KEYNOTE ADDRESS
THE WARREN COURT AND CRIMINAL JUSTICE: SOME LASTING LEGACIES AND UNFINISHED BUSINESS

Carol S. Steiker*

In thinking globally about the Warren Court's impact on criminal justice after fifty years, it is easy to miss the big picture. I'll illustrate this by asking you to mentally fill in the blank at the end of this sentence: "The single most important legacy of the Warren Court in the area of criminal justice is -------." I think I am safe in guessing that not everyone in this room came up with the same mental answer. But after my own extensive ruminating about various cases and lines of doctrine for the purpose of delivering these remarks, it became apparent to me that there is really only one obviously true response—and that is the simple fact of incorporation.

I will explain why I reached this conclusion in a moment, but first I want to reflect briefly on why it took me a while to see what now seems obvious to me. One reason is the sheer magnitude of the Warren Court's doctrinal legacy. There are so many lines of doctrine that were born during that era that theorizing and tracing even one of them (the Fourth Amendment exclusionary rule, anybody?) is a mammoth undertaking, more appropriately divided into many smaller rubrics such as deterrence, judicial integrity, standing, good faith, habeas corpus review, etc. A second main reason that incorporation's significance is obscured is the product of a pedagogical accident. When the Warren Court vastly expanded the scope of constitutional law by incorporating almost all of the Bill of Rights,[1] there was simply not enough room in traditional constitutional law courses to cover the rapidly expanding doctrinal terrain. As a result, the criminal procedure revolution ultimately spun off not one, but two separate criminal procedure courses in most law

 Henry J. Friendly Professor of Law and Faculty Co-Director of the Criminal Justice Policy Program at Harvard Law School. J.D., Harvard Law School, 1986; A.B., Harvard-Radcliffe Colleges, 1982. I thank Kai Su and the rest of the staff of the *Stetson Law Review* for organizing this symposium, and I am grateful to the symposium participants for their own thought-provoking presentations and comments on this address.

1. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 545 (1986).

schools—one on investigations and one on adjudication (or, as they are known in the biz, "Cops and Robbers" and "Bail to Jail"), both of which are primarily constitutional law courses. As a result, the phenomenon of incorporation tends to be covered more fully in constitutional law courses (and casebooks and treatises) and more cursorily—if at all—in criminal procedure courses (and casebooks and treatises). Scholarly and pedagogical engagement with constitutional criminal procedure often treats incorporation as simply a background fact and jumps immediately into the details of the Fourth, Fifth, and Sixth Amendments and beyond.

Despite incorporation's invisibility in plain sight, it is by far the most profound legacy of the Warren Court. For much of American history, the criminal procedure provisions of the Bill of Rights applied only to the federal government as a matter of uncontroversial, settled law and practice.[2] Limited challenges to state criminal processes became available under the Due Process Clause of the Fourteenth Amendment after the Civil War, and such challenges accelerated and expanded in scope in the decades preceding the Warren Court.[3] But not until the Warren Court's criminal procedure revolution did full-fledged incorporation emerge, making virtually all of the many criminal procedure provisions of the Bill of Rights applicable to the states in the same way that applied to the federal government.[4] This development was not a given—not a preordained or necessary culmination of federal constitutionalism. The Court could have retained its more limited Due Process approach to regulating state criminal justice, or it could have taken a much more "selective" approach to selective incorporation, incorporating only a few of the many constitutional clauses that address criminal processes.

Why is full-bodied incorporation so important?

First, incorporation created and continues to maintain a robust *national* conversation about the central criminal justice issues of the day. In the absence of incorporation, these conversations would take place primarily on the state or even the local level, and there would be far

2. *Id.* at 537.

3. For a comprehensive elaboration of the "free standing" Due Process challenges that preceded incorporation, see Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303 (2001).

4. Of course, there are a few exceptions. The Fifth Amendment grand jury clause has never been incorporated. *See* Hurtado v. California, 110 U.S. 516, 535–37 (1884). And the Sixth Amendment right to trial by jury, though incorporated to apply to the states, was held to require unanimous jury verdicts only in federal courts, not in state courts. *See* Apodaca v. Oregon, 406 U.S. 404, 411–13 (1972). This holding is up for reconsideration in the 2019 Term of Court. *See* Louisiana v. Ramos, 231 So. 3d 44, 44 (La. Ct. App. 2017), *cert. granted sub nom.* Ramos v. Louisiana, No. 18-5924 (Mar. 18, 2019).

more divergence across localities, states, and regions in the absence of a federally imposed "floor" of rights. True, there remains divergence in the extent to which state supreme courts interpret state constitutions to protect rights that go *beyond* the federal constitutional minimum.[5] But the existence of a federal floor not only maintains a greater nationwide consistency in rights enforcement than would otherwise exist; it also requires that institutional actors across the country pay attention to and participate in a national legal discourse that ensures exposure to practices around the country. This exposure can have the effect of "de-naturalizing" whatever the prevailing practice in a particular state or locality happens to be. Moreover, it can demonstrate that alternative practices are feasible by highlighting their use in other jurisdictions without ill effects. On a broader level, it can also unsettle the conceptual justification for entrenched practices. And the criminal justice practices implicated by the Bill of Rights are wide-ranging: they include policing issues (such as search and seizure, confessions, and identifications), adjudicative issues (such as right to counsel, jury trials, and plea-bargaining), and even issues regarding the scope of the substantive criminal law (such as gun control and the death penalty under the Second and Eighth Amendments). Incorporation thus ensures that an extremely broad swath of state practices are subject to national regulation that produces substantial cross-state comparative and conceptual engagement.

Second, incorporation entails that the national legal conversation around criminal justice practices is a *constitutional* one. This framing promotes recognition that the relationship between citizens and law enforcement agents or courts was recognized by the Founders as part of the structure of democratic governance. The regulation of policing and criminal adjudication—topics that are often treated as more prosaic criminal justice policy issues in other countries—is raised to a level of greater profundity and urgency through constitutional adjudication, which sees them as defining the proper relationship of the state to its people. It is not uncommon for Supreme Court opinions to speak in ringing tones about the importance of the freedoms that the criminal procedure amendments protect. For example, in extending the Fourth

5. For discussion regarding chronicling and cheering the development of state constitutional criminal procedure protecting rights beyond the federal constitutional floor, see generally Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Brennan, Jr., *supra* note 1.

Amendment's exclusionary rule to the states in *Mapp v. Ohio*,[6] the Warren Court pronounced portentously, "[t]he efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."[7] This elevated tone continues even in the opinions of courts less inclined to view criminal procedure rights expansively. Just last term, in an opinion authored by Chief Justice Roberts, the Supreme Court recognized that the Fourth Amendment limits law enforcement access to cell phone location information on the ground that unlimited access to such information "implicates basic Fourth Amendment concerns about arbitrary government power" and "risks Government encroachment of the sort the Framers, after consulting the lessons of history, drafted the Fourth Amendment to prevent."[8]

Finally, incorporation matters because the constitutional conversation that it requires is one that includes a publicly funded voice for indigent defendants by virtue of the right to counsel in most serious criminal cases. Regulation of the police and the adjudicative process by other means, such as through legislation or court rule, does not require, and therefore often does not include, the participation of criminal defendants (or heavily policed communities, for whom criminal defendants stand in to some degree). Both the contours and the legitimacy of the criminal justice system are improved by eliciting the perspective of criminal defendants, among others, in the shaping of that system—a perspective that is too frequently neglected in the political sphere because of the political powerlessness of the vast majority of defendants.

I do not mean to suggest that incorporation is all hearts and roses, however. Full-bodied incorporation has some significant downsides—practical, conceptual, and equitable—that are often the flipsides of its benefits.

Let's start with practical downsides. Having a national conversation about criminal justice policy through constitutional adjudication is a good thing for the reasons stated above. But setting baseline criminal justice rules for 50 states and the federal government through episodic adjudication (of a handful or so cases each year) is, as I've suggested

6. 367 U.S. 643 (1961).

7. *Id.* at 648 (quoting Weeks v. United States, 232 U.S. 383, 393 (1914)).

8. Carpenter v. United States, 138 S. Ct. 2206, 2222–23 (2018) (internal quotation marks and citation omitted).

elsewhere, "no way to run a railroad."[9] The Supreme Court can't hold hearings or consider all aspects of the justice system (or systems) when it makes a ruling. It can't develop a comprehensive framework, work top down from first principles, or update prior decisions as needed. Rather, the Court is bound by the facts developed and presented in individual cases and is limited in its response to either affirming or reversing a prior judgment, with no power of the purse to fund new institutional structures—as the more than half-century of inadequate indigent defense services post-*Gideon* depressingly demonstrates.[10] The limitations of adjudication entail that when a more comprehensive approach is needed, the Court must rely on legislative action, as exemplified by Congress' enactment of Title III in 1968 to regulate wiretapping in the wake of the Warren Court's landmark decision the previous year holding that the bugging of a public telephone booth required a warrant.[11] But Congress and state legislatures are not always speedy in promulgating the necessary top-down comprehensive frameworks, in part because judicial supremacy may lead legislatures to hang back in anticipation of constitutional rulings and, more generally, may discourage legislatures from seeing themselves as equal partners on the front line of criminal justice policy-making.

At a conceptual level, the fact that the Court's criminal justice rulings are constitutional gives them heightened moral and political relevance as described above—again, a good thing. But constitutional criminal procedure necessarily ties criminal justice policy to debates about how to interpret a constitution. The Supreme Court (and lower courts) are not free to make the best rule, all things considered. Constitutional adjudication is a form of regulation, to be sure; but it arises from a constrained practice of interpretation of a founding document. This practice must start (and for originalists, pretty much end) with an attempt to understand the meaning of text written more

9. Carol S. Steiker, *Introduction*, *in* CRIMINAL PROCEDURE STORIES vii, vii (Carol S. Steiker ed., 2006) [hereinafter Steiker, *Introduction*].

10. *See* Carol S. Steiker, Gideon*'s Problematic Promises*, 143 DAEDALUS 51, 53–54 (2014). The Supreme Court's lack of power of the purse and the resulting inadequacy of institutional structures also played out in the juvenile justice system after the Court's landmark decision in *In re Gault*, 387 U.S. 1 (1967), as Cara Drinan's contribution to this symposium explains. *See* Cara H. Drinan, *Conversations on the Warren Court's Impact on Criminal Justice:* In re Gault, 49 STETSON L. REV. (forthcoming Spring 2020).

11. *See* Katz v. United States, 389 U.S. 347, 359 (1967) (holding that bugging a public telephone booth required a judicial warrant, but not otherwise promulgating a framework to regulate the practice of wiretapping); David A. Sklansky, Katz v. United States*: The Limits of Aphorism*, *in* CRIMINAL PROCEDURE STORIES, *supra* note 9, at 245, 249–53 (explaining how *Katz* influenced the drafting of Title III).

than 200 years ago. When originalism predominates in constitutional decision making, as it has for several decades on the Supreme Court, debates about constitutional criminal procedure often become debates about 18th-century law and practice rather than about current needs. Or they become meta-debates about the proper mode of constitutional interpretation, with policy considerations disregarded altogether.

In addition, the Constitution privileges some kinds of regulation over others. The Bill of Rights has an undeniable procedural tilt, leading courts away from the regulation of criminal justice outcomes. William Stuntz highlighted this tilt by comparing the procedure-obsessed American Bill of Rights to the French Declaration of the Rights of Man, which precluded criminal penalties beyond those that are "strictly and obviously necessary."[12] Although the U.S. Supreme Court has placed some limits on the substance of criminal laws under the Eighth Amendment's Cruel and Unusual Punishments Clause and the Second Amendment's protection of gun rights, it has done much less robust substantive than procedural regulation—in large part because of the way the Constitution was written.

Finally, constitutional adjudication has some equitable downsides, most notably the uneven playing field of the adversary process. A benefit of constitutional adjudication, as noted above, is that indigent criminal defendants get a publicly funded voice in the process through representation. But a downside of adjudication is that the defendant's voice is generally weaker than that of the government because the quality of indigent defense representation is often so poor and because (not unrelatedly) defendants often bargain away their voice through plea deals. Andrew Crespo has persuasively demonstrated that defendants are at a systemic disadvantage in the crucial venue of the U.S. Supreme Court, both because the "expertness" of the Supreme Court Bar is so much deeper on the prosecution side than the criminal defense side and because prosecutors are able to shape the issues that are preserved for appellate review by controlling the plea-bargaining process.[13] The success of the adversary process as a mode of decision making relies on rough parity between the adversaries. The structural disadvantage of criminal defendants in that process, even with appointed counsel, undermines the promise of the Warren Court's legacy of incorporation.

12. WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 74–79 (2011) (internal quotations omitted).

13. *See* Andrew Manuel Crespo, *Regaining Perspective: Constitutional Criminal Adjudication in the U.S. Supreme Court*, 100 MINN. L. REV. 1985, 1988 (2016).

One answer to these various downsides of incorporation is a version of Winston Churchill's oft-quoted line about democracy—that it's the worst possible system until you consider all the others. Donald Dripps has made a strong version of this claim, arguing that the American political sphere is even more tilted against the interests of criminal defendants than the courts and that legislatures have "consistently . . . failed to address defects in the criminal process, even when they rise to crisis-level proportions."[14] Dripps concludes that constitutional adjudication is really the only game in town, contending that "criminal procedure rules that limit public power will come from the courts or they will come from nowhere."[15] Dripps may be overstating the case: in the absence of federal incorporation, perhaps state constitutional adjudication would have filled some of the void, or perhaps we would have seen greater reliance on court rules and expert commissions to protect rights that are routinely neglected in the political sphere.[16]

But counterfactual history is hard to write. Whether incorporation overall has been a boon or a burden can fairly be debated. But there can be no debate that incorporation has triumphed, as reflected in the Court's recent decision in *Timbs v. Indiana*,[17] incorporating the Excessive Fines Clause of the Eighth Amendment to regulate asset forfeiture, and in its grant of certiorari in *Ramos v. Louisiana*[18] to reconsider whether the Sixth Amendment right to a unanimous jury verdict is incorporated. In *Timbs*, when the Solicitor General of Indiana got up to argue in favor of non-incorporation of the Excessive Fines Clause, he got cut off at the knees by none other than Justice Neil Gorsuch, who said, "Here we are in 2018 still litigating incorporation of the Bill of Rights. Really? Come on, General."[19] As for *Ramos*, the upcoming unanimous jury case, the betting money is on full incorporation there as well. For better or worse, there is no turning back from the path of full-bodied incorporation.

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14. Donald A. Dripps, *Constitutional Theory for Criminal Procedure:* Dickerson*,* Miranda*, and the Continuing Quest for Broad-but-Shallow*, 43 WM. & MARY L. REV. 1, 45 (2001).

15. *Id.* at 46.

16. Or perhaps the federal courts would have used their inherent supervisory authority in a more robust way, a possibility that Bruce Green explores in his contribution to this symposium. *See* Bruce A. Green, *Federal Courts' Supervisory Authority in Federal Criminal Cases: The Warren Court Revolution That Might Have Been*, 49 STETSON L. REV. (forthcoming Spring 2020).

17. 139 S. Ct. 682, 689–91 (2019).

18. Louisiana v. Ramos, 231 So. 3d 44, 44 (La. Ct. App. 2017), *cert. granted sub nom.* Ramos v. Louisiana, No. 18-5924 (Mar. 18, 2019).

19. Oral Argument at 27:53, *Timbs v. Indiana*, (No. 17-1091), November 28, 2018, *available at* https://www.oyez.org/cases/2018/17-1091.

Adjusting the frame from the big picture of incorporation, I want to consider some lasting legacies of the Warren Court on a smaller scale. There are many possibilities in this smaller-gauge category, but I nominate three. These legacies are not individual case holdings or even lines of doctrine; rather, they are "moves" or types of reasoning that the Warren Court initiated that offer important counterweights to some troubling tendencies in the Court's criminal procedure jurisprudence.

First, in regulating police practices under the Constitution, the Warren Court made a concerted effort to understand those practices on the ground—to find out what exactly was actually going on in the stationhouse and on the beat. This attempt to illuminate the often-opaque world of modern policing provides a counterweight to originalism as a mode of constitutional analysis, which shifts the weight of attention to the common law and law enforcement practices of the founding era in a way that often displaces a nuanced understanding of current realities. One of the best and certainly the most famous example of this granular attention to contemporary practices is in the Warren Court's *Miranda* decision.[20] A substantial part of the Court's opinion in that case was devoted to police training manuals and texts, which the Court quoted at length to document the carefully planned psychological manipulation and trickery taught to the police interrogators of the time.[21] This focus made the implicit and persuasive claim that "in order to answer the question whether custodial police interrogations constituted a form of unconstitutional 'compulsion,' the Court needed to understand not only the Constitution, but also the nature of police interrogation as it was then widely practiced."[22]

This move has had some life beyond the Warren Court, most notably in the Burger Court's decision in *Tennessee v. Garner*,[23] which interpreted the Fourth Amendment to limit the circumstances in which the police may permissibly use deadly force to stop a fleeing felon. As in the Warren Court's *Miranda* decision, the Burger Court did not rely on eighteenth-century common law or law enforcement practices at the time of the founding. Rather, the Court invoked research by criminologists and by the police themselves on how the best current understanding of sound police tactics could obviate the need for the use of deadly force in such circumstances. Brandon Garrett and Seth Stoughton have argued that *Garner* offers a template for a "tactical"

20. Miranda v. Arizona, 384 U.S. 436 (1966).
21. *Id.* at 448.
22. Carol S. Steiker, *Two Cheers for* Miranda, 97 B.U. L. REV. 1197, 1204 (2017).
23. 471 U.S. 1 (1985).

Fourth Amendment—a constitutional line of doctrine regulating police use of force grounded in the growing body of police tactics research.[24] I would generalize even more broadly: emulating the Warren Court's attention to the nitty-gritty of current policing realities should inform constitutional regulation of criminal investigations writ large, beyond the narrower context of police use of force—even, perhaps especially, at a time when originalism exerts a strong gravitational pull as a mode of constitutional interpretation.

A second legacy of the Warren Court is its movement away from the formalism that had previously dominated interpretation of the Fourth Amendment's proscription of "unreasonable" searches and seizures. Prior to the 1960s, analysis of the constitutionality of governmental searches and seizures had been rooted in property rights as protected by the common law of trespass. With its path-breaking decision in *Katz v. United States*,[25] however, the Court adopted an alternative touchstone, undertaking an openly normative approach to Fourth Amendment reasonableness by asking whether the target of a governmental search or seizure had a "reasonable expectation of privacy" rather than a legally recognized property right.[26] In concluding that Charlie Katz had a reasonable expectation of privacy when using a public telephone booth, the Court emphasized "the vital role that the public telephone has come to play in private communication."[27]

This Fourth Amendment pragmatism waned in the decades following the Warren Court as a result of the Court's increasing embrace of an originalist approach to constitutional interpretation. However, the demands of applying the Fourth Amendment to rapidly developing technological innovations in law enforcement has prompted a resurgence of the normative considerations promoted by the *Katz* approach, even among some of the more conservative Justices on the Court. For example, in *United States v. Jones*,[28] the Court placed constitutional limits on the government's use of a GPS monitor attached to the undercarriage of a car to track a suspect for twenty-eight days.[29] Justice Antonin Scalia wrote a property-based opinion for the Court, relying on the fact that law enforcement agents had committed what would have been a trespass at the time of the founding by physically

24. Brandon L. Garrett & Seth W. Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 212 (2017).
25. 389 U.S. 347, 353 (1967).
26. *Id.* at 361 (Harlan, J., concurring).
27. *Id.* at 352 (majority opinion).
28. 565 U.S. 400 (2012).
29. *Id.* at 404.

tampering with the physical integrity of Jones' car.[30] However, five Justices (a majority of the Court) concurred on other grounds.[31] Justice Samuel Alito authored one of the concurrences, which criticized the majority for basing its decision "on 18th-century tort law."[32] In Justice Alito's view, attempting to analogize to the lost world of the founding era was a hopeless task:

> [I]t is almost impossible to think of late 18th-century situations that are analogous to what took place in this case. (Is it possible to imagine a case in which a constable secreted himself somewhere in a coach and remained there for a period of time in order to monitor the movements of the coach's owner?)[33]

More recently, the Court placed similar limits on the government's search of an arrestee's cell phone and on the government's use of cell phone records to track the phone user's location.[34] Chief Justice John Roberts wrote the opinion for the Court in both cases, in each case emphasizing the unprecedented threats to privacy posed by the "seismic shifts" of the digital age and the fact that cell phones are "'such a pervasive and insistent part of daily life' that carrying one is indispensable to participation in modern society."[35] The latter quote is an eerie echo of *Katz*'s invocation more than a half-century ago of the "vital role" played by (now defunct) public telephones.

A third and final legacy of the Warren Court is its resurrection of the wisdom of Justice Louis Brandeis in his famous dissent in *Olmstead v. United States*,[36] the early wiretapping case that was overruled forty years later in *Katz*. In warning about the dangers of government law-breaking in the service of law enforcement goals (wiretapping was officially prohibited but nonetheless extensively used by frustrated Prohibition agents to make their case against big-time bootlegger Olmstead), Brandeis famously wrote:

> Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law;

30. *Id.* at 404–05.
31. *Id.* at 413–31.
32. *Id.* at 418 (Alito, J., concurring).
33. *Id.* at 420 (footnote omitted).
34. *See* Riley v. California, 573 U.S. 373, 378–86 (2014); Carpenter v. United States, 138 S. Ct. 2206, 2221 (2018).
35. *Carpenter*, 138 S. Ct. at 2219, 2220 (quoting *Riley*, 573 U.S. at 385).
36. 277 U.S. 438, 471 (1928).

> it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this [C]ourt should resolutely set its face.[37]

Although Brandeis' *Olmstead* dissent has been justly admired, this stirring passage remained buried in the Supreme Court's legal canon until the Warren Court excavated it, quoting it in its cases extending the Fourth Amendment exclusionary rule to state law enforcement agents—first in *Elkins v. United States*,[38] which rejected the "silver platter doctrine" by which federal law enforcement agents were permitted to use evidence illegally seized by state law enforcement agents and presented to them on a proverbial silver platter, and then in *Mapp v. Ohio* itself,[39] which fully incorporated the exclusionary rule. In both of these cases, the Court underscored the importance of governmental clean hands to protect the legitimacy of the criminal justice system—an important counterweight to the tendency to treat the accuracy of verdicts as the sole or overwhelmingly important value at stake in constitutional criminal procedure.[40]

True, the Court ultimately abandoned judicial integrity as a grounding rationale for the Fourth Amendment exclusionary rule, relying instead solely on the rule's capacity to deter police misconduct.[41] But the Warren Court's resurrection of Brandeis' warning about the corrosive effects of tolerating governmental law-breaking was not in vain. This quote found continued life in opinions from later eras. During the Burger Court era, the "government as teacher" was aptly invoked in a case about Fourth Amendment rights in public schools, when Justice John Paul Stevens noted "the overall educative effect" of the exclusionary rule, quoting Brandeis.[42] During the Rehnquist Court era, the Court rejected the State of Georgia's claim that mandatory drug testing for state office holders was consistent with the Fourth Amendment because

37. *Id.* at 485 (Brandeis, J., dissenting).
38. 364 U.S. 206, 223 (1960).
39. 367 U.S. 643, 659 (1961).
40. *Id.*; *Elkins*, 364 U.S. at 223.
41. For a more extended discussion of the mostly negative legal treatment of Brandeis' government integrity argument, see Carol S. Steiker, *Brandeis in* Olmstead*: "Our Government Is the Potent, the Omnipresent Teacher*," 79 MISS. L. REV. 149, 169–72 (2009) [hereinafter Steiker, *Brandeis in* Olmstead].
42. New Jersey v. T.L.O., 469 U.S. 325, 373 (1985) (Stevens, J., concurring in part and dissenting in part) (citation omitted).

such officials needed to "set a good example."[43] Turning Georgia's argument against it, the Court called up Brandeis' argument that the government must "teach[] by example" by respecting Fourth Amendment rights.[44] And in the Roberts Court era, Brandeis' quote became a touchstone for a rousing call by four dissenting Justices for a "more majestic conception" of the Fourth Amendment and the exclusionary rule than the parsimonious and utilitarian approach taken by the majority.[45] By reviving Brandeis' lesson about the government as teacher, the Warren Court left a legacy that continues to be "astonishingly relevant" in generation after generation when the temptation to let the end justify the means inevitably arises.[46]

In addition to these notable legacies, however, the Warren Court also left some substantial unfinished business. The most important area in which the Warren Court failed—not only by my lights, but by its own—is the pursuit of racial justice in the enforcement of the criminal law. There is a scholarly consensus that the Supreme Court's constitutional intervention into state criminal justice administration was motivated, in large part, by a long history of stunning racial injustices in policing and prosecutions, especially in the American South.[47] The Court's ability to offer constitutional redress for this dismal history, however, was hampered by its unwillingness to confront the issue head-on. Despite the evident racial context of so many of its key criminal procedure decisions,[48] the Warren Court maintained a striking silence about that undeniable fact and its import.

Consider two examples of the Court's relentless relegation of race to subtext rather than text. First, one of the biggest incorporation cases of the Warren Court, *Duncan v. Louisiana*,[49] was positively soaked in the ugly racial strife of the 1960s. Nancy King tells the outrageous tale at greater length,[50] but the incorporation of the right to trial by jury was born in "one of the most undemocratic and hierarchical communities" in the United States at the time—Plaquemines Parish, Louisiana, which was run by the iron-fisted political boss and ardent segregationist

43. Chandler v. Miller, 520 U.S. 305, 322 (1997).
44. *Id.*
45. Herring v. United States, 555 U.S. 135, 151–52 (2009).
46. Steiker, *Brandeis in* Olmstead, *supra* note 41, at 164.
47. Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2002 (1998); Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 48–49 (2000).
48. Steiker, *Introduction*, supra note 9, at viii.
49. 391 U.S. 145 (1968).
50. Nancy J. King, Duncan v. Louisiana*: How Bigotry in the Bayou Led to the Federal Regulation of State Juries*, *in* CRIMINAL PROCEDURE STORIES, *supra* note 9, at 261–64.

Leander H. Perez, Sr.[51] When court-ordered desegregation came to Louisiana, it provoked resistance and violence in Perez's parish.[52] When two twelve-year-old black students who began to attend a formerly all-white school were confronted by four white boys on the street as they were walking home, Gary Duncan, a nineteen-year-old cousin of the two black boys who happened to be driving by, stopped to help. As his two cousins got into his car at Duncan's urging, words were exchanged between Duncan and the white boys, and Duncan touched or slapped (the degree of force was disputed) one of the white boys on the arm before driving away.[53] Duncan was charged with simple battery, which Louisiana law deemed a misdemeanor, but which was punishable by a maximum of two years' imprisonment and a $300 fine.[54] Duncan sought a jury trial, but Louisiana provided juries only in cases in which capital punishment or imprisonment at hard labor could be imposed.[55] Ultimately, he was convicted by a judge and sentenced to 60 days in prison and a $150 fine.[56]

At his trial and on appeal, Duncan was represented by Richard Sobol, a lawyer from the Lawyers Constitutional Defense Committee, which litigated civil rights issues in Mississippi, Alabama, and Louisiana. Like many civil rights workers of the era, Sobol ended up being arrested and prosecuted *himself* at Perez's behest—a prosecution that was ultimately enjoined by a federal appeals court, which concluded that it was an unlawful prosecution "undertaken . . . for the purpose of deterring [Sobol] and other lawyers similarly situated from helping to provide legal representation in civil rights cases, and to deter Negroes like Duncan from seeking their representation."[57]

But when the Supreme Court ultimately concluded that Duncan's constitutional rights had been violated, the majority, concurring, and dissenting opinions barely mentioned the racial context in which Duncan's claim arose.[58] Nor did any of the Justices ground the need for incorporating the right to trial by jury in the racial politics of the time,[59] when local prosecutors and judges might well have been under the thumb of (or simply in vigorous agreement with) bigoted leaders like

51. *Id.* at 261.
52. *Id.* at 262–63.
53. *Duncan*, 391 U.S. at 147.
54. *Id.* at 146.
55. *Id.*
56. *Id.*
57. Sobol v. Perez, 289 F. Supp. 392, 400 (E.D. La. 1968).
58. *Duncan*, 391 U.S. at 147.
59. *Id*.

Leander Perez, despite the fact that Duncan's brief explicitly made this argument:

> It is plain that in cases such as this—where the personal and political leanings of the trial judge will often be antagonistic to the defendant—the potential for a factual determination that is influenced by considerations other than the evidence of record is very great. This situation, particularly in civil rights related prosecutions in the Deep South, is not uncommon.[60]

Rather, the opinions read like an arid textbook debate about the abstract benefits of jury trials and the theoretical case for and against incorporation of that right.

The striking absence of race in the *Duncan* opinions stands in stark contrast to the most recent round of constitutional litigation—also from Louisiana—about the right to a jury trial. Last year, a state court judge in Sabine Parish, Louisiana, ruled that the State's law permitting non-unanimous jury verdicts in criminal cases violated the Equal Protection Clause of the federal constitution, in light of its purpose and effect of disregarding the voices and votes of black jurors.[61] On the heels of this decision, voters in Louisiana amended the State's constitution to provide for juror unanimity, after a campaign that trumpeted the racist history of the discarded non-unanimous jury provision.[62] Even more recently, the U.S. Supreme Court granted certiorari to reconsider its 1972 decision upholding the constitutionality of state laws permitting non-unanimous criminal jury verdicts—a decision, like *Duncan*, in which the racial context of the issue remained submerged.[63] Today's Court may not be as "liberal" as the Warren Court, but the combination of the current "woke" political climate and the fast-paced media environment make it much more difficult for the Court to control the narrative framing of its cases and to keep race in the subtext, as the Warren Court managed to do in *Duncan*.[64]

A second context in which the Warren Court suppressed the issue of race is that of capital punishment. I have explored in greater detail elsewhere what my brother Jordan Steiker and I call "the invisibility of

60. Brief for Appellant at 23, *Duncan v. Louisiana*, 391 U.S. 145 (1968) (No. 410).

61. State v. Maxie, No. 13-CR-72522, (La. 11th Judicial Dist., Sabine Parish, Oct. 11, 2018).

62. Julia O'Donoghue, *Louisiana Approves Unanimous Jury Requirement, Scrapping Jim Crow-Era Law*, NOLA.COM (Nov. 7, 2018), https://www.nola.com/crime/2018/11/louisiana-approves-unanimous-jury-requirement-scrapping-jim-crow-era-law.html.

63. Ramos v. Louisiana, 139 S. Ct. 1318, 1318 (2019); *see also* Apodaca v. Oregon, 406 U.S. 404, 406 (1972).

64. *Duncan*, 399 U.S. at 147.

race" in the Supreme Court's death penalty cases of the 1960s and 1970s.[65] The concerted campaign of constitutional litigation that ultimately produced a (temporary) nationwide abolition of capital punishment in 1972 in *Furman v. Georgia*[66] was born in 1963 when three Justices of the Court dissented from the denial of certiorari in a capital case from Alabama in which a black man had been sentenced to death for the rape of a white woman.[67] Justice Arthur Goldberg drafted the lengthy dissent hoping to persuade his colleagues to grant review in the case.[68] He was able to persuade only Justices William Douglas and William Brennan to join him, falling short of the four votes necessary for certiorari.[69] However, not only did Chief Justice Earl Warren decline to vote for certiorari, he went so far as to ask Goldberg to omit any reference to race in his published opinion—and Goldberg complied, despite the fact that his original draft had detailed the racially discriminatory use of the death penalty for interracial rape in the South as a reason that the case deserved the Court's attention.[70]

This pattern continued in the cases leading up to *Furman* and beyond—race remained submerged, and deliberately so. After Goldberg's 1963 dissent from denial of certiorari, the NAACP Legal Defense and Education Fund (the LDF) took on the nationwide litigation campaign against capital punishment as an issue of racial justice.[71] The LDF was the leading civil rights organization of the day; it had successfully litigated *Brown v. Board of Education* less than a decade previously.[72] The LDF's briefs and arguments in its capital litigation campaign, not surprisingly, made racial injustice in the use of the death penalty against black defendants, especially in the South, a major theme of its comprehensive arguments against the constitutionality of the practice.[73] But the Warren Court declined an invitation to directly rule on an Equal Protection challenge to capital punishment on the grounds of racial discrimination,[74] and its opinions on the challenges that it did

65. Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In)Visibility of Race*, 82 U. CHI. L. REV. 243, 253 (2015).

66. 408 U.S. 238 (1972).

67. Rudolph v. Alabama, 375 U.S. 889, 889 (1963) (Goldberg, J., dissenting from denial of certiorari).

68. *Id.*

69. *Id.*

70. Steiker & Steiker, *supra* note 65, at 255 (citing EVAN J. MANDERY, A WILD JUSTICE: THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA 28–29 (2013)).

71. *Id.*

72. 347 U.S. 483 (1954).

73. Steiker & Steiker, *supra* note 65, at 244.

74. Maxwell v. Bishop, 393 U.S. 997, 997 (1968) (granting certiorari limited to claims relating to standard-less sentencing discretion and lack of bifurcation between guilt and sentencing).

accept, including most of the nine opinions issued in *Furman* itself, made little to no reference to the sordid racial history of the American penalty, which included separate capital codes for blacks and whites prior to the Civil War, a long period of race-based extrajudicial executions in the form of lynching, and continued racial disparities in the application of facially non-discriminatory capital statutes that were especially striking in cases of interracial rape.[75]

The Court's silence was surely not meant to condone race discrimination. Rather, it seems clear that Chief Justice Warren sought to keep race out of the Court's attempt to regulate capital punishment (and criminal justice more generally) in order to protect rather than imperil the Court's ongoing project of racial justice. He—like the LDF prior to the 1960s, which sought to represent only innocent capital defendants in the South—thought that schoolchildren made better ambassadors for racial justice than convicted murderers and rapists.[76] Moreover, the criminal and capital justice reformers of the Warren Court may well have thought that race-neutral arguments for incorporation of criminal procedure rights and regulation of the death penalty might be perceived as more legitimate in the court of public opinion and dampen some of the outraged backlash that the Court's desegregation cases had already inspired.[77]

Despite these good intentions, the Court's silence about race—in the capital punishment context and more broadly—has had substantial costs.[78] Most obviously, such silence distorts the resulting doctrine. For example, by not acknowledging the deeply entrenched problem of racial discrimination in the administration of the death penalty, the Court was too insouciant by far about the amenability of the problem of "standard-less discretion" to legislative reform that focused solely on the sentencing process to the exclusion of prosecutorial charging decisions. But the Warren Court's silence about race in its work on criminal justice was not merely a doctrinal failure. It also was a failure of the Court in its role as a chronicler of history and social and political practices. Had the Court, for example, framed its constitutional intervention into capital punishment against the backdrop of antebellum slave codes, lynchings, mob-dominated trials, and disparate enforcement patterns, the Court would have done a much better job of explaining *why* the death penalty deserved the sustained attention of the American judiciary. This point is

75. Steiker & Steiker, *supra* note 65, at 245–53.
76. *Id.* at 277–78.
77. *Id.* at 277–88.
78. *Id.* at 288–93.

true more broadly about the Court's criminal procedure cases. If the Court's silence about its racial-justice motivation and the racial context of individual cases was calculated to preserve the Court's capital and prevent popular backlash or resistance, that strategy was spectacularly unsuccessful. It seems clear in retrospect that the Warren Court's general audience understood that it was taking sides in a culture war over racial status even as the Court omitted the history and context of discrimination that offered the greatest justification for its interventions.

I will close by noting the deep irony of the Warren Court's missed opportunity to grapple forthrightly with race: how poignant that a Court that was motivated to stage a "revolution" in constitutional criminal procedure in large part because of deeply rooted racial injustice in this sphere could not bring itself to speak the name of the very evil that it sought to eradicate.