. As it has been operationalized in the Court’s cases, it provides very little help in keeping false eyewitness identifications from the jury. The data bear out the failure of the Court’s eyewitness identification doctrine to prevent false identifications. In 63% of the exonerations accomplished by the Cardozo Innocence Project, a false identification played a role.\textsuperscript{144} The jeopardy that Black defendants face when suggestive eyewitness procedures are used is clear from the fact that of all the exonerations, 57% of the innocents were Black.\textsuperscript{145}

I will provide more detail on this issue in the next Part.

III. DIGGING DEEPER INTO THE FAILURES OF THE REVOLUTION

A. Right to a Jury Trial

The net effect of Duncan was to give state defendants the right to a jury in misdemeanor cases in which the authorized penalty is more than six months.\textsuperscript{146} Are these misdemeanor defendants who elect trial by jury somehow better off than those who choose to be tried before a judge? The classic Kalven and Zeisel study from the 1950s compares jury verdicts with what the judge who presided over the trial said would have been his

\begin{itemize}
  \item[142] Sample obtained in Westlaw, all states and federal database, search for “eyewitness identification,” first 40 cases identified by relevance, September 30, 2022. I included only cases in which there was a pre-trial identification procedure by the police, thus excluding cases where the initial identification occurred at a preliminary hearing or at trial. List of cases available from author.
  \item[143] Simmons v. United States, 390 U.S. 377, 384 (1968).
  \item[145] Id. (showing that 57% of the wrongful convictions investigated by the Innocence Project involved Black Americans).
\end{itemize}
verdict. In most cases, 78%, the judge would have reached the same verdict as the jury. When they disagreed, the jury acquitted in 19% of the cases in which the judge would have convicted, but the judge would have acquitted in only 3% of the cases in which the jury convicted. Kalven and Zeisel attribute this jury leniency in part to sympathy for the defendant, a finding replicated in 2005 by Eisenberg and co-authors.

All other factors being equal, sympathy should be correlated, at least to a degree, with a juror being of the same race as the defendant. As Blacks comprise 13% of the country’s population, Black defendants are immediately at a disadvantage, at least in most parts of the United States. And there is another problem. A 2010 study of jury selection procedures in eight Southern states found that (1) various counties “have excluded nearly 80% of [Blacks] qualified for jury service”; (2) in some Black-majority counties, Black defendants in capital trials were tried by all-white juries; and (3) some prosecutors received instructions from their superiors to exclude jurors of color and were trained on how to conceal their race-based peremptory challenges.

North Carolina was not one of the eight states in the 2010 study, but of course it is a Southern state. We know from the Grosso & O’Brien study of North Carolina jury cases, that prosecutors in North Carolina used peremptory challenges to remove Black jurors twice as often as they used

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147 See Harry Kalven, Jr. & Hans Zeisel, The American Jury, 55-57 (1966) (describing how judges and juries independently “agree[d] to acquit in 13.4 per cent of all cases” and agree “to convict in 62 per cent of all cases”).


149 Id.

150 See Kalven & Zeisel, supra note 147, at 214-16 (describing how jury sympathy toward defendants led to more acquittals compared to the verdicts the judge would have rendered).

151 Theodore Eisenberg et al., Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel’s The American Jury, 2 J. Empirical Legal Stud. 171, 185 (2005) (suggesting that a rationale for the difference between jury and judge outcomes rests in part on jury sympathy towards defendants).


154 Id.
them against non-Black jurors.\textsuperscript{155} \textit{Batson v. Kentucky}\textsuperscript{156} sought to give Black defendants tools to prevent the racially discriminatory use of peremptory challenges,\textsuperscript{157} but even a casual look at the \textit{Batson} case law suggests that the tool is largely ineffective. A prosecutor can defeat a \textit{Batson} claim by asserting a neutral basis for the peremptory strike; it can be as trivial as the jury venire member wearing eyeglasses or chewing gum.\textsuperscript{158} As Grosso & O’Brien put it, “[n]o one paying attention needs to be told the verdict on \textit{Batson v. Kentucky}. \textit{Batson} intended to eliminate the influence of race on jury selection, which is essential both to conducting fair and just trials and to protecting the reputation of the justice system. \textit{Batson} failed.”\textsuperscript{159}

There is much we do not know here, but it appears that \textit{Duncan} provided a modest benefit to defendants generally, one that might be particularly helpful to Black defendants if their juries include Black jurors. Bear in mind, however, that all 50 states already provided a right to a jury trial to felony defendants. Thus, the only conceivable benefit of \textit{Duncan} was to defendants in the states that did not require jury trials in misdemeanor cases. Some benefit is better than none, of course, and we should mark \textit{Duncan} as a small plus in the quest for racial justice.

\textbf{B. Fourth Amendment}

There are two problems attending the Warren Court’s Fourth Amendment that actually cause racial harm. One is obvious. The other is subtler and thus more insidious. The obvious one is \textit{Terry v. Ohio}.\textsuperscript{160} \textit{Terry} opened the door wide to police harassment of racial minorities, and many police departments have walked through that door.

\textsuperscript{155} See Catherine M. Grosso & Barbara O’Brien, \textit{A Call to Criminal Courts: Record Rules for Batson}, 105 KY. L. J. 651, 658 tbl.1 (2016-2017) (noting that prosecutors used preemptory strikes against 25.9 percent of non-Black venire members and against 52.3 percent of Black venire members).

\textsuperscript{156} 476 U.S. 79 (1986).

\textsuperscript{157} \textit{Id.} at 96 (attempting to develop principles by which a defendant can show racial discrimination in the prosecutor’s use of preemptory challenges to remove members of the defendant’s race from the jury).

\textsuperscript{158} \textit{EQUAL JUSTICE INITIATIVE, supra} note 153, at 4.


\textsuperscript{160} 392 U.S. 1 (1968).
1. Unreasonable Reasonable Suspicion

*Terry* famously permitted police to stop and frisk if an officer is led “reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous.”161 Although not mentioned in the opinion, *Terry* and one of his co-defendants were Black.162 While the *Terry* holding was explicitly limited to those suspected of being “armed and presently dangerous,”163 later cases abandoned that limiting principle. The Court has, for example, applied *Terry* to a suspect who had already passed through an airport metal detector.164 Those who board planes certainly hope that airport metal detectors pick up all, or almost all, weapons. If this is right, then how could there be reasonable suspicion that the airport suspect was armed? Indeed, the opinion in that case makes no mention of the suspect being armed and dangerous, only that there was reasonable suspicion that he was “carrying luggage that contains narcotics.”165 While reasonable suspicion that a suspect outside an airport is transporting large amounts of narcotics might support an inference that he was armed, there is no reason to assume a piece of luggage is armed and dangerous.

The Supreme Court cautioned lower court judges in 1996 that when reviewing determinations of reasonable suspicion, courts “should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers.”166 Once the threshold for making a *Terry* stop has been watered down to this extent, police can conjure up reasons to stop almost anyone.

I could cite many lower court cases, but one will do.167 A Wisconsin police officer, Kurt Wald, observed a vehicle that appeared to be disabled and “a traffic hazard.”168 Wald got out of the squad car and approached the vehicle.

161 *Id.* at 30.
164 See United States v. Place, 462 U.S. 696, 698-99, 706 (1983) (describing how Place’s airport search was allowed under the *Terry* framework).
165 *Id.* at 706 (holding that the “principles of *Terry* and its progeny” would allow an officer to briefly detain luggage suspected to contain narcotics).
168 *Id.* at *2.
As he did so, a man approached him in an excited state, saying that the vehicle was his. In response to Wald’s request, the man identified himself with a photo I.D. card as Billy Evans. Evans was talking fast, was excited, was watching all around him, and did not seem completely rational. It appeared to Wald that Evans did not want him near the vehicle for some reason.

The Wisconsin Court of Appeals articulated the issues as whether Evans was committing a crime and whether he was armed. The state court held that there was reasonable suspicion that he was committing a traffic offense. The traffic violation suspicion seems justified, but should Terry really be extended to traffic violations? Perhaps the state court required reasonable suspicion that Evans was armed to compensate for the low-level offense of which he was suspected. In any event, here is what the appellate court had to say on the armed issue: “Evans had initially approached Wald in an agitated manner, looking around him and not seeming to Wald to be completely rational.” Really? That’s all it takes? And the Supreme Court would water reasonable suspicion down even further in 2014. Remarkably, the Court held, 5-4, in Navarette v. California that an anonymous 911 call could justify reasonable suspicion that a particular vehicle was being driven by a drunken driver. What was this powerful tip? It was that the vehicle had run the reporting party off the road five minutes earlier. The caller provided no other information. The only corroboration the police accomplished was to locate the vehicle described by the caller roughly where the caller said it would be. When the police followed the vehicle for five minutes, the defendant’s driving was “irreproachable.” This is reasonable suspicion that the driver was drunk?

169 Id. at *10-11.
170 Id. at *11.
171 Id. at *12.
172 The court cheats here. It uses the traffic violation to justify a Terry seizure of Evans’s car, and justifies the frisk of Evans in part based on events that happened after the seizure of the car when Evans approached the squad car. But the “armed” parameter is part of what makes the Terry seizure constitutional. If the seizure of the car was unconstitutional, because there was no reason to think that the driver was armed at that point, then everything after that is poisoned fruit. But the sloppiness of the analysis here makes my point that courts go out of their way to affirm Terry stop-and-frisks.
174 Id. at 395.
175 Id. at 399.
176 Id. at 411 (Scalia, J., dissenting).
We can dig deeper into routine police Terry stops, thanks to self-reported data from the New York City police that appears in a class action civil suit filed against the city. The suit was based on a study by Dr. Jeffrey Fagan that examined forms police were required to fill out after each Terry stop; the period of the study was from January 2004 to June 2012. The form contained boxes an officer checked to indicate the basis for the stop. Over that period of roughly eight years, there were 4.4 million Terry stops, an average of over 550,000 per year. The two most common reasons for a Terry stop were “High Crime Area” (55%) and “Furtive Movements” (42%). One does not have to be much of a cynic to realize that both of those categories offer police almost unlimited discretion. If the suspect is not in a high crime area, there are furtive movements that can be observed or interpreted. As the federal district court who heard the civil suit observed:

Many of the checkboxes on the UF–250 that officers use to indicate the basis for a stop are problematic. “Furtive Movements” is vague and subjective. In fact, an officer’s impression of whether a movement was “furtive” may be affected by unconscious racial biases. . . . “High Crime Area” is also of questionable value when it encompasses a large area or an entire borough, such as Queens or Staten Island.

And how was that vast police discretion applied? We know from the New York City stop and frisk data that Blacks were targeted by police far more frequently than whites, 52% to 10%, even though New York City at the time had more whites (33%) than Blacks (23%). We also know that in 98.5% of the Terry stop and frisks, no weapon was found. If reasonable suspicion includes “armed and dangerous,” as Terry seemed to require, and if reasonable suspicion means anything other than a hunch or racial profiling, most of those encounters violated the Fourth Amendment. How could a failure rate of 98.5% equate with reasonable suspicion? Tracey Maclin’s assessment of Terry as applied to Blacks seems entirely justified: “The Court’s failure to treat as dispositive the clear correlation between stop and frisk and the violation of their Fourth Amendment rights only served to remind blacks

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178 Id. at 558.
179 Id. at 574.
180 Id. at 578.
181 Id. at 559.
182 Id. at 558.
and other minorities of their second-class status in America.”\textsuperscript{183} And this sad development, Maclin reminds us, ironically “is the product of a Supreme Court that did more to promote the legal rights of black Americans than any other court. The Warren Court, led by Chief Justice Earl Warren, played an instrumental role in ending racial segregation and discrimination in the United States.”\textsuperscript{184}

It is difficult to avoid the conclusion of Lewis Katz about \textit{Terry}: “What the Court, in fact, did was uphold a seizure on less than probable cause based on little more than race.”\textsuperscript{185} Why did the Warren Court fail in \textit{Terry}? Why did eight members of the Warren Court, including Chief Justice Warren and Justices Black, Brennan, Marshall, and Fortas—all strong supporters of the Court’s civil rights agenda—simply look away from the obvious racial implications of \textit{Terry}? That is the mystery that I will try to shed light on after I discuss the other, and more insidious, failure of the Court’s Fourth Amendment doctrine.

\textbf{B. Failure of the Court’s Basic Fourth Amendment Doctrine}

The Warren Court when considering \textit{Mapp} in 1961 perhaps did not perceive how malleable is the Fourth Amendment. What are the boundaries of the category of “unreasonable searches and seizures”? An example from my practice illustrates the point. The police officers testified that my client gave consent for a search of his car trunk, where contraband was found. My client testified that he said, “You can search my trunk if you have a warrant.” The suppression judge was free to accept either story. I was so certain I would lose that I failed also to make a motion to suppress my client’s confession (as fruit of the poisonous tree) that he gave at the police station. I won the motion (and the judge grumpily gave me the weekend to write a brief in support of a motion to suppress the confession\textsuperscript{186}). I have always thought I won for reasons that had nothing to do with Fourth Amendment doctrine or

\textsuperscript{184} Id. at 1275-76.
\textsuperscript{186} A funny part of the story is that the judge told the assistant district attorney that he wanted the State’s brief on Monday as well. “No sir,” said the prosecutor. The judge glared and repeated his command. The prosecutor assented. I spent most of the weekend on my brief and had it ready to file by the deadline. Thirty minutes before the deadline, the prosecutor called and told me he was dismissing the case. I’m sure the DA’s office relished the thought of my wasted weekend.
witness credibility, but the point is that there is nothing in Fourth Amendment doctrine to move the judge one way or the other.

As we have seen, the same is true of the boundaries of reasonable suspicion. And it will not surprise the reader to learn that the same indeterminacy affects probable cause, exigent circumstances, and special needs searches. But in 1961, the Court had yet to discover special needs searches; it had never decided an exigent circumstance case; and its consent doctrine was based on two atypical cases that provided no guidance to police for routine requests for consent.188

One might wonder why the Fourth Amendment was so lean and clean in 1961. The answer is that until Mapp, the Fourth Amendment did not apply in any meaningful sense to state prosecutions. And hard as it is to believe in 2023, federal criminal law had a very limited reach in 1961. The pre-Mapp Fourth Amendment cases featured prosecutions for gambling, possession of contraband, and bootlegging.189 Who needed complicated rules and sub-rules to deal with these cases? But a little noted unintended consequence of Mapp was to make evidence suppressible in murder, rape, robbery, and burglary cases.

The hydraulic of not wanting to free dangerous criminals was just too much for the Court to withstand, and it cut back on the scope of Fourth Amendment protections as a way to avoid reversing convictions.190 Because the content of “unreasonable searches and seizures” is far from self-evident,

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187 Each officer told a somewhat different story about the conversation that produced the putative consent, and my client had already been convicted of a drug trafficking offense that was going to put him away for decades. Thus, I believe the judge figured what is the point of another trial and, oh by the way, he could send a message to the officers to get their stories straight before testifying.

188 See infra note 201 and accompanying text (citing cases decided prior to 1961 which, due to consent, allowed warrantless searches within the context of record keeping of World War II gasoline rations and within the context of business records to confirm a contract with the government).

189 See, e.g., Nathanson v. United States, 290 U.S. 41, 46-47 (1933) (ordering suppression of evidence of liquor seized in the defendant’s home because the warrant did not demonstrate probable cause); United States v. Di Re, 332 U.S. 581, 582, 594-95 (1948) (deciding that a search of a defendant’s person for counterfeit gasoline ration cards was unconstitutional because the officers lacked probable cause to arrest defendant); Carroll v. United States, 267 U.S. 132, 160-62 (1925) (finding that officers had justification for searching the defendant’s car on suspicion of bootlegging); Weeks v. United States, 232 U.S. 383, 388, 398 (1914) (holding that the Fourth Amendment required return of papers, including lottery tickets, seized by a federal marshal without a search warrant).

the Court easily narrowed the protections that were available in federal cases. Before *Mapp*, the Fourth Amendment created an absolute zone of privacy for lawfully possessed property. *Boyd v. United States*\(^{191}\) held in 1886 that Congress could not authorize the subpoena of lawfully held business records. *Weeks v. United States*\(^{192}\) held in 1914 that federal prosecutors must return lottery tickets seized without a search warrant if the criminal defendant made a motion for their return. Even though lottery tickets were evidence of crime, the defendant’s property interest in them was superior to that of the government.

Modern readers might find it hard to believe, but *Gouled v. United States*\(^{193}\) held in 1921 that a search warrant could not justify seizing records lawfully possessed by a defendant because they were “of evidential value only”\(^{194}\) as opposed to contraband or fruits and instrumentalities of crime. Property was viewed as so protected by the Fourth Amendment that even a search warrant could not justify its seizure unless it was property that could not be lawfully owned. *Gouled* was not overruled until 1967, six years after *Mapp*. When local police were chasing a robbery suspect into a house, the most natural Fourth Amendment construction was to emphasize the State’s interest in solving crime. *Warden v. Hayden*\(^{195}\) in 1967 expressly overruled *Gouled* and noted that the underlying theories of *Boyd* and *Weeks* had been discarded.\(^{196}\) Overruling *Gouled* had to await the application of the Fourth Amendment to the states. As the Court put it, “*Mapp v. Ohio* . . . only recently made the ‘mere evidence’ rule a problem in the state courts.”\(^{197}\)

In 1961, one could confidently assert that there was a robust search warrant requirement, subject to only two exceptions: search incident to arrest and vehicle searches if agents had probable cause to believe the vehicle contained evidence of crime.\(^{198}\) Police had to have probable cause to forcibly detain a suspect; the intervention was called what it had been called for centuries—an arrest. An arrest permitted a search incident to arrest, not just

\(^{191}\) 116 U.S. 616, 631-32 (1886).
\(^{192}\) 232 U.S. 383, 384 (1914).
\(^{193}\) 255 U.S. 298, 305-06 (1921).
\(^{194}\) *Id.* at 312.
\(^{195}\) 387 U.S. 294 (1967).
\(^{196}\) *Id.* at 302-04.
\(^{197}\) *Id.* at 309 (citation omitted).
\(^{198}\) Search incident to arrest was apparently first mentioned in dicta in *Weeks v. United States*, 232 U.S. 383, 392 (1914). *Carroll v. United States*, 267 U.S. 132, 147 (1925), held that Congress could authorize warrantless searches of vehicles on probable cause. It was not until the Fourth Amendment was applied to the states that the Court began applying the vehicle exception without legislative authorization.
a frisk. Although the Court told us confidently in *Schneckloth v. Bustamonte* in 1973 that consent was a “well settled” exception that permitted search without a warrant, an examination of the precedents the Court cites show that this was hyperbole. But *Schneckloth* made clear that consent is a way police can comply with the Fourth Amendment when seeking to search a vehicle, a house, or a person. No warrant is needed; no suspicion is needed. Police can “fish” to their heart’s content. “Consent is an acid that has eaten away the Fourth Amendment.”

By 1984 Silas Wasserstrom would refer to “The Incredible Shrinking Fourth Amendment.” Indeed, Tracey Maclin’s careful review of the Supreme Court justices’ papers shows that by the late 1960s the Court was already having buyer’s remorse about forcing the exclusionary rule on the states and this even before Chief Justice Warren had left the Court.

Of course, as Joshua Dressler and others have argued, Richard Nixon’s election and appointment of four justices played a role in the Court squirming away from a robust application of the exclusionary rule. I believe, however, that even a continuation of a “liberal” Warren Court would eventually have backed away from the kind of automatic exclusionary rule envisioned by *Mapp*. *Terry v. Ohio*, after all, was written by Chief Justice Warren and joined by Justices Brennan, Fortas, Black, and Marshall, as well as Justices Stewart, Harlan, and White. And a lesser known case, *Alderman v. United States*, explicitly restricted application of the exclusionary rule in an opinion joined by all the justices except Justice Douglas.

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200 Id. at 219.
201 The Court cited two cases. *Davis v. United States*, 328 U.S. 582, 583 (1946), involved a search of the records the defendant was required to keep under a World War II rationing law. The second, *Zap v. United States*, 328 U.S. 624, 626-27 (1946), involved a search of business records that the defendant had agreed to maintain in a contract with the government. Neither search is remotely like the typical consent search of a vehicle or of a person.
It was not enough for a post-Warren Court that Fourth Amendment law was “spongy” and new categories were created to permit more police discretion. Sometimes a court simply could not avoid the claim that the Fourth Amendment was violated. For those cases, the Court began to dismantle the exclusionary rule in 1984, creating the first of a series of “good faith” exceptions to the exclusionary rule.\textsuperscript{207} Without tracing the evolution of these good faith exceptions, it is enough to note where we stand today. In \textit{Herring v. United States},\textsuperscript{208} there was no gainsaying that the Fourth Amendment was violated. Police arrested Herring based on a warrant that had been withdrawn; the withdrawal of the warrant was not reflected in the police records. Thus, the arresting officer acted in good faith when he arrested Herring and searched him incident to arrest.

Chief Justice Roberts explained for the Court, “The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct.”\textsuperscript{209} Later in the opinion, the chief justice expounded on the implications of the culpability rationale for applying the exclusionary rule:

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.\textsuperscript{210}

There were four dissenters in \textit{Herring}, but all of them (Justices Stevens, Souter, Ginsburg, and Breyer) are no longer on the Court. Justice Ginsburg was replaced by Justice Barrett. Overruling \textit{Herring} does not seem in the cards. How far will the Court and lower courts take the dicta in \textit{Herring}? If the dicta become holding, then the exclusionary rule will apply only to culpable police conduct. One imagines that a lot of police conduct that violates the Fourth Amendment would not rise to the level of deliberate, reckless, or grossly negligent conduct. An officer thinks she had probable cause or reasonable suspicion but is wrong; grossly negligent? An officer thinks she had consent but a court later rules it not consent; grossly negligent? An officer thinks he can search a dresser eight feet from the arrestee because

\textsuperscript{207} See United States v. Leon, 468 U.S. 897, 905 (1984) (announcing the good-faith exception to the exclusionary rule).


\textsuperscript{209} Id. at 143.

\textsuperscript{210} Id. at 144.
this is within Chimel’s arms-reach rule but a court holds otherwise; grossly negligent?

If this is the ultimate shape of the exclusionary rule, then notice that defendants have to win two levels of argument. First, they must persuade a court that the officer violated the Fourth Amendment, never an easy task. Then defendants have to persuade a court that the officer’s error was at least grossly negligent. In this world, Mapp will have been reduced to a niche doctrine.

And how does this affect Black defendants? The effect is far less direct than the effect of Terry. But since Black defendants are convicted of serious crimes disproportionately to whites, any doctrinal move that makes it easier to convict defendants falls more heavily on Black defendants.

How did we get this far from the robust exclusionary rule envisioned by the Mapp Court? Maybe we went too far too fast in the first place. The United States is the only country in the world that has (had) a rule that routinely suppresses evidence in criminal cases because of the way the evidence was secured. Section 8 of the Canadian Charter of Rights and Freedoms provides: “Everyone has the right to be secure against unreasonable search or seizure.” Unlike our Constitution, however, the Canadian charter expressly recognizes a general exclusionary rule. Section 24 of the Charter provides:

Where . . . a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

What does “bring[ing] the administration of justice into disrepute” mean? Essentially it is linked to the concept of judicial integrity: “to exclude any evidence whose admission might be seen as judicially condoning a

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212 In 2020, Blacks constituted 33% of state and federal prison populations. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, E. Ann Carson, Prisoners in 2020—Statistical Tables, 10, tbl.3. In 2021, Blacks were 13.6% of the United States population. United States Census Bureau, Quick Facts, https://www.census.gov/quickfacts/fact/table/US/PST045221 [https://perma.cc/84EE-DR9N].
213 Canadian Charter of Rights and Freedoms, § 8.
214 Id. at § 24(2).
‘serious’ violation of Canada’s Charter.” \(^{215}\) Apparently, the “seriousness” of the violation depends on whether it was deliberate or inadvertent. \(^{216}\)

In England and Wales, judges have discretion to exclude evidence if admitting it would make the proceedings unfair. \(^{217}\) The House of Lords, however, has not developed a body of search-and-seizure case law or guidelines for exclusion. \(^{218}\) In New Zealand, as a result of a 2002 court decision, evidence is now excluded . . . only if exclusion is held to be a proportional remedial response to the breach of the Bill of Rights at issue in the case. In order to make that determination, judges have to settle on what best serves the due administration of justice. \(^{219}\)

In applying this exclusionary rule, New Zealand courts balance various factors, including the nature of the violation, the seriousness of the crime allegedly committed by the defendant, and the importance of the evidence to the prosecutor’s case. \(^{220}\)

In Part IV, I will discuss how we can repair some of the damage the Warren Court did to racial minorities. I will return to these discretionary suppression regimes. If courts had discretion about when to apply suppression, they could take into account the racial dimension of the police conduct. It might be true that a less automatic exclusionary rule would better address racially discriminatory policing and be more in line with relevant crime control values.

**C. The Right to Counsel That Largely Failed**

It is difficult today to believe that *Betts v. Brady* \(^{221}\) held in 1942 that the Due Process Clause permitted a State to deny counsel to an indigent tried for robbery. As Justice Black said for the Court in *Gideon v. Wainwright* twenty-one years later: “[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided

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\(^{215}\) Craig M. Bradley, *Reconceiving the Fourth Amendment and the Exclusionary Rule*, 73 LAW & CONTEMP. PROBS. 211, 218 (2010).

\(^{216}\) *Id.*

\(^{217}\) *Id.* at 221.

\(^{218}\) *Id.*


\(^{220}\) *Id.* at 269-70.

\(^{221}\) 316 U.S. 455 (1942).
for him. This seems to us to be an obvious truth."222 There were no dissents.223 The only puzzle is why it took until 1963 to read due process to include the right to counsel when an indigent is charged with a felony. As Justice Douglas said 1961: “I cannot believe that a majority of the present Court would agree to Betts v. Brady were it here de novo . . .”224

When Gideon was decided, fifteen states did not routinely provide counsel for indigent defendants.225 It cannot have escaped the Court’s attention that many, if not most, of the indigent defendants denied counsel in these fifteen states were racial minorities. Gideon thus “solved” the problem of poor, often Black, defendants having to face prosecutors with no lawyer at their side, or did it? It certainly seems so when you read the soaring rhetoric in the Gideon opinion. Requiring counsel makes the process appear fairer. At least indigent defendants have a lawyer by their side at trial or when pleading guilty.

One obvious problem is funding. The right to counsel would later expand to include any offense for which a defendant serves even a day in jail.226 How would governments provide free lawyers to every defendant who faced a realistic prospect of jail time? The answer was up to the states, and a hodgepodge of approaches evolved.227 Some states have a state-wide public defender system that provides counsel to every defendant charged with a felony or misdemeanor. Some states permit counties to come up with their own solution. This could include appointing private lawyers for individual cases, paid by the county or the state either per case or per hour; it could include a contract between the county and a law firm or lawyer to represent all indigent defendants for a negotiated fee.

One horrendous example of a flat-rate contract arrangement is Lyon County, Nevada. A contract defender was appointed to the bench in mid-contract in 2006, his place taken by a 27-year-old lawyer who had just passed

223 See id. at 347 (Justice Clark concurred in the judgment, though why he did not join Justice Black’s opinion for the Court is not clear.).
225 Id. at 119-20 (Appendix to Justice Douglas’s opinion).
226 See Argersinger v. Hamlin, 407 U.S. 25, 40 (1972) (holding that no imprisonment can be imposed on an indigent defendant unless counsel had been provided at trial).
the bar exam.\footnote{228} The contract he inherited required him to represent all indigent defendants in Lyon County for a flat fee of $105,000 per year.\footnote{229} Day one on the job, the defender had 600 cases, including 200 felonies, a few of which were murder cases.\footnote{230} To make matters worse, all case-related expenses had to be paid out of the flat fee, including office expenses and travel costs; he had to travel on average 400-600 miles a week to the two courthouses in the county.\footnote{231}

Factor in overhead costs (e.g., insurance, bar fees, training, Internet, office space, etc.) and anything needed to properly defend the accused (e.g., experts, investigation, etc.), and it becomes obvious that, under flat fee contracts, public defense attorneys have financial interests to dedicate as little funding to case-related expenses as possible.\footnote{232}

Little wonder that American Bar Association has a principle that provides: “Contracts with private attorneys for public defense services should never be let primarily on the basis of cost . . . .”\footnote{233}

Mary Sue Backus and Paul Marcus, reporters for the National Committee on the Right to Counsel, concluded that indigent defense in 2009 faced a national crisis: “By every measure in every report analyzing the U.S. criminal justice system, the defense function for poor people is drastically underfinanced.”\footnote{234} The underfinancing leads to ineffective assistance of counsel, “excessive public defender caseloads and insufficient salaries and compensation for defense lawyers.”\footnote{235} A 2007 Bureau of Justice Statistics report shows that, of the states reporting public defense caseloads, most

\footnote{229} Id.
\footnote{230} Id.
\footnote{231} Id.
\footnote{234} Mary Sue Backus & Paul Marcus, The Right to Counsel in Criminal Cases: A National Crisis, 57 HASTINGS L.J. 1031, 1045 (2006).
\footnote{235} Id. at 1046.
were substantially above 150,\textsuperscript{236} and I would argue that even 150 is too many cases if what we want is what \textit{Gideon} promised: “the guiding hand of counsel at every step in the proceedings against him.”\textsuperscript{237}

The standard liberal critique of the implementation of \textit{Gideon} calls on state legislatures to better fund indigent defense. Is that happening? Not so far. John Pfaff in 2016 concluded that “since 1995, real spending on indigent defense has fallen, by 2 percent, even as the number of felony cases has risen by approximately 40 percent.”\textsuperscript{238} Donald Dripps put the implementation of \textit{Gideon} this way: “indigent defense is constitutionally required, but only in anemic form.”\textsuperscript{239}

Are defendants better off after \textit{Gideon} in the fifteen states that denied counsel to indigent felony defendants in 1963? I once thought the answer was yes, that felony defendants as a group are better served in the vast majority of cases even by an overworked or marginally competent lawyer than no lawyer at all. But now I’m not sure the benefit amounts to much. Imagine that prosecutor X has a calculus that tells her how much time a defendant should serve for a particular crime committed in a particular way. In states that did not, prior to \textit{Gideon}, provide counsel for indigent defendants, X would insist on a guilty plea with the punishment her calculus indicated. If the defendant represented himself at trial, the prosecutor could steamroll him and then suggest the judge impose the calculus sentence. In \textit{Betts v. Brady}, the sentence the indigent \textit{pro se} defendant received for robbery was eight years.\textsuperscript{240}

In a \textit{Gideon} world with an overworked public defender, how does X get the sentence she wants? She offers ten years, hoping to get eight in plea negotiations. But if the defense lawyer has a legitimate shot at a motion to suppress evidence, another strategy might be employed. Now the prosecutor adds another charge or a sentence enhancement (use of a weapon by a convicted felon; making terroristic threats; habitual offender) or upgrades the


\textsuperscript{240} 316 U.S. at 457.
charge to aggravated robbery. Now the defendant has a strong incentive to take a plea for eight years. As Bill Stuntz and Don Dripps have pointed out, one response to the Warren Court criminal procedure revolution was that legislatures created more crimes and increased penalty structures. So prosecutor X in 2023 gets eight years, more or less, one way or another. Just like the *Betts v. Brady* prosecutor.

I realize that the world has changed in many ways since Smith Betts was sentenced to eight years for robbery in 1942. And I realize that the average sentence for robbery in Maryland today does not prove my thesis that there is a robbery calculus of eight years, more or less, in Maryland. Yet I do find it intriguing that the average sentence for robbery in Maryland in 2016 was 8.2 years.

But what about the 5% of defendants who go to trial? Surely they benefit from *Gideon v. Wainwright*? Yes, but less so than you might think. The Supreme Court recognizes that the right to counsel is more than the right to have someone with a law license by the defendant’s side. How much more? In a stunning 8-1 decision in 1984, *Strickland v. Washington*, the Court decided that the defense lawyer’s decision not to investigate his client’s only defense to the death penalty was effective assistance of counsel. And the issue was not even close. Counsel’s choice not to investigate the most plausible defense, the Court said “was well within the range of professionally reasonable judgments, and the decision not to seek more character or psychological evidence than was already in hand was likewise reasonable.” Reiterating the point, the Court said, “On these facts, there can be little question, even without application of the presumption of adequate performance, that trial counsel’s defense, though unsuccessful, was the result of reasonable professional judgment.” Really? That’s what *Gideon* promised?

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245 *Strickland*, 466 U.S. at 699.

246 Id.
Do defense lawyers sometimes make a difference? Of course. A study found a statistically significant difference in sentence length between Philadelphia murder defendants represented by public defenders and those represented by appointed counsel.\footnote{James M. Anderson & Paul Heaton, \textit{How Much Difference Does The Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes}, 122 YALE L.J. 154, 159 (2012). One might think that the cases are of different culpability—that the public defender might try to opt out of particularly heinous cases. But the sorting is done on a random basis; every fifth murder defendant is assigned to the public defender and the other four to appointed counsel. \textit{Id.}} The difference is 2.8 years—20.9 years for clients of appointed counsel versus 18.1 for clients of public defenders—\( p = .001 \).\footnote{\textit{Id.} at 178, tbl.2.} where \( p < .05 \) is typically the cut off for statistical significance. That is a sentence reduction of 13\% by virtue of being represented by a public defender. Interestingly, however, there was no significant difference in outcomes, conviction versus acquittal.\footnote{\textit{Id.}} There was no difference at all in which defendants got the death penalty (1.3\% for both groups).\footnote{\textit{Id.}}

But murder cases are \textit{sui generis} and may tell us nothing about garden variety criminal cases. Murder cases carry much longer potential sentences and require more sophisticated knowledge about statutes and possible defenses. Perhaps in more ordinary cases, no difference in sentences would appear.

Moreover, every defendant in the study was represented by counsel. There were no \textit{pro se} cases. It might be that the competitive juices of prosecutors are engaged whenever there is a lawyer on the other side, thus making them more aggressive in seeking longer sentences. Perhaps if the defendant was not represented by counsel, and the case is a routine one, the prosecutor would simply defer to her “calculus” of what a particular offense is “worth.”

I do not wish to push my cynicism too far. Of course there will be isolated cases where having a defense lawyer makes a difference. In my second year of practice I was appointed to defend a second degree murder case. Thanks to the advice of a more experienced defense lawyer\footnote{Thanks to Gus Radford, now a retired Tennessee district attorney.} I was able to suppress the State’s most powerful evidence of guilt. The prosecutor still had a solid, if not overpowering, case, but for whatever reason offered involuntary manslaughter and a year in jail. My client refused to take the offer, despite my advice. The prosecutor came down to six months and finally to one

\[\text{\footnotesize \cite{247}}\]
month. Had my client had no lawyer, the outcome would not have been nearly as favorable. I cannot therefore claim that Gideon never makes a difference.

My claim is more modest: That in most cases the Gideon lawyer may make little difference. If we take a universe of two million felony convictions, roughly the annual average in the United States, with a median sentence of three years, perhaps the Gideon effect will be lost because of rounding.

Perhaps it is roughly eight years for most robberies in Maryland with a lawyer and roughly eight years without a lawyer. Call it the “steady state” theory of just deserts. Immanuel Kant would be pleased.

Recall Strickland v. Washington, the case in which the appointed counsel did not investigate his client’s only defense to the death penalty. The habeas petitioner was David Washington. He was executed in the electric chair July 13, 1984, two months after the Court ruled against his habeas petition. His minister, his wife, and 12-year-old daughter visited him the night before his execution.

The Rev. Joe Ingle said Washington sat her on his lap, lifted her chin and told her “I’m the one who got me here.” “I want you to do better,” he told the sobbing child. “I want you to set some goals for yourself and I want you to hit the books.” Washington made his daughter repeat what he had said, Ingle reported, and the little girl left him in tears. “Her heart was broken,” Ingle said. “They were leading her daddy away to kill him.”

David Washington was Black.

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252 I never figured out why the prosecutor was averse to taking the case to trial, but I was happy. The physician who drew blood for the blood alcohol test testified at the motion to suppress that my client was too drunk to consent to the blood draw. I was not looking forward to his testimony at trial!


256 Id.

257 Id.

258 Id.

259 Id.
Did *Gideon* “solve” the problem of poor, often Black, defendants being ground up by the state criminal justice systems? You be the judge.

*D. Miranda v. Arizona*

So far, we have concluded that *Duncan* provides a slight benefit to misdemeanor defendants who prefer a jury trial. We saw that the *Mapp* exclusionary rule provides precious little help to defendants charged with serious crimes, and that the Court actually made the life of racial minorities worse when it read the Fourth Amendment narrowly and also read it to permit stops based on reasonable suspicion. We concluded that *Gideon* is based on simple fairness but has made less of a difference than the Court anticipated, perhaps much less.

What about our old friend, *Miranda v. Arizona*? Prior to *Miranda*, the involuntary confessions rule that we inherited from England was more substance than procedure. Courts asked questions about the pressure of police interrogation but also took into account aspects of suspects that might make them more or less resistant to police pressure. Each case was considered on its own facts. In one fell stroke, *Miranda* replaced the tedious case-by-case analysis of the substance of the interrogation and the suspect with a clear procedural rule. Provide warnings of the right to silence and to counsel. The suspect either requests silence or counsel, or the suspect agrees to talk to the police. Neat. Clean. No more arduous reading of the record and making decisions about whether the suspect’s will was overborne. Short of torture, what does it mean to overbear a suspect’s will? But the *Miranda* solution is not so neat and clean.

The *Miranda* Court used some of the characteristics of high pressure police interrogation to justify its conclusion that custodial interrogation is inherently compelling. All of these characteristics, the Court concluded, interfered with the ability of a suspect to make a “free choice” about whether to answer police questions. Some examples are the “good cop, bad cop” routine; the fake lineup where fictitious eyewitnesses pick out the suspect; offering the suspect an excuse only to withdraw it once he admits doing the act; isolating the suspect and subjecting him to prolonged interrogation; and maintaining an air of confidence in the suspect’s guilt (“we know you did it;
we just need you to fill in some details”).262 As the Court put it, “[W]e concern ourselves primarily with this interrogation atmosphere and the evils it can bring.”263

How to combat these evils? The Court made plain its hope to empower suspects to make up their own minds about whether to cooperate with police interrogation: “We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.”264

To the extent Miranda achieved greater “free choice,” would that work to the benefit of racial minorities more than white suspects? Maybe. We know from the linguistic studies surveyed by Janet Ainsworth that those who feel powerless are particularly susceptible to pressure from authoritative sources.265 An individual who feels powerless speaks in what Ainsworth calls “indirect speech patterns” that recognize the power of the person being spoken to.266 “This use of indirect speech patterns in order to avoid conflict can be found both in the female register and in the adaptive speech patterns of subordinated African Americans forced to deal with white authority figures.”267

Under arrest, alone in an interrogation room with a police officer, a suspect is in one of the most powerless positions imaginable. How much more does this pressure affect racial minorities? We do not know, but the Miranda Court was probably aware of this effect on minority suspects. Two of the four cases consolidated in Miranda involved suspects who were minorities; the Court noted that the potential “for [police] compulsion is forcefully apparent, for example, in Miranda, where the indigent Mexican defendant was a seriously disturbed individual with pronounced sexual fantasies, and in Stewart, in which the defendant was an indigent Los Angeles Negro who had dropped out of school in the sixth grade.”268

262 Miranda, 384 U.S. at 449-53.
263 Id. at 456.
264 Id. at 457.
266 Id. at 267.
267 Id. at 318.
268 Miranda, 384 U.S. at 457.
The *Miranda* Court’s goal was to help suspects, perhaps especially racial minorities, make a “free” choice about whether to answer police questions. Whether choice is free is a philosophical conundrum that even Aristotle could not solve. The *Miranda* gold standard is a “statement given freely and voluntarily without any compelling influences.” That stirring rhetoric is inconsistent with the image of police, alone in a room with a suspect, eventually obtaining incriminating statements after interrogating for hours and resorting to strategies designed to weaken the will to resist.

To analyze the effect of *Miranda*, I begin with case studies and then turn to the data. *Spano v. New York* is a typical pre-*Miranda* case decided under the Fourteenth Amendment Due Process Clause. The Court held inadmissible, because involuntary, a confession made after eight hours of interrogation, in part because the suspect was a “foreign-born young man” who “had a history of emotional instability.” He was found unfit for military service because of a “Psychiatric disorder.” The perceived vulnerability of the suspect was an important part of the Court’s due process analysis.

It was this case-by-case approach that was both the strength and the weakness of the due process voluntariness doctrine. While the Supreme Court applied the due process test with care and solicitude toward suspects, most state courts did not follow suit. Lawrence Herman analyzed the Court’s voluntariness cases and concluded that the Court was unable to create a workable standard for state courts to follow. Small wonder, then, that in a period of thirty years or so, the Supreme Court granted review in over thirty-five cases in which confessions had been held voluntary. Small wonder, too, that the Court reversed the conviction in most of these cases. And small wonder that the Court became disaffected from its own work product. All students of the Court recognize that it cannot police the application of doctrine by lower courts. All it can hope to do is make doctrine intelligible and give illustrative examples. The Court tried to do that in the confession cases, and it failed. Given the inherent vagueness of the crucial

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270 *Miranda*, 384 U.S. at 478.


272 *Id.* at 321-22.

273 *Id.* at 322 n.3 (quoting a physician).
concepts and the many rationales underlying the rule, failure was foreordained.274

But if the due process approach was a failure, the question is whether Miranda is an improvement. I will provide two case examples of Miranda failure and then turn to the data. Recall the facts of Spano: eight hours of interrogation of a suspect who had mental deficiencies. Compare those facts with Miller v. State.275 A state trial judge held that Miller, whose I.Q. was “70 to 75 or below,” was a “mentally retarded” person under state law, and thus ineligible for the death penalty.276 Miller made a putative waiver of Miranda.277 Once Miranda is waived, the only protection the suspect has against abusive police interrogation is the due process voluntariness doctrine that protected Spano and many other suspects in the pre-Miranda era.

The police interrogated Miller intensely for six hours, often confronting him with assertions that he was guilty.278 They also lied about the evidence against Miller, telling him falsely that witnesses had seen him in the hallway outside the victim’s office. Police showed him a fingerprint card and computer printout that proved his fingerprints were found in the victim’s office; no fingerprint match had then been made. Police showed Miller a police report showing that the victim died of natural causes and suggested to him that the death might have been an accident. Police knew the report was erroneous. After six hours, he admitted that he was in the office when the victim died. The same trial judge who ruled that Miller was mentally retarded accepted his Miranda waiver and incriminating statement as voluntary, and the Indiana Supreme Court affirmed the lower court.279 Wouldn’t Miller have won his due process claim in the same Supreme Court that decided Spano?

Or consider State v. Harris.280 Police arrested Harris for murder and provided Miranda warnings. He agreed to talk to the police and denied involvement. He was taken to the police station, “placed in a 10 foot by 10 foot interview room” where “the handcuffs were removed, and he was shackled to the floor.” He was “allowed to take bathroom breaks as needed,”

275 770 N.E. 2d 763 (Ind. 2002).
276 Id. at 766 n.3.
277 Id. at 768 (implicit waiver) & 769 (explicit waiver).
278 Id. at 768-69.
279 Id. at 770.
280 105 P.3d 1258 (Kan. 2005).
but otherwise remained shackled to the floor for seven hours.\textsuperscript{281} Police interrogated him for about two and one-half hours while he was shackled.\textsuperscript{282} Police falsely implied that the victim’s blood was on the suspect’s coat, that several people saw him at the scene of the murder, and that people were picking his photo out of photo arrays.\textsuperscript{283} Indeed, four witnesses had in fact picked a man’s picture out of the photo array, but the man was not Harris. The police did not disclose this fact.\textsuperscript{284}

The Kansas Supreme Court held, without a dissent, that Harris’s confession was voluntary. The court’s methodology was to look at each factor that might suggest involuntariness in isolation, rather than, as in \textit{Spano}, looking at the cumulative effect on the suspect. For example, the court wrote:

Harris complains that his interrogation was coercive because he was shackled throughout the process and the interrogation lasted too long. Harris fails to cite any case law establishing that a nearly 7–hour detention is too long. Likewise he has not pointed to any case law to support his proposition that his confession was involuntary because he was restrained by shackles.\textsuperscript{285}

The court also interpreted what the officers told Harris as if parsing a statute. For example, the officer said, “I’ve talked to a number of people and I have been hearing that you were there.”\textsuperscript{286} The court said that this statement did not literally say that witnesses saw him at the scene of the crime.\textsuperscript{287} Yes, but how would a suspect, under arrest for murder and shackled to the floor, understand that statement? It was just this type of gamesmanship that \textit{Miranda} criticized and hoped its warnings would empower suspects to resist. Central to the Court’s finding that \textit{Spano}’s confession was involuntary was a trick the police played on him. Although the trick is too elaborate to explain in detail here, it was in sum to have \textit{Spano}’s friend, Bruno, pretend that his job as a police officer was jeopardized because \textit{Spano} had called him after the crime.\textsuperscript{288} Bruno was instructed to attempt to get \textit{Spano}’s sympathy for Bruno’s three children and pregnant

\begin{thebibliography}{99}
\item\textsuperscript{281} \textit{Id.} at 1263-64.
\item\textsuperscript{282} \textit{Id.} at 1264.
\item\textsuperscript{283} \textit{Id.} at 1264-65.
\item\textsuperscript{284} \textit{Id.}
\item\textsuperscript{285} \textit{Id.} at 1263-64.
\item\textsuperscript{286} \textit{Id.} at 1265.
\item\textsuperscript{287} \textit{Id.}
\item\textsuperscript{288} \textit{Spano}, 360 U.S. at 318-23.
\end{thebibliography}
wife.\textsuperscript{289} The trick was played four times before Spano confessed.\textsuperscript{290} Confession inadmissible. But that was then, before \textit{Miranda}. \textit{Harris} is now; he had the vaunted protections of \textit{Miranda}, which he waived, and he also apparently waived the due process protection against being tricked by police interrogators.

Indeed, it seems that courts indulge an implicit presumption that a voluntary waiver of \textit{Miranda} typically also waives the due process voluntariness protection when a suspect later makes incriminating statements. As Justice Souter observed for four justices, a \textit{Miranda} “waiver has generally produced a virtual ticket of admissibility; maintaining that a statement is involuntary even though given after warnings and voluntary waiver of rights requires unusual stamina, and litigation over voluntariness tends to end with the finding of a valid waiver.”\textsuperscript{291} Case examples cannot of course provide a complete picture. But the rich \textit{Miranda} literature demonstrates that police are quite successful in “navigating” \textit{Miranda} and getting suspects to answer questions. Studies show that roughly seventy to eighty percent of suspects waive their \textit{Miranda} rights.\textsuperscript{292}

To be sure, that suspects waive their rights tells us nothing about whether they freely chose to answer police questions. But Richard Leo’s observational study allows us to make reasonable inferences about “free choice” in the interrogation room. The variables highly correlated to police obtaining an incriminating statement were the number of interrogation strategies police used (p < .002) and the length of the interrogation (p < .000).\textsuperscript{293} The more strategies used and the longer the interrogation, the more likely the suspect was to make damaging statements. As Leo put it, “The more interrogation tactics detectives use, the more likely they are to find something that works. The longer detectives interrogate, the more likely they are to wear the suspect down and elicit incriminating statements.”\textsuperscript{294}

This is the world \textit{Miranda} has created. Are suspects and defendants better off? It is difficult to avoid the conclusion of Charles Weisselberg:

\begin{itemize}
  \item \textsuperscript{289} \textit{Id}. at 319.
  \item \textsuperscript{290} \textit{Id}. at 323.
  \item \textsuperscript{291} Missouri v. Seibert, 542 U.S. 600, 608-09 (2004) (plurality).
  \item \textsuperscript{293} Leo, \textit{supra} note 292, at 292.
  \item \textsuperscript{294} \textit{Id}.,
Miranda launched a forty-year experiment in reforming police practices. I think the Court was right to try; sometimes there can be no progress without experimentation. Now, four decades later, we know that a set of bright-line rules is not a panacea for the issues endemic in police interrogation. I mourn the passing of Miranda. I deeply regret that the justices’ ambitions and expectations were not met. However, I think that the best way to mourn the loss is to learn from the experiment called Miranda, acknowledge its failures, and move forward.\footnote{Charles D. Weisselberg, *Mourning Miranda*, 96 CAL. L. REV. 1519, 1599 (2008).}

How the Court might move forward is briefly sketched in the next Part.

\textbf{E. The Right to Have a Lawyer at a Lineup}

As we saw earlier,\footnote{See supra notes 136-145 and accompanying text.} eyewitness identifications are rife with the possibility of mistake, and identification of Black suspects by white witnesses is particularly riddled with error. What to do about the potential for unreliable eyewitness identification? Lawyers had already been given the task of suppressing evidence seized in violation of the Fourth Amendment, representing indigent felony defendants, and being available to defuse the inherent compulsion of the police interrogation room, all in the space of five short years.\footnote{See *Mapp v. Ohio*, 367 U.S. 643 (1961); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Miranda v. Arizona*, 384 U.S. 436 (1966).} Why not give them one more mission: preventing unreliable eyewitness identifications? And that’s what the Court did in *United States v. Wade*.\footnote{388 U.S. 218, 228 (1967).} Of all the tasks that the Warren Court gave to lawyers, this is the poorest fit. Lawyers can argue motions to suppress evidence seized in violation of the Fourth Amendment; lawyers can represent clients as a case proceeds to trial; lawyers could, if called upon, give suspects advice about whether to answer police questions.

But what exactly is a lawyer going to do to help make a lineup identification more reliable? The central reason eyewitness identifications are potentially unreliable is inherent in the enterprise itself; as Frankfurter put it: the “identification of strangers is proverbially untrustworthy.”\footnote{*Id.* (quoting FELIX FRANKFURTER, THE CASE OF Sacco AND VANZETTI 30 (1927)).} Lawyers can do nothing about that. Of course, Frankfurter went on to speculate that “improper suggestion” might be a “major factor” in mistaken identifications.\footnote{*Id.* at 228-29.} That suggestion can take at least three forms. The lineup...
itself can be constructed so that only the suspect comes close to matching the
description that the eyewitness gave. Or the officer conducting the
procedure can seek to guide the witness to the “right” person in the lineup.
This could be subtle: “take another look; take your time; don’t jump to
conclusions.” It could be unsubtle: “Are you sure it’s not number 3?” The
third way to guide the witness is to make comments after the witness has
picked the suspect: the officer can say some form of “Good; that’s what we
thought.” The danger here is that the witness will probably make a more
certain witness at trial because her opinion has been validated.

What is a lawyer supposed to do about these forms of suggestiveness?
Take a lineup with four tall foils and only the suspect who meets the witness’
description of a short pudgy man. The lawyer cannot very well criticize the
lineup in the hearing of the witness because this tells the eyewitness which
person to identify. So does the lawyer request a conference with the officers
outside the hearing of the witness? What if the police ignore the request?
And wouldn’t even seeking a conference send a message to the witness that
the short guy is the one who did it? Assuming the police decide to do another
lineup, when the pudgy short guy shows up again, the witness probably
remembers him from the first lineup. Presumably, police could preview the
lineup with the defense lawyer, but it is difficult to imagine police taking the
time to be that cooperative with defense lawyers.

Alternatively, the lawyer can simply take note of the unfairness of the
lineup. And do what with that knowledge? She cannot testify at trial so the
best she can do is cross-examine the officer who conducted the proceeding.
But what if the officer denies the unfairness? “Isn’t it true officer that four of
the men in the lineup were tall and only my client was short?” The officer
consults his notes and says, “No counselor; my notes indicate that all the men
in the lineup were roughly the same height.” What does the lawyer do now?

Today, the lawyer could whip out her smart phone and take a
photograph of the lineup. But in 1967, the lawyer would have to bring a
camera. I suspect the police would say, “No cameras” and seize the camera.
Maybe today they would even seize the smart phone. In any event, the whole
idea of the lawyer supervising the lineup procedure seems artificial.

I suppose one might think that the presence of a defense lawyer would
deter obvious forms of suggestiveness. Perhaps. But that is rank speculation.

In my view, the Court got caught in a formalism trap. Its right to counsel
cases dealing with proceedings outside the trial and preparation for trial
turned on whether the event was a “critical stage.” For example, in Coleman
v. Alabama, the Court concluded that a preliminary hearing was a critical stage and thus defendants had a right to counsel.

The Wade Court identified a lineup as a critical stage and then simply applied its critical stage fix. But that involved a double error. The Court’s “critical stage” doctrine was based on determining when a lawyer could provide assistance. No better example exists than a preliminary hearing. As fans of Perry Mason know, almost all of his victories over the prosecutor took place during preliminary hearings. While the value of a defense lawyer in the real world is small compared to the Perry Mason world, it remains true that a lawyer can learn a lot about the State’s case by skillful cross-examination during a preliminary hearing. But as I have just argued, a lawyer can provide little to no aid while a witness is viewing a lineup. Indeed, the Court itself later acknowledged the emptiness of its Wade analysis in two cases that give formalism a bad name.

In Kirby v. Illinois, a plurality refused to extend Wade to pre-indictment lineups. But if a lawyer was critically important in a post-indictment lineup, why would that not be true without regard to whether the defendant had been indicted? The only reason the plurality gave in Kirby was that the language of the Sixth Amendment applied only to criminal prosecutions. While that is true enough, the dissent is correct that for purposes of eyewitness identification, the Court could construe an arrest and an identification procedure as sufficiently within the scope of “criminal prosecution.” The Court had done so in the interrogation context in Escobedo v. Illinois and could have done so again. In the words of the dissent:

In view of Wade, it is plain, and the plurality today does not attempt to dispute it, that there inhere in a confrontation for identification conducted after arrest the identical hazards to a fair trial that inhere in such a confrontation conducted “after the onset of formal prosecutorial proceedings.” . . . An arrest, according to the plurality, does not face the accused “with the prosecutorial forces of organized society,” nor immerse him “in the intricacies of substantive and procedural criminal law.” Those consequences ensue, says the plurality, only with “[t]he initiation of judicial criminal proceedings,” “[i]f or it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government

301 399 U.S. 1, 9-10 (1970).
303 A majority of the Court later accepted Kirby. See United States v. Ash, 413 U.S. 300 (1973).
304 Kirby, 406 U.S. at 696 (Brennan, J., dissenting).
and defendant have solidified.” If these propositions do not amount to “mere formalism,” it is difficult to know how to characterize them.\footnote{Kirby, 406 U.S. at 697-99 (Brennan, J. dissenting) (citations omitted).}

Michael Vitiello has recently made an intriguing argument that \textit{Wade} is better understood as using counsel to protect the defendant’s right of confrontation.\footnote{Michael Vitiello, \textit{The Warren Court’s Eyewitness Identification Case Law: What If?}, 51 U. Pac. L. REV. 867 (2020).} The notion here is that counsel’s presence at the lineup could help the defendant through his lawyer’s cross-examination of the eyewitness and the officers if they testify about the lineup. Thus, just like the \textit{Miranda} Court saw counsel as a way to protect the suspect’s right against compelled self-incrimination, the \textit{Wade} Court saw counsel as a way of protecting confrontation. Vitiello offers substantial evidence from the \textit{Wade} opinion. This is an important interpretational move because it avoids the formal trap of adversary criminal proceedings. If the role of counsel at lineups is to protect a trial right, it should apply to pre-indictment procedures. This interpretation makes sense to me. It also avoids the problem of what role the lawyer is to play during the lineup. The lawyer’s role is not to improve the lineup but to help the defendant confront the witnesses at trial. But, as Vitiello concedes, \textit{Kirby} ended that promising line of analysis.\footnote{\textit{Id.} at 874.}

Now consider photographic arrays that occur after indictment. If lawyers provide critical assistance while watching a live lineup by assessing the composition of the lineup and being alert for suggestiveness from the police, why wouldn’t lawyers offer the same critical aid when watching a witness pore over photographs? The Court essentially ignored this question in \textit{United States v. Ash},\footnote{413 U.S. 300 (1973).} instead retreating to a different kind of formalism.

The \textit{Ash} Court gives the game away when it does not rest its decision on the issues of an unfair array and police suggestiveness. Instead, in a remarkably facile move, the Court draws on the history of the role of counsel and then concludes that a photo array does not resemble a trial as much as an in person lineup.\footnote{\textit{Id.} at 317.} In explaining the \textit{Wade} Court’s concern about the composition of the lineup and police suggestiveness, the \textit{Ash} Court said those concerns were raised only after the Court had determined that a lineup was

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\item \footnote{Kirby, 406 U.S. at 697-99 (Brennan, J. dissenting) (citations omitted).}
\item \footnote{Michael Vitiello, \textit{The Warren Court’s Eyewitness Identification Case Law: What If?}, 51 U. Pac. L. REV. 867 (2020).}
\item \footnote{\textit{Id.} at 874.}
\item \footnote{413 U.S. 300 (1973).}
\item \footnote{\textit{Id.} at 317.}
\end{itemize}
\end{footnotesize}
enough like a trial to justify requiring counsel.\textsuperscript{311} This is legal analysis? Optics control. Really?

What the \textit{Ash} Court was implicitly saying is that it was simply a mistake to identify a lineup as a critical stage requiring lawyers. Lawyers add almost no benefit to the defendant. To be sure, lineups are critical stages in the due process sense that the results can essentially be the whole case against the defendant who is identified. But if this definition of critical stage is used, lawyers are not the remedy of choice.

The remedy of choice would be a meaningful protection against the admission of eyewitness testimony that carried too high a risk of being false. Here, the Court failed. The Court recognized the need for due process protection but adopted a test that rarely results in suppression of an eyewitness identification. In \textit{Stovall v. Denno},\textsuperscript{312} decided the same day as \textit{Wade}, the Court held in an opinion by Justice Brennan that no due process violation occurred even though the eyewitness was shown a suspect who was handcuffed to one of five police officers and one of the officers asked whether he “was the man.”\textsuperscript{313} The suspect was the only Black person in the room.\textsuperscript{314} The due process test was whether the procedure “was so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant] was denied due process of law.”\textsuperscript{315} While there is no doubt that the show-up in \textit{Stovall} was “suggestive and conducive to an irreparable mistaken identification,” it was not “unnecessarily suggestive” because the eyewitness was seriously injured and in a hospital. The Court never says she was in critical condition, but the opinion reads as if she might not survive.

The Court later refined the due process test to put the burden on the defendant to demonstrate a “very substantial likelihood of [an] irreparable misidentification.”\textsuperscript{316} This standard is difficult to meet. Consider \textit{Neil v. Biggers}.\textsuperscript{317} The victim was attacked in her home from behind in a dark hallway.\textsuperscript{318} The assailant then took her to a woods and raped her.\textsuperscript{319} It was

\begin{footnotesize}
\begin{enumerate}
\item Id. at 314.
\item 388 U.S. 293 (1967).
\item Id. at 295.
\item Id. at 302.
\item Id. at 302.
\item 409 U.S. 188 (1972).
\item Id. at 193-94.
\item Id. at 194.
\end{enumerate}
\end{footnotesize}
night and no lights were on in the kitchen where she was assaulted, though some light shone from the bedroom.\textsuperscript{320} She gave police a “very general description.”\textsuperscript{321} Over the next seven months, police showed her several potential suspects, some in person and some from photographs.\textsuperscript{322} She did not identify any of these as the rapist.\textsuperscript{323} Seven months after the rape, police called her to the station and showed her Biggers, not in a lineup, but just by himself.\textsuperscript{324} She later testified that she had “no doubt” that he was the rapist.\textsuperscript{325} But we do not know whether the “no doubt” was based on what she remembered from seven months earlier in the darkened kitchen or was created when the police showed her Biggers. The Court held that introducing this identification did not violate the Due Process Clause. The majority opinion stressed that the victim “made no previous identification at any of the showups, lineups, or photographic showings.”\textsuperscript{326} While this fact is surely relevant, the lack of light during the crime and the passage of seven months make the identification seem shaky to me.

The Supreme Court has found a due process violation in only one eyewitness identification case, one with remarkable facts:

There were three men in the lineup. One was petitioner. He is a tall man—close to six feet in height. The other two men were short—five feet, five or six inches. Petitioner wore a leather jacket which David [the eyewitness] said was similar to the one he had seen underneath the coveralls worn by the robber. After seeing this lineup, David could not positively identify petitioner as the robber. He “thought” he was the man, but he was not sure. David then asked to speak to petitioner, and petitioner was brought into an office and sat across from David at a table. Except for prosecuting officials there was no one else in the room. Even after this one-to-one confrontation David still was uncertain whether petitioner was one of the robbers: “truthfully—I was not sure,” he testified at trial. A week or 10 days later, the police arranged for David to view a second lineup. There were five men in that lineup. Petitioner was the only person in the second lineup who had appeared in the first lineup. This time David was “convinced” petitioner was the man.\textsuperscript{327}

\textsuperscript{320} Id. at 193-94.
\textsuperscript{321} Id. at 194.
\textsuperscript{322} Id. at 194-95.
\textsuperscript{323} Id. at 195.
\textsuperscript{324} Id.
\textsuperscript{325} Id.
\textsuperscript{326} Id. at 201.
The eyewitness testified about the various identification procedures and also identified the defendant in the courtroom. The only other evidence against the defendant was the testimony of his accomplice. The Court concluded, “[i]n the present case the pretrial confrontations clearly were so arranged as to make the resulting identifications virtually inevitable.”

Even these egregiously suggestive procedures marshalled only five votes to reverse the conviction! Four members of the Court “being unwilling in this case to disagree with the jury on the weight of the evidence, would affirm the judgment.” A doctrine that flaccid provides very little protection against false eyewitness identifications, as the New Jersey Supreme Court recognized in *State v. Henderson*:

> In the end, we conclude that the current standard for assessing eyewitness identification evidence does not fully meet its goals. It does not offer an adequate measure for reliability or sufficiently deter inappropriate police conduct. It also overstates the jury’s inherent ability to evaluate evidence offered by eyewitnesses who honestly believe their testimony is accurate.

The Court in 1967 could have chosen a better due process path, one that would offer much more protection against false eyewitness identification and thus would have kept out of evidence more false cross-racial identifications. I will describe that path in the next Part.

In the mind of the Warren Court on June 13, 1967, the day after *Wade* and *Stovall* were announced, the justices who carried the day in the “revolution” must have thought they had largely solved some major problems that had been endemic in state criminal proceedings. Lawyers would be able to suppress evidence taken in violation of the Fourth Amendment. *Miranda* warnings would help suspects decide for themselves whether to answer police questions, and lawyers were available to help suspects avoid the inherent compulsion and trickery of police interrogation. Almost all defendants would be represented by counsel during pre-trial and trial proceedings. Eyewitness identifications procedure would be (somehow) helped by the presence of counsel, and, in any event, defendants could invoke

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328 *Id.* at 442.
329 *Id.*
330 *Id.* at 443.
331 *Id.* at 444 (statement of Justices White, Harlan, and Stewart). Though Justice Black filed a separate dissent, he agreed that a jury must be given the freedom “to decide for itself” what evidence is true and what is false. *Id.* at 447 (Black, J., dissenting).
333 *Id.* at 878.
the Due Process Clause as an additional protection. All defendants would benefit from this “revolution,” but Black defendants would disproportionately benefit.

The only problem: It was largely an illusion.

IV. BACK TO THE FUTURE: WHAT COULD THE WARREN COURT HAVE DONE DIFFERENTLY?

The lesson so far is not that the Warren Court failed. No, the lesson is deeper. It is that in the American system courts have limited power to fashion systemic remedies for perceived problems in criminal justice. But the Court could have done more. I will sketch a few ideas here. First, however, let us deal with two areas where improvement was not possible.

A. Jury Trial and Counsel

Whatever modest benefits flow from giving misdemeanor defendants facing more than six months incarceration the right to choose a jury rather than a judge were accomplished in Duncan.334 There is no reason to revisit that issue. It is a small plus for the Warren Court.

The same holds, for a different reason, in the right to counsel doctrine. Basic fairness requires indigent defendants be given a lawyer, even if that lawyer is burdened with too many cases. But the Court cannot fund the requirement. To be sure, it might have been a mistake to make counsel available for any offense that results in even a day in jail, as the Court did in Argersinger v. Hamlin.335 It is, for one thing, an odd rule because it requires the judge to make a prediction before the case is tried about whether she will sentence the defendant, if found guilty, to any period of incarceration. But the most likely alternative might have created more demand for counsel. The right to a jury trial exists for non-petty offenses, defined by the Court as offenses that authorize more than six months incarceration.336 Misdemeanors are “typically” punished by up to twelve months incarceration.337 If the non-petty rule applied to the right to counsel, many

334 Prior to Duncan, for example, New York gave defendants the right to a jury trial only if charged with a felony. The Court struck down this aspect of New York law in Baldwin v. New York, 399 U.S. 66 (1970).
337 Cornell Law School, supra note 91.
misdemeanors would require counsel even if no jail time resulted. I suspect that judges often sentence misdemeanor defendants to probation or some other alternative to incarceration. If so, a non-petty approach to counsel might require more defenders for indigent defendants than the current Argersinger rule.

The other piece of the counsel puzzle beyond the reach of the Court is the power of legislatures to create more avenues for prosecutors to get what legislatures consider deserved punishment. As we saw earlier, legislatures can create new offenses and increase penalties for offenses already on the books. This gives prosecutors more leverage in plea bargaining to get the penalty they think appropriate. If robbery in Maryland is worth 8 years in prison, the legislature in Maryland will create ways for prosecutors in 2023 to get 8 years, more or less.

But Gideon must be counted as a small plus for the Warren Court. Basic fairness required what appears to be a level playing field. Appearances are not everything but they are something. The robbery defendant in Maryland who gets eight years after his lawyer did a credible job at trial likely feels better about the justice system than did Smith Betts who faced the prosecutor with no lawyer at his side.

Because a higher percentage of Black defendants are indigent, the appearance of fairness is particularly important. To see Black defendants having to defend themselves against a prosecutor who will often be white would be jarring in the extreme. While appearances “count” for all indigent defendants, they “count” more when the indigent defendant is Black.

B. The Fourth Amendment Mess

Terry v. Ohio was a mistake the day it was decided. It put the Court on the slippery slope of reasonable suspicion and the harassment of racial minorities. One irony is that the Terry Court was aware that its holding would make matters worse and did it anyway. The Court wrote:

The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial. Yet a rigid and unthinking application of the exclusionary rule, in futile protest against practices

338 See supra note 241 and accompanying text.
which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime. 339

Justice Fortas presciently observed at the Terry conference, “[W]e are inventing a new kind of probable cause” and “I would be cautious and would go case-by-case.” 340 As we saw, the Court has not been cautious. If the Court wanted to give police more discretion on the ground to prevent crime, it could have done what Fortas was proposing and what Warren sought initially to do: soften the probable cause standard to allow the seizure of Terry to comply with the Fourth Amendment. “I rest solely on ‘probable cause.’ I would not downgrade probable cause to reasonable suspicion,” Warren said at conference. 341 Every member of the Court initially agreed that this was a probable cause case and that the officer had probable cause. 342

If Terry had survived as a probable cause case, limited to situations where an armed crime seemed imminent, the harms would have been substantially less than those caused by the reasonable suspicion standard ultimately adopted. It is difficult to believe that even a “softened” probable cause standard would have permitted the kind of wholesale interventions that we saw in the New York City data.

Justice Scalia was a critic of Terry. “I frankly doubt,” he wrote, “whether the fiercely proud men who adopted our Fourth Amendment would have allowed themselves to be subjected, on mere suspicion of being armed and dangerous, to” a Terry frisk. 343 Justice Scalia then described what a frisk can entail:

Check the subject’s neck and collar. A check should be made under the subject’s arm. Next a check should be made of the upper back. The lower back should also be checked.

A check should be made of the upper part of the man’s chest and the lower region around the stomach. The belt, a favorite concealment spot, should be checked. The inside thigh and crotch area also should be searched. The legs should be checked for possible weapons. The last items to be checked are the shoes and cuffs of the subject. 344

Because Scalia viewed stare decisis as important if not sacrosanct, he offered a novel way to keep Terry but improve it.

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341 Id. at 453.
342 Id. at 453-55.
344 Id. at 381-82 (quoting J. Moynahan, Police Searching Procedures 7 (1963) (citations omitted)).
If I were of the view that Terry was (insofar as the power to “frisk” is concerned) incorrectly decided, I might—even if I felt bound to adhere to that case—vote to exclude the evidence incidentally discovered, on the theory that half a constitutional guarantee is better than none . . . . As a policy matter, it may be desirable to permit “frisks” for weapons, but not to encourage “frisks” for drugs by admitting evidence other than weapons.345

But Scalia wrote alone. And no other member of the Court has criticized Terry, other than Justice Douglas, who dissented in Terry. At the conference, Douglas said he would have affirmed on the basis of probable cause,346 but he refused to depart from that standard and dissented.347

A Supreme Court committed to racial justice would grant certiorari in a case like Navarette v. California,348 the 911 case finding reasonable suspicion created by the most trivial traffic offense described by an anonymous caller, and use that case to at least partially clean up the Terry mess. The Court could leave “reasonable suspicion” in place, in deference to stare decisis, but return to the language of Terry and insist that the reasonable suspicion has to be that the person frisked is presently armed and dangerous. And as Terry itself said, that suspicion has to be based on more than an “unparticularized suspicion or hunch.”349 Given that standard, a 911 tip about a possible drunken driver could never qualify, nor could suspicion that luggage in an airport contained narcotics.350 The millions of New York City Terry stops because someone is in a high crime area351 would all be unconstitutional, unless other facts were known. Once it is made clear to lower courts that suspicion of drug possession simply does not qualify under a revived Terry doctrine, the harassment of racial minorities should diminish. It would not, of course, disappear, but small strides are important. State courts and state legislatures could, of course, adopt a stricter Terry standard under state law or adopt Scala’s “half-a-loaf” compromise.

We saw earlier that the distaste courts and the Court have for the exclusionary rule in cases of serious, violent crime caused what Silas

345 Id. at 382.
346 THE SUPREME COURT IN CONFERENCE, at 454.
347 Douglas could have concurred in the judgment if he still believed the officer had probable cause.
348 572 U.S. 393 (2014).
349 Terry, 392 U.S. at 27.
351 See supra notes 177-179 and accompanying text.
Wasserstrom called “The Incredible Shrinking Fourth Amendment.”\footnote{Silas J. Wasserstrom, \textit{The Incredible Shrinking Fourth Amendment}, 21 AM. CRIM. L. REV. 257 (1984).} Could that have been mitigated? I think the answer is a qualified yes. The Court could have adopted a more flexible approach, something like the English/Wales approach or the Canadian approach: exclude evidence seized in violation of the Fourth Amendment if the “admission of it in the proceedings would bring the administration of justice into disrepute.”\footnote{Canadian Charter of Rights and Freedoms, sec. 24.} Linked to the concept of judicial integrity, the “disrepute” standard roughly tracks whether the violation was deliberate.\footnote{Craig M. Bradley, \textit{Reconceiving the Fourth Amendment and the Exclusionary Rule}, 73 LAW \& CONTEMP. PROBS. 211, 217 (2010).}

The discerning reader has already realized that the dicta in \textit{Herring}—which would limit exclusion to cases of deliberate, reckless, or grossly negligent violations of the Fourth Amendment\footnote{\textit{Herring}, 555 U.S. at 144.}—has finally arrived at a flexible approach roughly like those adopted in other English speaking countries. If the Court makes \textit{Herring} dicta into doctrine, it will have adopted a flexible approach after a long and winding road that begins with \textit{Weeks} in 1914, goes through the states in 1961, and now has settled on judicial integrity as the critical value to be served.

One “cost” of the long and winding road is the shrinking of the substantive protections of the Fourth Amendment. Another cost is the lost opportunity to pay attention to race. It is, of course, not easy to determine whether a police violation of the Fourth Amendment was deliberate, reckless, or grossly negligent. It was clear enough in \textit{Mapp}; the police violation was no doubt deliberate. It was clear enough in the first of the Court’s good-faith cases, \textit{United States v. Leon};\footnote{468 U.S. 897 (1984).} the violation was not deliberate. The police obtained a search warrant based on an affidavit that a divided panel of the Ninth Circuit held fell short of the probable cause standard.\footnote{\textit{Id.} at 904.} But what if an officer conducts a warrantless search of a vehicle that is later found to be without probable cause. How bad does the misjudgment have to be to imply culpable conduct on the part of the police? Or what about consent to search that is ambiguous?

Here is where the Warren Court’s concern about racial justice could have had “bite.” We know today, and the Warren Court surely suspected, that police target vehicles driven by Blacks and Hispanics seeking grounds to
search the vehicles. In Maryland over a three-year period, 70% of the drivers stopped on an interstate were Black even though only 17.5% of the traffic and speeders were Black.\footnote{David Cole, NO EQUAL JUSTICE 36 (1999).} Videotapes in one county in Florida showed that 80% of the traffic stops were drivers of color even though only 5% of the drivers were dark skinned.\footnote{Id. at 37.} Once the vehicle is stopped, police can search based on probable cause or consent, and consent is easily obtained.\footnote{See State v. Carty, 790 A.2d 903, 910-11 (N.J. 2002) (citing data showing that 95% of drivers gave consent when asked).}

In constructing a taxonomy of culpable violations of the Fourth Amendment, race could be a factor. To be sure, operationalizing that factor in a concrete way is likely impossible. But the hypothetical Warren Court could have offered guidance. For example, the Court could have said, “In deciding whether an officer has deliberately or recklessly violated the Fourth Amendment, courts should take into account whether the victim of the violation is poor or a racial minority. Courts should take judicial notice that Fourth Amendment rights of the disadvantaged are at greater risk than those of more fortunate citizens.”

I am not laboring under the illusion that this rhetoric would inspire local judges to suppress evidence in cases of serious crime.\footnote{See Meares, supra note 9, at 112 (noting that in the due process cases “[i]nspiring language was not enough to produce wholesale changes in the operation of criminal justice by the states”).} Perhaps it should not. But for lower level crimes—e.g., possession of small amounts of contraband or disorderly conduct—the hypothetical guidance might make a difference. And even if it did not, the Court would have been on record saying that race should matter. Just like appearances matter in the counsel context, telling the world that race matters when considering Fourth Amendment violations should matter, too.

\textit{C. Confessions}

We saw earlier that \textit{Miranda} probably facilitates free choice in an unknown subset of suspects facing interrogation. That’s a plus for the Warren Court. The cost, however, is that courts simply assume that the \textit{Miranda} warnings and waiver create a very strong presumption that any subsequent confession is voluntary.\footnote{See supra notes 275-291 and accompanying text.} This assumption deprives the
defendant of a realistic chance to win a due process voluntariness argument in all but the most egregious cases.\textsuperscript{363}

Several scholars in the last twenty or so years have suggested that suspects might be worse off today than when courts struggled with the vagaries of the due process voluntariness test.\textsuperscript{364} We saw two examples earlier, the \textit{Miller} case with a low IQ suspect who was told repeated lies about evidence against him,\textsuperscript{365} and the \textit{Harris} case where the suspect is shackled to the floor and lied to by police.\textsuperscript{366} \textit{Miranda} permits this police conduct because a waiver of \textit{Miranda} somehow carries over to a finding of voluntariness in waiver’s aftermath. That makes no sense logically, and courts never acknowledge this carry-over effect, but its presence in the case law is unmistakable.

One advantage to suspects in the pre-\textit{Miranda} world was that the voluntariness inquiry was a suspect-centric inquiry that took account of race as well as education and psychological makeup. It also undoubtedly took account of location. A Black suspect in the South in the 1940s, 1950s, and 1960s probably presented a better argument than a white defendant in California. In \textit{Lisenba v. California},\textsuperscript{367} the Court affirmed a conviction based on a confession secured after 40 hours of intense interrogation spread over two sessions,\textsuperscript{368} in part because the suspect “exhibited a self-possession, a coolness, and an acumen throughout his questioning, and at his trial, which negatives the view that he had so lost his freedom of action that the statements he made were not his but were the result of the deprivation of his free choice to admit, to deny, or to refuse to answer.”\textsuperscript{369} Lisenba was white.\textsuperscript{370}

In \textit{Blackburn v. Alabama}, by contrast, a nine-hour interrogation of a Black suspect by white officers, who made no threats, was held to produce an
involuntary confession.371 The “interrogation took place in closely confined quarters—a room about four by six or six by eight feet—in which as many as three[,] [undoubtedly white,] officers had at times been present with Blackburn.”372 The Court also took note of Blackburn’s history of mental illness, describing it in quite a lot of detail.373 The Court concluded that when these factors were considered with

the absence of Blackburn’s friends, relatives, or legal counsel; the composition of the confession by the Deputy Sheriff rather than by Blackburn—the chances of the confession’s having been the product of a rational intellect and a free will become even more remote and the denial of due process even more egregious.374

It is unclear to what extent Blackburn’s mental illness contributed to the Court’s holding, but at least the Court considered the circumstances of the interrogation, as well as the race of the suspect. Although the Court never explicitly mentions race as part of its calculation, it did describe Blackburn as a “Negro.”375 The state is Alabama; the time of the interrogation is 1948;376 it is inconceivable that the Court ignored the race factor when finding that the confession was not a product of Blackburn’s free will.

Race was critical to the Court’s finding confessions involuntary in five other cases decided in the 1940s and 1950s.377 If we include Blackburn, decided in 1960, and Brown v. Mississippi,378 decided in 1936, and thus extend our time period to 1936 to 1960, seven confessions cases involved Black defendants. The Court reversed the convictions in all seven cases. All but one came from Southern courts.379

372 Id. at 204.
373 Id. at 200-04.
374 Id. at 207-08.
375 Id. at 200.
376 Id.
377 See Payne v. Arkansas, 356 U.S. 560, 568 (1958) (finding a 19-year-old black man was coerced into confessing to murder), Fikes v. Alabama, 352 U.S. 191 (1957) (holding that a black man was coerced into confessing to rape after five days of questioning and isolation), Haley v. Ohio, 332 U.S. 596 (1948) (finding the confession of a 15-year-old black boy was coerced by police), White v. Texas, 310 U.S. 530, 532 (1940) (holding that a black man’s confession to rape was coerced after nightly “trips” to the woods where police “whipped him [and] asked him each time about a confession”), Chambers v. Florida, 309 U.S. 227, 230 (1940) (confessions of four young black men suppressed because taken during “all night vigil” following “persistent and repeated questioning” over “several days” of thirty to forty black suspects).
379 Haley v. Ohio is the exception.
Fikes v. Alabama\textsuperscript{380} captures the Court’s due process approach. Here is how the Court described its mode of analysis: “He is a Negro, 27 years old in 1953, who started school at age eight and left at 16 while still in the third grade.”\textsuperscript{381} To be sure, Fikes was an easy case because there was testimony by three psychiatrists at the trial that Fikes “is a schizophrenic and highly suggestible.”\textsuperscript{382} Still, the focus on race and education provides context and shows the Court’s sensitivity to issues of justice.

Youth and race made the Court especially sympathetic to defendants. In Haley v. Ohio,\textsuperscript{383} Justice Douglas’s plurality opinion described the interrogation of a 15 year old Black suspect this way:

What transpired would make us pause for careful inquiry if a mature man were involved. And when, as here, a mere child—an easy victim of the law—is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race . . . . This is the period of great instability which the crisis of adolescence produces. A 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal from midnight to 5 a.m. But we cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, [will] crush him. No friend stood at the side of this 15-year-old boy as the police, working in relays, questioned him hour after hour, from midnight until dawn. No lawyer stood guard to make sure that the police went so far and no farther, to see to it that they stopped short of the point where he became the victim of coercion. No counsel or friend was called during the critical hours of questioning. A photographer was admitted once this lad broke and confessed. But not even a gesture towards getting a lawyer for him was ever made.\textsuperscript{384}

All of this careful consideration of the suspect’s race, age, education, and mental fitness simply disappears in the cases decided by state courts since Miranda. What is instructive is that the Supreme Court has not lost sight of the importance of suspect characteristics in the rare case where Miranda is

\begin{footnotes}
\footnotetext[380]{352 U.S. 191 (1957).}
\footnotetext[381]{Id. at 193.}
\footnotetext[382]{Id.}
\footnotetext[383]{332 U.S. 596 (1948).}
\footnotetext[384]{Id. at 599-600. The plurality opinion referred to the suspect as a “Negro boy.” Id. at 597. Justice Frankfurter joined in reversal of the judgment, providing a majority. Id. at 602. His opinion tracks closely that of the plurality; it is not clear why he did not join Douglas’s opinion.}
\end{footnotes}
inapplicable. In *Arizona v. Fulminante*, the Court addressed the voluntariness of a confession made by a prisoner to another inmate. *Miranda* did not apply because the confessor did not know he was speaking to the government. But because the confession was made to a government informant, the Due Process Clause protected the prisoner’s right against the use of his confession if it was involuntary.

The pressure on Fulminante included that he “was an alleged child murderer” who “was in danger of physical harm at the hands of other inmates.” Another inmate said he was aware that Fulminante was being treated “rough[ly]” by other prisoners and “offered to protect [him] in exchange for a confession to [the child’s] murder.” The Court also noted that the defendant was

low average to average intelligence; he dropped out of school in the fourth grade. He is short in stature and slight in build. Although he had been in prison before, he had not always adapted well to the stress of prison life. While incarcerated at the age of 26, he had “felt threatened by the [prison] population,” and he therefore requested that he be placed in protective custody. Once there, however, he was unable to cope with the isolation and was admitted to a psychiatric hospital. The Court has previously recognized that factors such as these are relevant in determining whether a defendant’s will has been overborne.

*Fulminante* is, to be sure, a close case. Chief Justice Rehnquist dissented on the voluntariness point, joined by Justices O’Connor, Kennedy, and Souter. But my point is not that the Court necessarily reached the right result but that it considered the facts of the interrogation and the characteristics of the suspect who was interrogated.

The due process right against an involuntary confession is still available in a *Miranda* world. Presumably, the Court would have reached the same result if Fulminante had waived his *Miranda* rights and the police made these threats. What the Court needs to do, and it is easily done, is grant certiorari in a few state cases in which the post-*Miranda* waiver conduct of the police is like that in *Fulminante* or some of the old due process cases. The Court should

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387 *Fulminante*, 499 U.S. at 286.
388 *Id.*
389 *Id.* at n.2 (citations to record omitted).
390 *Id.* at 302-03.
overturn the convictions in those cases, hoping to send a message to state courts to apply traditional due process standards to post-waiver conduct of police interrogators and carefully analyze post-waiver cases in terms of the characteristics of the suspect and the pressures applied by police.

Again, I am not promising that this will solve the post-waiver problem in the lower courts. Perhaps the principal reason the Court resorted to *Miranda* is that its message to be skeptical of confessions in dozens of cases it decided in the pre-*Miranda* period was not working to bring the state courts in line. As Larry Herman cogently remarks, “[a]ll students of the Court recognize that it cannot police the application of doctrine by lower courts. All it can hope to do is make doctrine intelligible and give illustrative examples. The Court tried to do that in the confession cases, and it failed.”391 Joe Grano preferred a voluntariness approach over *Miranda*, but he conceded the “intolerable uncertainty that characterized the thirty-year reign of the due process voluntariness doctrine in the law of confessions.”392

A return to due process uncertainty would, however, likely be an improvement over the current state of confessions law that governs post- *Miranda* waiver cases. After surveying some post- *Miranda* state cases, Herman concludes, as I conclude, that in post-*Miranda* voluntariness cases, “courts, as they did in the pre-*Miranda* days are still holding confessions admissible in doubtful or marginal cases.”393 The Court should attempt to resuscitate the old due process doctrine that sought to prevent intense, coercive police interrogation and make clear that is still applies after a suspect waives *Miranda*. The Court should send a message to lower courts to take into account a suspect’s mental fitness, age, education, and race when the suspect has waived *Miranda* and faces police interrogators alone in an interrogation room.

**D. Suggestive line-ups**

The Court’s jury trial right accomplishes exactly what the Court intended. The right to counsel matters less, perhaps much less, than the Court anticipated, but it is not nothing. The Court’s attempt to achieve fairness through exclusion of evidence crashed on the rocky shoals of pragmatic judges wanting to convict those guilty of serious crimes. The

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391 Herman, supra note 274, at 754.
393 Herman, supra note 274, at 752.
Court’s concession in *Terry* to the reality of policing has been a disaster. *Miranda* has perhaps caused more problems in the law of confessions than it has solved, but it represented a legitimate attempt to instill fairness in the interrogation room. The eyewitness identification cases, however, are an incoherent mess.

As noted earlier, the Court’s attempt to reduce the incidence of suggestive line-ups by requiring defense lawyers at the lineup failed on two fronts. First, there is no evidence that a lawyer could make a difference in more than a trivial number of lineups. More fundamentally, by later restricting the right to counsel to post-indictment lineups, the Court removed the right from the vast majority of lineups because they typically occur during the investigative phase and thus before a grand jury indictment. The Court threw a sop at the real problem: the police use of show-ups and unfair lineups. The Court created a vague due process right that evolved into whether the procedure created a very substantial likelihood of an irreparable mis-identification. The burden is on the defendant to make that showing. The Court has only found one case where that burden was met.394

And we know, and the Court surely knew, that racial identifications are particularly rife with error. Indeed, the Court chose for its first due process case one in which the suspect was a Black man shown to the white victim by several white officers and prosecutors.395 But the *Stovall* Court offered little solace to defendants. Could the Court have done better? Yes. The Court could have:

1) Required that a record be made of the composition of the lineup; this is easy enough to do by taking a photograph of the lineup;
2) Required that the names and addresses of all the foils be recorded;
3) Required that witness make a written description of the perpetrator before viewing the lineup and that this description be provided defense counsel;
4) Required that a record be made of why the eyewitness chose the person he did, what identifying features sparked his recognition;
5) Required that a tape recording be made of the entire lineup process.

394 See Foster v. California, 394 U.S. 440, 441-42 (1969) (“This case presents a compelling example of un-fair lineup procedures.”).
395 See Stovall v. Denno, 388 U.S. 293 (1967) (defendant argued unsuccessfully that “identification testimony violated his rights under the Fifth, Sixth, and Fourteenth Amendments because he had been compelled to submit to the . . . confrontation . . . under circumstances which unfairly focused the witness’ attention on him as the man believed by the police to be the guilty person.”).
For readers who might be tempted to say that I should not be expecting the Warren Court to anticipate ideas that states have recently adopted, look at footnote 26 in the 1967 Wade opinion. All these ideas were there for the Court to adopt as a matter of due process.

Of course, courts prefer not to interpret constitutional principles in a granular fashion that mimics legislation. In 1968, Justice Fortas was still feeling the heat of the criticism of the legislative-style Miranda opinion and requirements. During the conference on Terry, decided a year after Wade, he announced he was joining the majority but wanted “a precisely refined opinion—not a Miranda type.”

Clearly, the Wade Court was not in the mood for a “Miranda type” opinion infusing specific content into the due process right against mis-identification. The Court did not, of course, have to adopt all five requirements as part of due process. Numbers 1, 3, and 5 (photograph of lineup; written description by eyewitness before lineup; and tape recording of lineup procedure) would be easy for police to do and easy for courts to review.

But there is another problem: remedy. Suppose the police omit one of the requirements. Automatic exclusion? I think that is too harsh and would opt for a burden shifting rule. If the State cannot show full compliance with my newly-minted due process requirements, the burden would shift to the State to demonstrate that the identification was reliable. The Court could also have specified that the more requirements the State fails to meet, the heavier the burden on the State. How to operationalize this differential burden is a problem but, once again, the Court could have supplied the rhetoric and let other courts deal with the implementation.

It did that in Miranda, though maybe that is a bad example as it did not work out the way the Warren Court probably intended. The Court stated in Miranda: “If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed

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397 United States v. Wade, 388 U.S. 218, 236 n.26 (1967) (using a model statute to show the importance of defense counsel at a lineup).
This “heavy burden” turned out twenty years later to be preponderance of the evidence. Of course, later Courts turned hostile toward Miranda. One hopes that due process accuracy-enhancing provisions would prove more durable. A judge, or law professor, who worries about freeing guilty suspects could plausibly call for limits on Miranda’s expansive dicta or even its overruling. But no one should want a defendant to be convicted based on a false eyewitness identification. The proposed modifications to the eyewitness identification process do not seem, to me, to threaten loss of convictions in very many cases. If the State has other evidence of guilt (e.g., a confession or forensic evidence) the loss of a shaky identification would not be difficult to overcome. If the State’s case turns on a shaky identification, the risk of convicting an innocent defendant seems too high.

Thus, unlike the partial failures of the right to counsel, the Fourth Amendment adventure, and the Miranda warnings and waiver regime to protect disadvantaged suspects and defendants, the due process right against erroneous identifications had an easy solution. It still does.

CONCLUSION

The Warren Court began its task of reforming state criminal procedure with a burst of optimism and a touch of arrogance. But the state criminal justice systems proved remarkably resilient. In some important ways, state criminal justice today looks a lot like it did in 1960. Would it have been different if Hubert Humphrey rather than Richard Nixon had won the presidency in 1968? Maybe. We will never know, but my strong suspicion is that the system of arresting, trying, and convicting those who commit serious crimes would have adjusted to a more liberal Court. If so, a Warren Court robust criminal procedure revolution was doomed from the beginning.

The revolution was, as Charles Weisselberg said about Miranda, an “experiment in reforming police practices.” But the best way to “mourn”

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399 Miranda, 384 U.S. at 475 (citing Escobedo v. Illinois, 378 U.S. 478, 490 n.14 (1964)).
402 Weisselberg, supra note 295, at 1599.
its failure is “to learn from the experiment, . . . acknowledge its failures, and move forward.”\textsuperscript{403}