

# THE WARREN COURT: A MOSAIC OF DECISIONS

Ellen S. Podgor\*

## I. INTRODUCTION

Earl Warren, who previously served as the Governor of California,<sup>1</sup> became chief justice of the Supreme Court in 1953 and served in that role until his retirement in 1969.

<sup>2</sup> Thus, the year 2019 marks the 50th anniversary of this historic Court. The list of cases decided during the Warren Court is extensive with major constitutional law decisions such as *Brown v. Board of Education*.<sup>3</sup> But this was also a time for a growth of criminal procedure jurisprudence. For instance, decisions such as *Miranda v. Arizona*,<sup>4</sup> which gave rise to major changes in police conduct, caused a “revolution in the American law school curriculum,” with courses added in criminal procedure investigation and casebooks written to cover this growing subject.<sup>5</sup> The Warren Court also provided the birth of law school courses

---

\* © 2020, Gary R. Trombley Family White Collar Crime Research Professor and Professor of Law. The author thanks Kelly A. Jackson, Kai L. Su, and the members of the *Stetson Law Review* for this extraordinary work with both the live Symposium and its written product.

1. *List of California Governors*, THE GOVERNOR'S GALLERY, <https://governors.library.ca.gov/list.html> (last visited Sept. 13, 2019).

2. *Justices 1789 to Present*, SUPREME COURT OF THE UNITED STATES, [https://www.supremecourt.gov/about/members\\_text.aspx](https://www.supremecourt.gov/about/members_text.aspx) (last visited Sept. 13, 2019).

3. 347 U.S. 483 (1954) (finding segregation of public schools unconstitutional); see also Morton J. Horowitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5, 5 (1993) (discussing the Warren Court being emblematic of a living constitution and “rights as a dominant constitutional mode”).

4. 384 U.S. 436, 444 (1966) (finding that the Fifth Amendment requires constitutional warnings when police conduct an interrogation).

5. Yale Kamisar, *A Look Back on a Half-Century of Teaching, Writing and Speaking About Criminal Procedure*, 2 OHIO ST. J. CRIM. L. 69, 70 (2004) (talking about the growth of criminal procedure courses in law schools and the addition of textbooks in this subject).

on criminal procedure adjudication<sup>6</sup> with decisions such as *Gideon v. Wainwright*.<sup>7</sup>

The breadth of decisions during the Warren Court, and notable criminal justice-related decisions, makes it impossible to cover all the opinions coming from this Court.<sup>8</sup> But on this fifty-year anniversary, this Symposium explores ten opinions, looking back fifty years to consider how these cases have fared over time. Each criminal justice scholar in this Symposium selected one, or in one instance two, Warren Court criminal procedure decisions, offering both a historic and current analysis of the Court's opinion.<sup>9</sup> To accommodate all of these important cases, as well as the profound words of a lunchtime speaker, this Symposium is presented in two issues of the *Stetson Law Review*. This Introduction is an overview to both Part I, which follows in this issue, and Part II, which follows in Volume 49, Issue 3 of the *Stetson Law Review*.

## II. PART ONE

Following this Introduction, Part One of the Warren Court Symposium presents the work of lunchtime speaker, Professor Carol S. Steiker, the Henry J. Friendly Professor of Law at Harvard Law School. Professor Steiker opens by asking the question of what is the single most important legacy of the Warren Court. Her response is simple, yet very important—incorporation. She provides ample support in her talk to demonstrate the Court's success with selective incorporation of the Bill of Rights. But she is equally critical of the Court for its failure to “grapple forthrightly with race.”<sup>10</sup>

Although most speakers in the Symposium focused on landmark decisions of the Warren Court, Professor Bruce A. Green, Stein Chair and Director of the Stein Center for Law and Ethics at Fordham Law School,

---

6. Jerold H. Israel, *Creating (and Teaching) the “Bail-To-Jail” Course*, 13 OHIO ST. J. CRIM. L. 475, 476–77 (2016) (discussing how the Warren Court provided the basis for a new generation of textbooks and courses on criminal procedure adjudication); see also Ellen S. Podgor, *Criminal Procedure: It Wasn't Always So*, 13 OHIO ST. J. CRIM. L. 469, 470 (2016) (introducing a historic review of law school courses and casebooks that provided the growth of criminal procedure in law schools).

7. 372 U.S. 335, 351–52 (1963) (establishing the right to counsel for indigent defendants in state felony cases).

8. See generally Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L. REV. 1, 3–4 (1995) (looking back at criminal procedure law developed by the Warren Court).

9. Although emanating from the Warren Court, different justices often authored the opinions.

10. Carol Steiker, *Keynote Address—The Warren Court and Criminal Justice: Some Lasting Legacies and Unfinished Business*, 49 STETSON L. REV. 223, 239 (2020).

selected the case of *Offutt v. United States*.<sup>11</sup> This little-known case, involving the conviction of a criminal defense attorney for contempt, provides history and consideration of a court's "supervisory authority."<sup>12</sup> Professor Green reflects on what might have happened if the Warren Court had paid more attention to supervisory authority and provided a stronger base for developing this doctrine.<sup>13</sup>

Professor Cynthia Alkon, Professor of Law and Director of the Criminal Law, Justice and Policy Program at Texas A&M University School of Law, takes on a case often examined in first-year criminal law classes, *Lambert v. California*.<sup>14</sup> But she offers a unique analysis to this opinion by considering what the law could have been if it had gained traction in later cases. Although the Court found that Mrs. Lambert did not violate the law by failing to register as a convicted felon, the case did not serve as a fulcrum to expand strict liability law. Professor Alkon explores the defects in the decision, as well as what it could have accomplished to combat overcriminalization if the Court had developed this analysis further.<sup>15</sup>

Professor Janet C. Hoeffel, the Catherine D. Pierson Professor of Law at Tulane Law School, pulls out two opinions from the Warren Court, *Pierson v. Ray*<sup>16</sup> and *Terry v. Ohio*,<sup>17</sup> and explains how these decisions served as the "birth of the 'reasonably unreasonable' police officer."<sup>18</sup> She tells the story of "qualified immunity" as it developed under *Pierson*, a decision that often goes unnoticed, and follows it with analysis under *Terry*, a well-known and often-cited Warren Court decision. Putting these two decisions together, she demonstrates how immunity came to be given to an unreasonable officer.

Professor Amber Baylor, Associate Professor and Criminal Defense Clinic Director at Texas A&M School of Law, dissects the Supreme Court decision of *Boynton v. Virginia*,<sup>19</sup> focusing "on the impact of police enforcement of discriminatory trespass claims in commercial

---

11. 348 U.S. 11 (1954).

12. *Id.* at 13.

13. Bruce A. Green, *Federal Courts' Supervisory Authority in Federal Criminal Cases: The Warren Court Revolution That Might Have Been*, 49 STETSON L. REV. 241, 242 (2020).

14. 355 U.S. 225 (1957).

15. Cynthia Alkon, *The Lost Promise of Lambert v. California*, 49 STETSON L. REV. 267, 268 (2020).

16. 386 U.S. 547 (1967).

17. 392 U.S. 1 (1968).

18. Janet C. Hoeffel, *The Warren Court and the Birth of the Reasonably Unreasonable Police Officer*, 49 STETSON L. REV. 289–290 (2020).

19. 364 U.S. 454 (1960).

establishments.”<sup>20</sup> In telling the story of the *Boynton* case, she reflects on Boynton’s personal history as a law student and the role this played in the decision. She sees the *Boynton* decision “as a clear link between the blatant segregation policies of commercial establishments of the past and state regulation of trespass among people of color and other targeted minorities today.”<sup>21</sup> In her reflections on this case, she includes that court protections might not be sufficient.<sup>22</sup>

This Symposium also includes a Comment by Joshua Schow,<sup>23</sup> who considers *Katz v. United States*,<sup>24</sup> a landmark case of the Warren Court. Those referencing the *Katz* decision, a case at the heart of Fourth Amendment jurisprudence, have faced questions of how to interpret the law when examining new technologies. The technology often does not fit neatly in the Justices’ 1967 Supreme Court opinion. Mr. Schow looks at the criticisms and defenses of *Katz*, as well as recent proposals for how best to capture Fourth Amendment jurisprudence with recent advances. He offers “an alternative digital trespass doctrine” as an approach for current *Katz* issues.

### III. PART TWO

The second part of the Symposium can be found in Volume 49, Issue 3 of this law review. The volume commences with Professor Sanjay K. Chhablani, the Laura J. & L. Douglas Meredith Professor of Teaching Excellence and Professor of Law at Syracuse University College of Law, who looks at the case of *Chapman v. California*.<sup>25</sup> The Court held that constitutional errors do not merit automatic reversal and instead are subject to harmless error analysis.<sup>26</sup> At first blush, this opinion, which denies a remedy to the accused, may appear not to be aligned with the progressive criminal procedure posture of the Warren Court. But Professor Chhablani explains how this opinion actually promotes a more robust interpretation of constitutional rights. He notes that later Courts failed to adhere to the *Chapman* constitutional analysis and confused this legal framework by blurring the distinction between rights and

---

20. Amber Baylor, *Boynton v. Virginia and the Anxieties of the Modern African-American Customer*, 49 STETSON L. REV. 101, 315 (2020).

21. *Id.* at 335.

22. *Id.* at 338.

23. Joshua Schow, *Defying Expectations: A Case for Abandoning Katz by Adopting a Digital Trespass Doctrine*, 49 STETSON L. REV. 339, 339 (2020).

24. 389 U.S. 347 (1967).

25. 386 U.S. 18 (1967).

26. Sanjay K. Chhablani, *Chapman v. California: Harmless Error and the Warren Court’s Progressive Legacy*, 49 STETSON L. REV. (forthcoming Spring 2020).

remedies. One has to wonder, if the *Chapman* decision had been more forceful, it might have provided a better construct for later decisions in cases such as *Strickland v. Washington*,<sup>27</sup> which used a “prejudice” analysis for ascertaining whether the right to counsel had been breached.

Professor Neil L. Sobol, Professor of Law at Texas A&M University School of Law, considers the Court’s decision in *Griffin v. Illinois*.<sup>28</sup> He looks at the promise offered by this opinion to provide a criminal justice system not dependent on the wealth of the accused. But he also notes the failures in the current system and the need to reform the criminal justice system to provide equal justice.<sup>29</sup>

Professor Cara H. Drinan, Professor of Law at Catholic University, Columbus School of Law, focuses on one of the most important decisions in juvenile law, *In re Gault*.<sup>30</sup> Professor Drinan notes how this case transformed juvenile justice rights in the United States. But she also stresses that so much more is needed to fully “change the landscape of juvenile justice in a meaningful way.”<sup>31</sup> Although she offers a somewhat bleak outlook for implementation of full rights for juveniles under *Gault*, she does provide an alternative source for achieving this result—state legislatures.

Professor Jonathan Stubbs, Professor of Law at Richmond School of Law, focuses on the historic decision of *Gideon v. Wainwright*,<sup>32</sup> looking at the role of the Sixth Amendment and whether it can be applied to include a right to counsel in civil cases.<sup>33</sup> Recognizing that the current Court is not likely to endorse a civil right to counsel, he advocates for legislative change. Specifically, his piece endorses provisions of American Bar Association (ABA) Resolution 112A, unanimously adopted by the ABA House of Delegates in 2006, urging “federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake.” He notes as

---

27. 466 U.S. 668 (1984).

28. 351 U.S. 12 (1956).

29. Neil L. Sobol, *Griffin v. Illinois: Justice Independent of Wealth?*, 49 STETSON L. REV. (forthcoming Spring 2020).

30. 387 U.S. 1 (1967).

31. Cara H. Drinan, *Conversations on the Warren Court’s Impact on Criminal Justice: In re Gault at 50*, 49 STETSON L. REV. (forthcoming Spring 2020).

32. 372 U.S. 335 (1963).

33. Jonathan Stubbs, *The Ripple Effects of Gideon: Recognizing the Human Right to Legal Counsel in Civil Adversarial Proceedings*, 49 STETSON L. REV. (forthcoming Spring 2020).

examples here “those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.”<sup>34</sup>

Professor Donald F. Tibbs, Visiting Professor of Law at St. Thomas University School of Law, discusses the *Mapp v. Ohio*<sup>35</sup> opinion, a case which tells the remarkable story of Dollree Mapp and her encounter with the Cleveland, Ohio police during a search of her home. The *Mapp* case is a decision that serves as a centerpiece of the Warren Court with enormous significance in Fourth Amendment jurisprudence. Professor Tibbs notes how “[w]hile *Mapp v. Ohio* is regarded as the start of the Warren Court’s criminal procedure revolution; the true delight of this case lies in the story of Dollree Mapp and her journey into Supreme Court spotlight as one of the most important cases of the 20th century.”<sup>36</sup>

#### IV. CONCLUSION

Justice Warren was the fourteenth chief justice of the Court, and it has been claimed that President Dwight D. Eisenhower, who appointed him to the Court, later regretted this decision.<sup>37</sup> After all, many believe that the Warren Court decisions did not fulfill a Republican conservative agenda. Yet, a closer examination of the opinions during this time frame demonstrates that although some rights may have taken a progressive road in providing selective incorporation of the Bill of Rights, other decisions would later be the basis for holding back a liberal agenda.<sup>38</sup>

A common thread throughout this Symposium was that although the Warren Court was moving an inch closer to providing greater justice for all, it was failing with its decisions to truly rectify systemic long-term problems. One has to ask whether the Warren Court’s opinions could have accomplished more to firmly entrench constitutional rights. Could the language in the decisions have provided a broader application to curtail future questions that might diminish constitutional rights? Or is it better to take smaller steps with Supreme Court decisions to assure that society accepts and embraces the changes? Narrower Court

---

34. *Id.*

35. 367 U.S. 643 (1961).

36. Dr. Donald F. Tibbs, *The Start of a Revolution: Mapp v. Ohio and the Warren Court’s Fourth Amendment Case That Almost Wasn’t*, 49 STETSON L. REV. (forthcoming Spring 2020).

37. The Warren Court is noted for many liberal decisions. It has been claimed that President Eisenhower, a Republican, in later years regretted having appointed Justices Warren and Brennan. See Kim Eisler, *Opinion—Eisenhower’s ‘Mistakes,’* N.Y. TIMES, July 28, 1997, <https://www.nytimes.com/1997/07/28/opinion/1-eisenhower-s-mistakes-336475.html>.

38. See Eric J. Miller, *The Warren Court’s Regulatory Revolution in Criminal Procedure*, 43 CONN. L. REV. 1, 81 (2010) (“[T]he Warren Court should be understood as a rights-contracting court—or at the least, strongly limiting pre-existing categorical libertarian-liberal privacy doctrines.”).

decisions might provide a slower trajectory of the law and a wider base of precedent to account for changing times. All that said, one cannot diminish the magnitude of change brought about by the Warren Court. We now need to await the 100th Anniversary of the Warren Court to evaluate whether these landmark constitutional principles will survive and whether the Court and the legislature will work together to fortify these important constitutional rights.