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SARAH A. SEO

Democratic Policing Before the Due Process Revolution

ABSTRACT. According to prevailing interpretations of the Warren Court's Due Process Revolution, the Supreme Court constitutionalized criminal procedure to constrain the discretion of individual officers. These narratives, however, fail to account for the Court's decisions during that revolutionary period that enabled discretionary policing. Instead of beginning with the Warren Court, this Essay looks to the legal culture before the Due Process Revolution to provide a more coherent synthesis of the Court's criminal procedure decisions. It reconstructs that culture by analyzing the prominent criminal law scholar Jerome Hall's public lectures, *Police and Law in a Democratic Society*, which he delivered in 1952 on the differences between democratic and totalitarian police forces. Hall's definition of democratic policing appealed to self-rule, then to the rule of law, and finally, to due process, as he struggled to account for twentieth-century police forces that were not, in important ways, governed by the people or entirely constrained by law. Hall ultimately settled on the idea that in a democratic society due process meant that the police did not decide the outcome of a "fair trial" — a definition that is different from today's understanding of due process, which emphasizes judicial review of police action. The Essay applies the methodology of cultural history to argue that during the Cold War, Hall articulated a concept of due process that was not just a legal norm but also a cultural value that rationalized discretionary policing and served to distinguish two competing systems of government that both relied on discretionary authority. The Essay concludes by exploring how Hall's explication of due process, which was representative of midcentury views, might revise standard accounts of the Due Process Revolution. Understanding the legal culture that came before — and informed — the Warren Court's criminal procedure decisions suggests that due process functioned as much to justify as to restrain police discretion.

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Yet even the ordinary human mind is quite capable of recognizing both that an ideal has no objective truth and yet that it does have emotional value. For example, note the display of joy and sadness at football games indulged in by alumni who well know that nothing of importance is at stake; note the necessity of the presence of an admittedly non-existent Santa Claus at Christmas; note the English attitude toward their king. Most churches today have achieved that attitude toward their creeds. Realistic understanding of an ideal does not *necessarily* destroy it. In the end it may make the ideal even more vital by restricting it to the purposes for which it has value.

— Thurman W. Arnold¹

INTRODUCTION

In July 1952, Jerome Hall, a prominent legal scholar at Indiana University, gave three public lectures collectively titled *Police and Law in a Democratic Society* at the University of Chicago Law School.² To illustrate his understanding of democratic values in the police context, Hall rendered a conceptual flowchart. He began with the constitutional provision of due process, which imputed legality to statutes enacted under it. Those statutes, in turn, gave legitimacy to rules and standards set forth in judicial decisions. The rule of law then manifested in the police officer who acted pursuant to those rules and standards. The flowchart, however, did not conclude with the officer's mechanical enforcement of the laws. Ultimately, the officer, through such enforcement, turned into an abstraction: "the living embodiment of the law," "the concrete distillation of the entire mighty, historic corpus juris," "the living expression of democratic law."³ Hall's figurative language seems remarkable today, coming from a self-professed "rule of law person" and conservative critic of the discretionary powers of administrative bureaucrats.⁴ Within a single lecture and with the facility of metaphor, Hall cloaked the most discretion-wielding, law-enforcing arm of the twentieth-century state with the legitimacy of law.

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1. Thurman W. Arnold, *Law Enforcement—An Attempt at Social Dissection*, 42 YALE L.J. 1, 6 (1932).
 2. The lectures were published the following year. See Jerome Hall, *Police and Law in a Democratic Society*, 28 IND. L.J. 133 (1953).
 3. *Id.* at 144.
 4. Letter from Jerome Hall, Professor, Univ. of Cal. Hastings Coll. of Law, to Hans Zeisel, Professor Emeritus, Univ. of Chi. Law Sch. (July 9, 1981) (on file with the University of California Hastings Law Library Special Collections, Jerome Hall Papers, Box 2, Folder "Correspondence Z" [hereinafter Jerome Hall Papers]).

* * *

The dominant narrative of the Warren Court's Due Process Revolution is one of rupture, captured in the word *revolution* itself. In this account, the Court broke new ground by extending federal procedural rights to state criminal defendants in an effort to protect individuals, especially minorities and the poor, from the police. Most histories of twentieth-century criminal procedure have adopted this paradigm of social conflict.⁵ The flourishing of rights, we have learned, emerged from an enduring struggle between the forces of security and advocates of liberty, with the Supreme Court leading the charge to police the police under the banner of the Fourteenth Amendment's Due Process Clause. Today's understanding of due process accordingly centers on judicial oversight of policing. Dan Kahan and Tracey Meares, for example, have defined the "modern criminal procedure regime" as the body of constitutional doctrines that seeks to tame police discretion through "exacting judicial scrutiny of routine policing functions."⁶

Yet several inconsistencies complicate this story of active and progressive judicial review of police discretion. One is Yale Kamisar's observation that "[t]he Warren Court's performance in the field of criminal procedure does not fall into neat categories."⁷ In Kamisar's assessment, during the "closing years of the Warren Court Era," when the Revolution had already ended, the "defense did win some victories."⁸ The defense also "lost some important cases earlier, when the

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5. See, e.g., WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 216-18 (2011); SAMUEL WALKER, *POPULAR JUSTICE: A HISTORY OF AMERICAN CRIMINAL JUSTICE* 8, 180 (2d ed. 1998); Michael Willrich, *Criminal Justice in the United States*, in 3 *CAMBRIDGE HISTORY OF LAW IN AMERICA* 198, 217-18 (Michael Grossberg & Christopher Tomlins eds., 2008). Encapsulating this dualistic way of thinking, Stanford law professor Herbert Packer's famous article *Two Models of the Criminal Process*, first published in 1964, aptly consisted of the "Crime Control Model" and the "Due Process Model." Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 6 (1964). Most law professors accepted Packer's binary framework as a truth claim. For example, when assistant professor John Griffiths sought "to illustrate that our present assumptions" underlying the two models were "not the inevitable truths they often seem to be" by proposing a third "family model" (this was the 1960s), Yale Law School denied him tenure. John Griffiths, *Ideology in Criminal Procedure or a Third "Model" of the Criminal Process*, 79 YALE L.J. 359, 359-60 (1970); see LAURA KALMAN, *YALE LAW SCHOOL AND THE SIXTIES: REVOLT AND REVERBERATIONS* 245-55 (2005).
 6. Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1158-59 (1998).
 7. Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1, 4 (1995); see also Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1344-45 (1977) (citing Warren Court decisions that expanded police authority).
 8. Kamisar, *supra* note 7, at 4, 6.

revolution in criminal procedure was supposed to be at its peak.”⁹ Second, while many of the Warren Court’s landmark decisions provoked prompt backlash—consistent with the narrative of opposition—one of its most prominent cases, *Gideon v. Wainwright*,¹⁰ received immediate and widespread approval.¹¹ Third, the subsequent, more conservative Burger Court invalidated vagrancy laws in *Papachristou v. City of Jacksonville*¹² for granting too much discretion to the police and, in doing so, articulated a breathtakingly broad understanding of personal liberty. Rather than proving the rule, all of these exceptions suggest that a general theory built on a dichotomy between due process and crime control fails to provide a fully coherent view of the Supreme Court’s criminal procedure decisions.

* * *

One could dismiss Jerome Hall’s striking description of the police as the embodiment of democratic values and the rule of law as mere metaphor, political spin, or cognitive dissonance. But it is more difficult to ignore the fact that the Chicago lectures received attention from both the general public and legal scholars, including Herbert Wechsler.¹³ Although now somewhat obscure, Hall was a Distinguished Professor of Law at Indiana University from 1957 to 1970, and in recognition of his stature, the Maurer School of Law named its library and a postdoctoral fellowship in his honor. In 1966, a *New York Times* book review essay identified him as among the “American judges, lawyers and teachers of law . . . who made contributions to legal philosophy and jurisprudence.”¹⁴ He was a leader in several disciplines, serving as President of the American Society for Political and Legal Philosophy (1967–1969), President of the American Sec-

9. *Id.* at 4.

10. 372 U.S. 335 (1963).

11. See, e.g., ANTHONY LEWIS, *GIDEON’S TRUMPET* 206–07 (1964); *Shows to Watch*, *TIMES RECORD*, Oct. 3, 1964, at 31 (recommending a show on the “remarkable story of a Florida convict who changed the structure of the American legal system and opened the prison doors for more than a thousand men”).

12. 405 U.S. 156 (1972).

13. See Letter from Herbert Wechsler, Professor, Columbia Univ., to Jerome Hall, Professor, Univ. of Ind. Sch. of Law (Mar. 10, 1953) (on file with Jerome Hall Papers, Box 2, Folder “Correspondence W”) (“Could we get eight or ten reprints [of Hall’s Chicago lectures] for our library?”); *Report on the First Chicago Lecture*, *HYDE PARK HERALD*, July 23, 1952 (on file with Jerome Hall Papers, scrapbook); cf. DAVID ALAN SKLANSKY, *DEMOCRACY AND THE POLICE* 44 (2008) (discussing “Jerome Hall’s influential article of 1953”).

14. Milton R. Konvitz, *Democracy and the Law*, *N.Y. TIMES*, Nov. 13, 1966, at 18 (including Hall in a list with Oliver Wendell Holmes, Louis Brandeis, Benjamin Cardozo, John Chipman Gray, Roscoe Pound, Jerome Frank, Thurman Arnold, Felix S. Cohen, Karl Llewellyn, Max Radin, and Lon L. Fuller).

tion of the International Association for Legal and Social Philosophy (1966-1968), and Director of the American Society for Legal History.¹⁵ Once he retired from Indiana, U.C. Hastings College of Law immediately hired him into the distinguished “65 Club.”¹⁶ This peculiar tradition took advantage of mandatory retirement rules then in place at many law schools by recruiting prominent scholars and jurists over the age of sixty-five, including the Chief Justice of California Roger Traynor, U.S. Supreme Court Justice Arthur Goldberg, and the torts scholar William Prosser.¹⁷ This assembly of star power prompted Roscoe Pound to declare that Hastings had “the strongest law faculty in the nation.”¹⁸ According to Hall’s *New York Times* obituary, he continued to teach until about six years before his death at age ninety-one.¹⁹

By the time he delivered his Chicago lectures in 1952, Hall had established an international reputation as a leading scholar of criminal law and legal philosophy. The major works for which he was known – including *General Principles of Criminal Law*, which the *Journal of Legal Education* described as “the most important treatise on criminal law produced by American legal scholarship”²⁰ – had already been published.²¹ (In 1960, his publisher would increase his royalties for a second edition of *General Principles* from fifteen to twenty percent because “Professor Hall is the mos[t] ou[t]standing Criminal Law writer of the twentieth Century.”²²) Hall had also written on democratic theory, having published *Living Law of Democratic Society* in 1949. Based on his scrapbook, Hall began receiving invitations to give talks on the topic in 1947, and his 1952 lectures appear to have been part of this speaking tour. Two years later, in 1954, the U.S. State Department asked him to assist with the “legal reconstruction” of South Korea

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15. *Faculty Focus: Professor Jerome Hall*, HASTINGS ALUMNI BULL., Sept. 1972, at 11 (on file with Jerome Hall Papers, Box 2, Folder “Biographical Data Announcements”).
 16. Eric Jaye, *Professor: 85 and Still on His Toes*, RECORDER, Mar. 3, 1986, at 1; Wolfgang Saxon, *Jerome Hall, 91, Legal Scholar Who Was Professor and Author*, N.Y. TIMES (Mar. 11, 1992), <https://www.nytimes.com/1992/03/11/us/jerome-hall-91-legal-scholar-who-was-professor-and-author.html> [<https://perma.cc/TDU6-WSU8>]; see also *The 65 Club: A Legacy of Distinguished Scholarship*, U.C. HASTINGS MAG. (Oct. 3, 2013), <https://web.archive.org/web/20160419112241/https://uchastings.edu/news/articles/2013/10/65-club-magazine.php> [<https://perma.cc/8B8U-RFTE>].
 17. *The 65 Club*, *supra* note 16.
 18. *Id.*
 19. Saxon, *supra* note 16.
 20. Fred Cohen, *Criminal Law Legislation and Legal Scholarship*, 16 J. LEGAL EDUC. 253, 260 (1964).
 21. *Much Honored Professor Ranked Superior as Law Instructor and Scholar*, YOUR U., Jan. 1965, at 3, 4 (on file with Jerome Hall Papers, Box 12, Folder “photographs”).
 22. Memorandum from Walter A. Cornell to Leo Gobin (Jan. 8, 1960) (on file with Jerome Hall Papers, Box 2, Folder “Biographical Data Announcements”).

after the war there.²³ Given Hall's reputation as a criminal law scholar and democratic advisor and theorist, *Police and Law in a Democratic Society* received serious attention.

Hall's exposition of democratic policing may be perplexing to us today, but it made sense to him and to his audience. Taking Hall on his own terms, rather than writing off the lectures as a curious relic, might offer a starting point for a cultural history of fundamental principles in American law—and could help to explain tensions within the Due Process Revolution. This approach may suggest insights altogether different from those of traditional legal studies. The pages of a judicial opinion, a casebook, or a professor's lecture provide a first-order description of, say, due process, to take the example from Hall's illustration above. They address the *legal* meanings of due process, such as the Sixth Amendment right to counsel. To be sure, these rights are important in the real world; the point at which an accused has the right to consult a lawyer can make all the difference in a case. The main point here is that the internal view of law—the very stuff of law school curricula—centers on legal reasoning and argument.

But there is also a second-order inquiry, which explores the *symbolic* meaning of legal norms within a particular culture. Thinking about law as culture raises different questions than the legal inquiry of which procedural rights *are* due or the normative inquiry of which rights *should be* due. Instead, it asks what values those rights signified beyond the debates of lawyers and what purpose those values served. This Essay examines Hall's lectures at this interpretive level, as an artifact reflecting American legal culture in the mid-twentieth century, and then reinterprets the Warren Court's landmark criminal procedure decisions within this particular culture.²⁴

Of course, culture is amenable to many definitions, especially among anthropologists. This Essay adopts the understanding memorably stated by Clifford Geertz, that “man is an animal suspended in webs of significance he himself has spun,” and that culture refers to those webs.²⁵ To get at these questions of meaning, Geertz proposed “sorting out the structures of signification . . . and deter-

23. *Faculty Focus: Professor Jerome Hall*, *supra* note 15, at 11.

24. Most accounts of the Warren Court compare it with the succeeding Burger Court, *see, e.g.*, MICHAEL J. GRAETZ & LINDA GREENHOUSE, *THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT* (2016); *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* (Vincent Blasi ed., 1983); Cary Franklin, *The New Class Blindness*, 128 *YALE L.J.* 2 (2018), but we can also gauge its legacy by comparing it with what came before.

25. CLIFFORD GEERTZ, *Thick Description: Toward an Interpretive Theory of Culture*, in *THE INTERPRETATION OF CULTURES* 3, 5 (1973). I approach culture as a system of meaning. Other legal scholars have adopted a different conception of culture as social structure, that is, the relationship between individuals and groups. *See, e.g.*, Reva B. Siegel, *Constitutional Culture, Social*

mining their social ground and import,” a process more simply known as “thick description.”²⁶ In even plainer language, the cultural anthropologist describes behavior in context, distinguishing—to use Geertz’s example—an involuntary twitch of the eye from a flirtatious signal or a parody of an amateur’s first attempt at a wink. Only by absorbing a community’s “socially established code,”²⁷ usually assumed and unstated, can the researcher properly interpret a physical movement as a blink, a suggestion, or ridicule, and accordingly appreciate the intended meaning.²⁸

Historians have borrowed from the anthropologists’ toolkit to study the past, whose culture can be just as foreign. Evoking Geertz, Robert Darnton wrote that “[w]hen we cannot get a proverb, or a joke, or a ritual, or a poem, we know we are on to something. By picking at the document where it is most opaque, we may be able to unravel an alien system of meaning.”²⁹ Because historians cannot physically immerse themselves in a different historical period, they look beyond traditional textual sources to glean as much as they can about a past culture. For instance, when Darnton read about an incident in late 1730s Paris involving several printing apprentices who brutally maimed every cat they could find, which they then reenacted as burlesque at least twenty times in as many days, he looked far and wide for more evidence of the torture of animals, especially cats, in an effort to understand their joke. After consulting folklores as well as popular ceremonies and literature, Darnton discovered that the “great cat massacre” was actually a labor protest that, astonishingly, occurred at a time that historians had believed to be an idyllic period of artisanal manufacturing before industrialization.³⁰

Darnton’s method for explaining eighteenth-century French apprentices’ delight in killing cats can be as illuminating when applied to legal history, for law offers a rich source for finding cultural values—the “webs of significance”

Movement Conflict and Constitutional Change: The Case of the De Facto ERA, 94 CALIF. L. REV. 1323, 1325 (2006) (defining constitutional culture to be what guides “interactions among citizens and officials in matters concerning the Constitution’s meaning”).

26. GEERTZ, *supra* note 25, at 9-10.

27. *Id.* at 6.

28. *Cf.* Commonwealth v. Holden, 134 A.2d 868, 872 (Pa. 1957) (“It will be noted that the stupendous and compendious wink not only solicited the fabrication of a spurious alibi but specified that it was ‘to cover up some of his actions.’ One movement of the eyelid conveyed a message of 21 words. Not even the most abbreviated Morse code could say so much with such little expenditure of muscular and mechanical power.”).

29. ROBERT DARNTON, THE GREAT CAT MASSACRE AND OTHER EPISODES IN FRENCH CULTURAL HISTORY 5 (1984).

30. *Id.* at 75-104.

Geertz described.³¹ In twentieth-century America especially, law existed everywhere, not just in courtrooms or the halls of legislatures. As Christopher Tomlins has pointed out, “law [was] *the* paradigmatic discourse explaining life in America, the principal source of life’s ‘facts.’”³² While Paul Kahn has emphasized how law forms communities and informs identity, the converse is also true – the motivation to understand the self and one’s community in the world often finds expression in law.³³ Twentieth-century Americans often used law to make sense of their everyday life and to give it meaning; this Essay examines one academic’s efforts.³⁴ Hall’s portrayal of policing as the manifestation of the rule of law may be downright baffling today – like Darnton’s cat killers, if you will – but we can use the methodology of cultural history to decipher its meaning and significance.

Hall makes for an ideal subject for a cultural study of law because he was, in important ways, both singular and representative of his generation’s views on policing. He was singular in that most elite law professors of his time focused on the study of administrative and judicial discretion, not police discretion.³⁵ Certainly, many mid-twentieth-century jurists, academics, and reformers wrote about the problem of police lawlessness.³⁶ But lawlessness is a concept distinct from discretion, and midcentury writers were relatively, and remarkably, silent on the latter. Even Hall did not directly discuss discretionary policing in his lectures. Nevertheless, no other scholar, lawyer, or judge – certainly no one of Hall’s caliber – tried to spell out how the police function accorded with democratic principles to the extent that Hall did. The lectures thus offer a rare source for

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31. See LAWRENCE ROSEN, *LAW AS CULTURE*, at xii (2006) (“[L]aw [is] constituted by culture, and culture (in no small way) by law.”).
 32. CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* 21 (1993). Tomlins pinpoints the start of this “law’s revolution,” *id.*, to sometime between the American Revolution and the beginning of the nineteenth century.
 33. See PAUL W. KAHN, *THE CULTURAL STUDY OF LAW* 9 (1999) (“[T]he function law performs is constitutive as well as regulatory.”).
 34. See ROSEN, *supra* note 31, at 4 (“In short, we create our experience, knit together disparate ideas and actions, and in the process fabricate a world of meaning that appears to us as real. Law is one of these cultural domains.”); *id.* at 7 (“[N]owhere is law . . . without its place within a system that gives meaning to its people’s life.”); Naomi Mezey, *Law as Culture*, 13 *YALE J.L. & HUMAN.* 35, 37 (2001) (defining culture “as a set of shared signifying practices that are always in the making and always up for grabs”).
 35. See Geoffrey C. Shaw, *H.L.A. Hart’s Lost Essay: Discretion and the Legal Process School*, 127 *HARV. L. REV.* 666, 697 (2013) (observing that process theorists focused on the role of judges).
 36. See Sam Bass Warner, *Investigating the Law of Arrest*, 31 *J. AM. INST. CRIM. L. & CRIMINOLOGY* 111 (1940); Paula R. Markowitz & Walter I. Summerfield, Jr., Note, *Philadelphia Police Practice and the Law of Arrest*, 100 *U. PA. L. REV.* 1182 (1952); see *infra* notes 63-65 and accompanying text.

gleaning how a legal theorist thought about policing in a democratic society. At the same time, Hall was representative in that his ideas fell within the mainstream in an age of consensus.³⁷ He did not unsettle respectable notions about police in American society; rather, his lectures mirrored sentiments expressed in judicial opinions and popular presses on the need for robust policing. No one called him out on what we can recognize today as an astounding articulation of police as the embodiment of the rule of law. The value of Hall's lectures lies precisely in his recording of a shared way of thinking that was largely assumed and thus unstated—a way of thinking that we have nearly forgotten today.

To recover this past, to understand why Hall viewed police as “the living expression of democratic law” and what he meant by it, this Essay first reconstructs the progression of Hall's thinking, which does not follow his own organization of the lectures. He began by advancing his theory of democratic policing in the first lecture, and then in the second and third lectures applied that theory to the police's role in preventing crime and in upholding civil liberties, respectively. This Essay instead limns the conceptual shifts throughout the lectures in order to highlight the tensions in Hall's explanation of how American police conformed to democratic values—tensions that did not appear to Hall but are striking to us today. The main purpose of the first three Parts of this Essay is to highlight how Hall's thinking is as alien to twenty-first-century readers as the reenactment of a cat massacre.

Part I begins with Hall's attempt to reconcile professionalized, twentieth-century American police forces with the traditional democratic principle of self-government, which would have mandated “self-policing.” Unable to do so, Hall twice changed his definition of democratic policing, without realizing, or at least without noting, that the various definitions contained different ideas. Part II examines the first modification, that of democratic police as bound by the rule of law, which Hall described as an antidiscretion norm. But his efforts to characterize police officers as mere law enforcers who did not exercise discretion stretched his own understanding of the laws. He dealt with that conflict not head on, but, as Part III shows, with a second modification, that of the rule of law as due process. Hall did not think of due process in the police context as we do today; while we emphasize judicial review of police discretion, Hall focused on a “fair trial” that served to separate judicial and police functions. Although this idea of due process did not always ensure that officers would conform to the law, its observance, even if pro forma, sufficiently satisfied Hall. In short, democratic policing ultimately meant that the police did not adjudicate cases.

37. On this consensus, see, for example, WENDY L. WALL, *INVENTING THE “AMERICAN WAY”: THE POLITICS OF CONSENSUS FROM THE NEW DEAL TO THE CIVIL RIGHTS MOVEMENT* (2008).

Building on this analysis, Part IV moves beyond the lectures to apply the methodology of cultural history to figure out how all the formulations of democratic policing may have cohered in Hall's mind. For additional context, this part considers two early Cold War cases, *Brinegar v. State*, a routine state criminal case, and *Abel v. United States*, a more high-profile case that implicated national security.³⁸ The discourses that these cases prompted illustrate not only how concerns about democratic policing and totalitarianism resonated broadly in American society but also how the American public, like Hall, justified discretionary, even lawless, policing by finding reassurance in the fact that criminal defendants received fair trials in which neutral judges, not the police, decided the outcome of their cases.

Relying on a wide range of sources from newspapers and pamphlets to memoirs and letters, this Essay posits that Hall's lectures were not intended simply to offer an exegesis of due process in the police context. They were part of a larger effort to differentiate the United States from a police state when American police exercised authority in ways that were necessary for social order and yet seemed reminiscent of totalitarian police behavior.³⁹ During the early Cold War, many jurists worried that discretionary power paved a slippery slope to dictatorial power. More conservative scholars like Hall understood discretion and the rule of law to be mutually exclusive concepts. But policing, a mode of governance that Hall did not question, inherently entailed the exercise of discretion. The disconnect between the reality of policing on the ground and the lofty ideals associated with democratic governance lies at the heart of Hall's seeming contradictions. Like shadowboxing with an invisible opponent, Hall grappled with the conundrum of police in a democratic society, unable to see or acknowledge that discretion, the source of that conundrum, was pervasive and unavoidable. He was caught between the association of discretion with totalitarian regimes on the one hand and the necessity of discretionary policing on the other.

Hall did not resolve this puzzle with a belated recognition and acceptance of police discretion. Instead, his solution entailed a redefinition. He revised his definition of democratic policing—from self-rule, to the rule of law, and finally to due process—to accommodate police action, rather than the other way around, which would have required significant reforms to policing as it was then prac-

38. *Abel v. United States*, 362 U.S. 217 (1960); *Brinegar v. State*, 262 P.2d 464 (Okla. Crim. App. 1953).

39. Cf. Richard Primus, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 YALE L.J. 423, 423 (1996) (tracing how twentieth-century "constitutional thought still operates within the framework defined by opposition to Nazism and communism").

ticed.⁴⁰ Not only did due process justify the police’s tremendous discretion, but a fair trial with requisite procedures also symbolized the difference between democracy and totalitarianism – two competing systems of governance that both relied on discretionary authority.⁴¹ Historicizing due process as a cultural norm illuminates how that concept served to rationalize police discretion in response to the Cold War imperative to distinguish American police from totalitarian police. This legacy of due process perpetuated the message that even if Americans were not free from discretionary policing, and even if due process did not guarantee substantive justice, they still lived in a free society.

Finally, Part V situates this midcentury perspective as a prelude to the Warren Court’s Due Process Revolution and, in doing so, questions the prevailing interpretation of twentieth-century criminal procedure as a project to constrain the discretion of individual police officers.⁴² This “modern,” but ahistorical, view so dominates our current thinking that not only have careful readers overemphasized Hall’s concern with police discretion in his lectures, but we have also misread the Supreme Court’s revolutionary decisions.⁴³ Hall’s understanding of due process was not an outlier; it reflected midcentury legal culture. The Warren Court Justices shared that culture, and it informed their decisions that governed the police primarily by protecting the judicial role in adjudicatory proceedings, particularly the warrant process, rather than by establishing substantive limits on police discretion. While the choice of procedural rights over substantive rights can become meaningless when theorized, this choice mattered in the real world.⁴⁴ Choosing procedure over substance reflected an a priori choice to accept

40. Dan Ernst has argued that the understanding of rule of law as “a state bound by rules” fell to a rival understanding of rule of law as “an appeal from government officials to independent, common-law courts.” DANIEL R. ERNST, *TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940*, at 2 (2014). This Essay shows how Jerome Hall held both understandings at the same time without acknowledging the tension between the two.

41. See ROSEN, *supra* note 31, at 8 (describing the cultural study of law as an examination of “the ways in which facts are created for purposes of addressing differences”).

42. See, e.g., LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 297, 300-02 (1993); SKLANSKY, *supra* note 13, at 33 (“Democratic policing [during the late 1950s through the 1970s] meant, above all, bringing the police under the ‘rule of law’: reining in the discretion of individual officers . . .”); Kahan & Meares, *supra* note 6, at 1159 (identifying a “central feature of the modern criminal procedure regime [as] its hostility toward discretion”). The opposition of due process and policing has been a longstanding perspective among American legal scholars. See Sarah A. Seo, *Antinomies and the Automobile: A New Approach to Criminal Justice Histories*, 38 *LAW & SOC. INQUIRY* 1020, 1024-25 (2013).

43. See, e.g., SKLANSKY, *supra* note 13, at 44 (summarizing Hall as arguing that “the wide scope of police discretion . . . violated a core component of democracy, the ‘rule of law’”).

44. See STUNTZ, *supra* note 5, at 210-12 (concluding that there is “no good answer” for why the Warren Court did not adopt an “aggressive substantive review” of criminal laws in favor of a

a great deal of policing. In the postwar years and even through the 1960s, jurists sought not just to rein in the police's discretionary authority, but also to legitimize it. They did so by relying on due process, which functioned to justify police discretion—even when the exercise of that discretion amounted to lawless policing.

Taking Hall seriously, as Darnton did the cat killers, reveals a past way of thinking about democratic policing that is more foreign to us in the twenty-first century than we have previously realized. The payoff of studying that past is a clearer understanding of the motivations for legal change. We may gain a better understanding of why we have the laws we do by recognizing that as midcentury jurists were hashing out what due process required, they were also trying to define what it meant to be an American living in a free society.

I. SELF-RULE ON THE POLICE LEVEL

The early Jerome Hall embraced a legal-realist view of law, a far cry from the legalism that would inform his 1952 lectures. He began his academic career in the 1930s by embarking on the progressive path that Roscoe Pound had forged.⁴⁵ Indeed, Pound later remembered Hall as “one of my most esteemed former students.”⁴⁶ In line with Pound's sociological jurisprudence, Hall's first monograph, *Theft, Law and Society*, published in 1935, included a chapter proposing that all petty thieves receive individualized treatment, which meant, according to Hall, “that a person convicted of a crime is not punished in accordance with narrow, predetermined rules laid down with regard to objectively defined behavior, but is treated as required by his own social and psychic needs.”⁴⁷ As an exemplar of this streamlined procedure, Hall cited juvenile courts that dispensed with many of the formal due process requirements of traditional criminal proceedings.⁴⁸

“detailed law of procedure” regulating law enforcement); William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 10, 13 (1996).

45. See THOMAS ANDREW GREEN, FREEDOM AND CRIMINAL RESPONSIBILITY IN AMERICAN LEGAL THOUGHT 151-57 (2014).

46. Letter from Roscoe Pound, Dean Emeritus, Harvard Law Sch., to Jerome Hall, Professor, Ind. Sch. of Law (Oct. 15, 1963) (on file with Jerome Hall Papers, Box 1, Folder “Correspondence P”).

47. JEROME HALL, THEFT, LAW AND SOCIETY 292 (1935); see also *id.* at 305 (“Of all the misdemeanors petty larceny affords the best opportunity for individualization of treatment.”).

48. E.g., Jerome Hall, *Social Science as an Aid to Administration of the Criminal Law*, 3 DAKOTA L. REV. 285, 291 (1931) (“Fortunately, the juvenile court is relatively free from a traditional body of procedural rules . . .”); cf. MICHAEL WILLRICH, CITY OF COURTS: SOCIALIZING JUSTICE IN

Just as *Theft, Law and Society* rolled off the presses, Hall immediately came to question its premises. That same year, in 1935, Hitler's Germany enacted, in addition to the Nuremberg Laws, a statute that abrogated the principle of *nullum crimen sine lege*, which in Hall's translation meant that "no conduct shall be held criminal unless it is specifically described in the behavior-circumstance element of a penal statute."⁴⁹ Two years later in 1937, Hall wrote an article about this legality principle and the related principle of *nulla poena sine lege*, which he used as the article's title. Hall recognized that this phrase had several meanings, but he settled on the definition that "no person shall be punished except in pursuance of a statute which fixes a penalty for criminal behavior."⁵⁰ For Hall, this also meant that "penal statutes must be strictly construed."⁵¹ In the article, he argued that "[e]ven the all-powerful state, indeed, especially the all-powerful state, must use the regular channels of due process before any individual can be punished."⁵² In an even clearer admission of misgivings, Hall acknowledged "[t]hat the abolition of law took place first in the treatment of juveniles" and that "the possibilities" of "the movement for individualization" were "now apparent."⁵³ He also added a footnote to qualify his earlier writing on the treatment of petty larceny, clarifying that "the major objective was to formulate a general theory regarding individualization, rather than to advance a particular reform."⁵⁴

By the late 1940s, Hall's views were set. *General Principles of Criminal Law* included *Nulla Poena Sine Lege* and focused largely on mens rea.⁵⁵ In 1952, Herbert Wechsler and the American Law Institute invited Hall to serve as a member of the Advisory Committee on the Model Penal Code, which Hall did until his resignation four years later because of a substantive disagreement on the issue of

PROGRESSIVE ERA CHICAGO 79-82 (2003) (describing the minimal procedural rules in Chicago's juvenile courts).

49. Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165, 165 (1937); see also Gesetz zur Änderung des Strafgesetzbuchs [Law to Change the Penal Code], June 28, 1935, RGBL I at 839, art. 1, § 2 (Ger.), translated in OFFICE OF THE U.S. CHIEF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, 4 NAZI CONSPIRACY AND AGGRESSION 600, 600 (1946), <http://avalon.law.yale.edu/imt/1962-ps.asp> [<https://perma.cc/97WH-LYWR>] ("Any person who commits an act which the law declares to be punishable or which is deserving of penalty according to the fundamental conceptions of the penal law and sound popular feeling, shall be punished. If there is no penal law directly covering an act it shall be punished under that law which most closely fits, in regards to fundamental conception.").

50. Hall, *supra* note 49, at 165.

51. *Id.*

52. *Id.* at 192.

53. *Id.* at 189.

54. *Id.* at 183 n.68.

55. JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW (1960).

criminal responsibility.⁵⁶ Hall had strongly opposed the inclusion of negligence liability in penal law, in part because it violated *nulla poena sine lege*.⁵⁷ His *Living Law of Democratic Society*, confusing to contemporary readers⁵⁸ and still inscrutable today, sought to reclaim positive law mainly through redefinition and again mentioned the Nazi law of June 28, 1935, as a countermodel to support his argument.⁵⁹ Clearly, what had happened in Germany indelibly shaped Hall's thinking about criminal law.

The threat of totalitarianism also informed Hall's views about the police.⁶⁰ When he read about what was going on around the world—refugees arriving from the “fascist dictatorships of Italy and Germany” and defectors coming from behind the Iron Curtain who bore the “horrible scars of police violence,” “scientific tortures[,] and enslavement”—he could not help but think about the police in his own country. The acts of “depravity” and “brutality” abroad seemed troublingly comparable, perhaps not in degree but certainly in kind, to “American third degrees” and “the torture of Negroes by the police in some communities.”⁶¹ “At no time in history has it been easier to compare the police of democratic societies with that of dictatorships,” Hall admitted at the start of his Chicago lectures.⁶²

Hall was not alone in making this comparison. Police abuse in the United States recalled European upheavals in the minds of American jurists as well. In

56. Letter from Herbert F. Goodrich, Dir., Am. Law Inst. to Jerome Hall, Professor, Univ. of Ind. Sch. of Law (Feb. 27, 1952) (on file with Jerome Hall Papers, Box 2, Folder “Correspondence”); see also Letter from Herbert Wechsler, Professor, Columbia Univ., to Jerome Hall, Professor, Univ. of Ind. Sch. of Law (Jan. 10, 1956) (on file with Jerome Hall Papers, Box 2, Folder “Correspondence W”); Letter from Herbert Wechsler, Professor, Columbia Univ., to Jerome Hall, Professor, Univ. of Ind. Sch. of Law (Dec. 4, 1950) (on file with Jerome Hall Papers, Box 2, Folder “Correspondence W”).

57. See Jerome Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 COLUM. L. REV. 632, 636 (1963) (“[I]f there is any doubt regarding any of the relevant criteria—voluntariness and the suitability and effectiveness of punishment—the issue should be resolved by narrowing penal liability.”).

58. See, e.g., Thomas A. Cowan, Book Review, 26 IND. L.J. 137, 137-38 (1950) (observing that “everyone[]’s writing on the nature of law including my own and Professor Hall’s” is “confusing”); William J. Kenealy, Book Review, 98 U. PA. L. REV. 954, 955, 956 (1950) (admitting that “the reviewer frankly fails to follow” the thesis and describing “a certain obscurity of expression”).

59. See JEROME HALL, *LIVING LAW OF DEMOCRATIC SOCIETY* 54 (1949).

60. For an exposition on totalitarianism contemporaneous with Hall’s lectures, see, for example, HANNAH ARENDT, *ORIGINS OF TOTALITARIANISM* (1951); and see also SKLANSKY, *supra* note 13, at 17-18.

61. See Hall, *supra* note 2, at 139-42.

62. *Id.* at 139.

a 1955 case where the police had entered and searched a home without a warrant, Justice Traynor of the California Supreme Court wrote that such practices could turn a democratic society into “the police state.”⁶³ This was not an abstract worry. Justice Traynor called it “one of the foremost public concerns,” in the light of “recent history” that “demonstrated all too clearly how short the step is from lawless although efficient enforcement of the law to the stamping out of human rights.”⁶⁴ This recent history also inspired a group of Berkeley researchers – two of whom were themselves political emigres from Nazi-occupied territories – to publish *The Authoritarian Personality* in 1950. This influential study did not discuss the police, but for some readers, its association of the “potentially fascistic individual” with discriminatory attitudes seemed to describe police officers in the United States.⁶⁵

Even those working in law enforcement were aware of this common perception. A police chief who gave the keynote address at the 1945 Annual Conference of the International Association of Chiefs of Police simultaneously acknowledged and deflected criticisms of the police by insisting that the “police are possessed of prejudices in about the same proportion as our general civilian public, and they acquired them in the same way.”⁶⁶ To generalize the problem and emphasize the public’s shared duty with the police to prevent race riots, he maintained that it was a “Nazi technique to pit race against race, religion against religion, prejudice against prejudice, and thus divide and conquer.”⁶⁷ Yet the speaker failed to mention the riots where the police had inflamed tensions by abusing racial minority groups.⁶⁸ Incidents like these forced Hall to grapple with

63. *People v. Cahan*, 282 P.2d 905, 912 (Cal. 1955). For an example in a U.S. Supreme Court opinion, see *Wolf v. Colorado*, 338 U.S. 25, 28 (1949), which states that the sheriff’s warrantless search and seizure of the abortion doctor’s office “did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.”

64. *Cahan*, 282 P.2d at 912.

65. T.W. ADORNO ET AL., *THE AUTHORITARIAN PERSONALITY* 2 (1950); SKLANSKY, *supra* note 13, at 17, 30 (discussing the midcentury fear of the authoritarian personality and its association with police officers).

66. JOSEPH T. KLUCHESKY, *POLICE ACTION IN MINORITY PROBLEMS* 4 (1945) (on file with the UCLA Library Special Collections, American Civil Liberties Union of Southern California Records, Box 24, Folder 13).

67. *Id.* at 13-14.

68. See, e.g., EDUARDO OBREGÓN PAGÁN, *MURDER AT THE SLEEPY LAGOON: ZOOT SUITS, RACE, AND RIOT IN WARTIME L.A.* 26, 134-35 (2003) (describing the Zoot Suit Riot); THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* 29 (1996) (describing race riots in Detroit).

“the unavoidable question, what essential differences, if any, are there between American police and the Gestapo or NKVD?”⁶⁹

Hall endeavored to answer this question in his three Chicago lectures. *Police and Law in a Democratic Society* represented a mature Hall’s attempt to reconcile his understanding of democracy and the police function. The first lecture, revealingly titled *Standards*, sketched the broad outlines of his theory of democratic policing. In the following lecture, called *Preventive Measures and Arrest*, Hall continued to refine his theory – or to redefine democratic policing – as he discussed how a democratic society should address the problem of police lawlessness. Hall then sought to debunk the opposition between *Security and Civil Liberty*, the title of his final lecture. While this summary suggests the lectures were conceptually linear, they were anything but. Throughout, Hall constantly switched back and forth not only between different definitions of democratic policing but also between theory and application, reflecting his efforts to grapple with undeniable evidence that the police in the United States often engaged in unlawful and abusive conduct.

Articulating the theoretical differences between American police and Nazi or Soviet police became easier when Hall set aside actual incidents of police brutality. Although he acknowledged that “wholesale torture and democracy obviously cannot co-exist,” he began his lectures by submitting that the “essential criteri[on] of the police in a democratic society” was not the absence of abuse.⁷⁰ Rather, the fundamental character of democratic policing was “self-rule on the police level,” or “self-policing.”⁷¹ By “self-policing,” Hall seemed to have in mind self-government through some sort of public participation or control over policing.⁷² Of course, local communities would have been no help to minority citizens. Law enforcement participation in lynchings in the Jim Crow South provided the most extreme example of the perils of self-rule.⁷³ Nevertheless, Hall as legal philosopher sought to distill the essence of democratic police. As a matter of theory, just as the difference between democracy and totalitarianism lay in

69. Hall, *supra* note 2, at 140.

70. *Id.* at 140.

71. *Id.* at 139.

72. See, e.g., *id.* at 145 (“Intelligent Americans therefore have a major job to do – first, to understand the meanings of police service in a democratic society; then, by their support and cooperation, they must create a police force that is capable of discharging its duties in a manner that strengthens the democratic way of life.”).

73. See David Garland, *Penal Excess and Surplus Meaning: Public Torture Lynchings in Twentieth-Century America*, 39 *LAW & SOC’Y REV.* 793, 793-95, 809-15 (2005).

popular rule, in a free society, the police answered to the public, not to those in political power.⁷⁴

Notwithstanding the clarity of this distinction, Hall struggled to account for the reality that in the twentieth century, policing had become a government service in which citizens played a minor role and, if police chiefs had their way, the people would have very little say. In other words, self-policing hardly existed in America. This development came about largely from the professionalization movement, beginning in the Progressive Era, which sought to unify and centralize police functions.⁷⁵ As police scholar Samuel Walker observed, by the late 1930s, policing had acquired the basic aspects of professionalism, namely, a monopoly on specialized knowledge, autonomy and the right to exclude others, and a commitment to public service.⁷⁶ Although localization remained typical of policing in the United States, progressive police reforms marked a shift away from ward influences and towards bureaucratic centralization.⁷⁷ In many municipalities, reformers replaced the spoils system with civil service exams and required specialized training.⁷⁸ Some cities even prohibited officers from living in the beats they patrolled.⁷⁹ Police chiefs also vociferously opposed citizen review boards.⁸⁰ Having to answer to civilians diverged from the goals of professionalization, which endeavored to make the police more independent and less vulner-

74. *See id.* at 817-19, 822; Hall, *supra* note 2, at 143.

75. In big cities like New York and Boston, police centralization happened much earlier. *See, e.g.*, George H. McCaffrey, *The Boston Police Department*, 2 J. AM. INST. CRIM. L. & CRIMINOLOGY 672, 678 (1911) (noting that for the past twenty-six years, “the Boston police have been under state control,” and acknowledging that this “may be an encroachment on the principle of ‘home rule,’” but that “there can be no doubt whatever that . . . it has brought about a most marked improvement in every branch of Boston’s police administration”); *see also* WALKER, *supra* note 5, at 114 (discussing the impact of the “expanding professional-managerial class” in increasing state police power).

76. SAMUEL WALKER, *A CRITICAL HISTORY OF POLICE REFORM: THE EMERGENCE OF PROFESSIONALISM*, at ix-x, 167-68 (1977). For how police professionalization claimed autonomy for the institution of policing, *see* SKLANSKY, *supra* note 13, at 34-38.

77. CAROL A. ARCHBOLD, *POLICING: A TEXT/READER* 7, 9 (2013) (“The professionalization movement of the police in America resulted in police agencies becoming centralized bureaucracies focused primarily on crime control.”).

78. SAMUEL WALKER, *THE POLICE IN AMERICA: AN INTRODUCTION* 10-11 (1983); *see also* O.W. WILSON, *POLICE ADMINISTRATION* 342-53, 376-85 (1950) (describing model forms of selection and training).

79. ARCHBOLD, *supra* note 77, at 34; WILSON, *supra* note 78, at 336-37.

80. *See, e.g.*, WALKER, *supra* note 76, at 173; Norman H. Moore, *A Page out of the Communist Manual—“Police Review Boards,”* CAL. PEACE OFFICER, Nov.-Dec. 1960, at 51; *ACLU Blasted on Police Review Plan*, L.A. HERALD & EXPRESS, June 16, 1960, at D-5; Editorial, *Police Review Board Is a One-Sided Plan*, STAR-NEWS (Pasadena, Cal.), June 2, 1960, at 12; Alan Gartner, *The Police*

able to the vagaries of public opinion.⁸¹ All of these developments made plain that self-rule did not describe policing in the United States.⁸²

To be sure, by Hall's time, theories of democracy had themselves evolved. According to David Sklansky, the 1950s marked a "watershed" moment when democratic pluralism gained orthodox status.⁸³ Defining their new theory largely in contrast to the totalitarian systems of Nazi Germany and the Soviet Union, pluralists eyed mass politics with distrust and turned to "responsible leaders" and interest groups to manage a stable democratic society.⁸⁴ The leading theory of democracy at midcentury thus rejected the town-hall paradigm for the marketplace, in which average citizens did not participate in day-to-day governance and instead enjoyed—consumed—the benefits of a democratic system.⁸⁵ Lay involvement was limited to electing officials who specialized in governing. By the middle of the twentieth century, democracy had become more efficient.

Hall's historical explanation for the "specialization of police functions" reflected this consumerist conception of democracy.⁸⁶ Wrinkling through time, he began by delving into the origins of American police and found the "embryo of a democratic police force" in Anglo-Saxon England a thousand years prior, when every man had a duty to join the "hue and cry."⁸⁷ Within a page, Hall covered the evolution of the "tithingman," to the "parish constable," to the "Watch and Ward" and, finally, to the early nineteenth-century "Bobbies," London's professional police officers.⁸⁸ By 1829, Hall explained, organized gangsters and riots

and the Community: Police Practices and Minority Groups 23-24 (1965) (unpublished manuscript) (on file with the NAACP Archives, Folder 001475-015-0481, ProQuest History Vault) (advocating for citizen-complaint procedures despite police opposition).

81. See WALKER, *supra* note 76, at 173; see also BRUCE SMITH, THE STATE POLICE: ORGANIZATION AND ADMINISTRATION 260 (1925) (arguing against the "division of responsibility" over police forces and for unified administrative control of police executives).
82. See SKLANSKY, *supra* note 13, at 35 ("Police professionalization meant politically insulated police departments organized along hierarchical, quasi-military lines, with strong commitments to . . . centralized command . . ."); SMITH, *supra* note 81, at 253 ("[T]he state police [in the United States] are more nearly akin to the police forces of Europe, than to the most common type of American police department."). For the views of "sympathetic critics of the New Deal" concerned about "the relationship between expertise and democracy," see ANNE M. KORNHAUSER, DEBATING THE AMERICAN STATE: LIBERAL ANXIETIES AND THE NEW LEVIATHAN, 1930-1970, at 55 (2015).
83. SKLANSKY, *supra* note 13, at 14.
84. *Id.* at 20, 18-24.
85. *Id.* at 13-14, 18-19, 21-23.
86. Hall, *supra* note 2, at 134.
87. *Id.* at 135.
88. *Id.* at 135-36.

struck more terror in Londoners than “the fear of tyrannical police.”⁸⁹ But the important point for Hall was that “the new police force was not the child of Parliament, but developed from ancient institutions, close to the practices and habits of the people.”⁹⁰ From this history, Hall drew the conclusion that “the police function in a democratic society is epitomized as self-policing, which specialization and the remuneration of a trained force do not alter.”⁹¹ According to Hall, American police, given their lineage, were not really specialized agents of the state. In the United States, which inherited English traditions and whose cities modeled their police forces after the London Metropolitan Police, “the existence of a professional [police] force does not in the least alter that duty” of every citizen to do police work, “but only facilitates its skillful discharge.”⁹² The common notion that policing “belongs exclusively to the publicly employed police officers” was a “misapprehension,” “fallacy,” and “myth.”⁹³ The truth, Hall maintained, was that “police work rests on every citizen.”⁹⁴ American police were simply undertaking the “full-time performance of the duties of all citizens.”⁹⁵ Put simply, the specialization of police work was merely an efficient allocation of the obligations of citizenship.

Perhaps recognizing how strained this conclusion may have seemed, Hall granted that the specialization of police functions posed the “greatest obstacle to understanding the police problem.”⁹⁶ But removing that obstacle did not occur to him. Like most Americans, he could not imagine society without the police, musing that it was “very likely that in every society disorder has been a threat to

89. *Id.* at 134-35. Hall’s historical foray may have been brief, in part, because the history was generally understood. In 1953, E.W. Roddenberry, a sergeant in the Los Angeles Police Department’s “public information office”—his job was to write promotional materials for the LAPD—lectured on “Early Police Systems,” which was essentially identical to Hall’s account. E.W. Roddenberry, *Early Police Systems*, L.A. POLICE BEAT, Dec. 1953, at 18-21 (on file with Los Angeles City Archives, Erin W. Piper Technical Center, Box B-2283). Roddenberry later wrote television scripts and gained fame as the creator of *Star Trek*. The character Spock was allegedly based on LAPD Chief William Parker. 2 THOMAS A. REPPETTO, *AMERICAN POLICE: A HISTORY, 1945-2012*, at 34 n.7 (2012).

90. Hall, *supra* note 2, at 136.

91. *Id.* at 143; *see also* Roddenberry, *supra* note 89, at 20-21 (comparing the “kin-police system” of England, where “police power . . . remained in the hands of the people,” with the “Gendarmerie system” of continental Europe, in which “public cooperation is not vital to effectiveness”).

92. Hall, *supra* note 2, at 135.

93. *Id.*

94. *Id.*

95. *Id.* at 139.

96. *Id.* at 134.

survival, hence a permanent problem, and that organized police forces have functioned everywhere and at all times to maintain order principally by preventing crimes and apprehending offenders.”⁹⁷ Hall emphasized the timelessness and “universality” of police by normalizing, even naturalizing, their enforcement of criminal laws.⁹⁸ For support, he referred to studies of Indian tribes showing “the origin of both criminal law and police in the need to maintain order in the buffalo hunt.”⁹⁹ Given the unquestioned need for law enforcement, Hall’s challenge was to articulate how twentieth-century police forces accorded with traditional democratic principles. It was a difficult task when held against a pure concept of self-rule.

II. THE POLICE ASPECT OF RULE OF LAW

Hall may have started his first lecture by finding the origins of American police in early forms of self-government, but he ended it with another definition of democratic policing – “the rule of law.”¹⁰⁰ In dictatorial states, he explained, the police acted with “sheer physical force unlimited by law,” which was “the antithesis of the rule of law” found in a democratic society.¹⁰¹ The rule of law, Hall now argued, was the essential difference between the two systems of government. Notably, Hall introduced this new definition without any transition or distinction between the ideas of self-policing and legal constraints on policing. Indeed, he seemed unaware that he had shifted emphasis from self-rule to the rule of law even though these definitions conveyed different ideas. Rule by the people required some form of public involvement or control while rule by law, at its most basic, meant police conformity to all laws, whether legislatively enacted or judicially decreed.

Hall discussed the rule of law most extensively when explaining the police function in a democratic society. In his view, the American system of government did not empower police officers to make law, like legislators, or interpret law, like judges. Rather, their job was to enforce law – a task that, in Hall’s mind, did not involve exercising discretion. By midcareer, Hall had developed strong opinions about discretionary authority. As a junior scholar in the early 1930s, he aligned with legal realists who deflated the notion that law was natural or “a brooding

97. *Id.* at 139.

98. *Id.* at 138.

99. *Id.*

100. *Id.* at 143.

101. *Id.*

omnipresence in the sky”¹⁰² and argued that doctrinal formalism could not prevent judges from deciding cases for personal or political reasons. Rather than try to restrain the power of choice, reformers sought to use this reality for progressive purposes. They hoped that judges, after surrendering the illusion of an autonomous law, would clear the way for administrative bureaucrats equipped with knowledge of the social world to govern an increasingly complex society. Along these lines, Hall wrote articles such as *Social Science as an Aid to Administration of the Criminal Law*.¹⁰³ But by the late 1930s, he shed his more youthful idealism and turned to traditional ideas about the boundary between law and social science. Sociological positivism, he came to believe, lent itself to “the efficiency engineer, the mechanist, the dictator.”¹⁰⁴ The collapse of constitutional regimes and the rise of totalitarianism in Europe highlighted the dangers of the administrative state and prompted Hall’s apostasy. The fear that the United States might be veering in the same direction prompted once-progressive thinkers like Pound and Hall to change their tune, charging that the New Deal had spurned the rule of law for “administrative absolutism.”¹⁰⁵ As Hall later recalled, he “was interested to separate [him]self from the extremes of Legal Realism.”¹⁰⁶

It was in this vein that Hall presented his lectures in 1952. When, by the end of the first lecture, he gestured to the “vast literature discuss[ing] rule of law in many of its phases and applications,”¹⁰⁷ Hall probably had in mind the political

102. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) (“The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified.”).

103. Hall, *supra* note 48.

104. HALL, *supra* note 59, at 64.

105. Roscoe Pound, *Report of the Special Committee on Administrative Law*, 63 ANN. REP. A.B.A. 331, 340 (1938); see also DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 48 (2011); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 219-22, 225, 230-33 (1992); WILLIAM E. NELSON, *THE LEGALIST REFORMATION: LAW, POLITICS, AND IDEOLOGY IN NEW YORK, 1920-1980*, at 121-30 (2001) (dating the “legalist reformation” to 1938, the year of Kristallnacht); EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* 159-78 (1973); WILLRICH, *supra* note 48, at 315-18; Primus, *supra* note 39, at 427-29; Shaw, *supra* note 35, at 688 (quoting David Sugarman, *Hart Interviewed: H.L.A. Hart in Conversation with David Sugarman*, 32 J.L. & SOC’Y, 267, 279 (2005) (“The word ‘positivist’ had a tremendously evil ring [at Harvard] . . . I remember hearing somebody say, ‘You know he’s a positivist, but he’s quite a nice man.’”)). For a critique of the “use of the totalitarian specter both to explain and justify mid-twentieth-century political moderation,” see Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718, 733 n.65 (2016) (reviewing ERNST, *supra* note 40).

106. Letter from Jerome Hall to Hans Zeisel, *supra* note 4.

107. Hall, *supra* note 2, at 144; see also ERNST, *supra* note 40, at 1-2.

reverberations of Frederick Hayek's *The Road to Serfdom*, which reached American readers in translation in 1944 and then in cartoon form in *Look* magazine the following year.¹⁰⁸ In the postwar context, when every Western society, including the United States, had adopted some aspects of a "welfare state," the Austrian's well-publicized book renewed discussions about an idea that many Americans came to associate with the long-cherished phrase, "government of laws and not of men."¹⁰⁹ Of course, "government of laws" meant something different to John Adams when he used the phrase back in 1780.¹¹⁰ Indeed, one can trace the concept of rule of law farther back, perhaps even to fifth-century BCE Greece.¹¹¹ Even in mid-twentieth-century America, the rule of law meant different things to different people.¹¹² But at least since A.V. Dicey's 1885 *Law of the Constitution* — which Hall cited in *Nulla Poena Sine Lege*¹¹³ — the legalist tradition served as a critique of administrative regulation.¹¹⁴ Hayek offered the purest definition of "rule of law" in *The Road to Serfdom*, insisting that the concept required preestablished rules to constrain all government action.¹¹⁵ In this exposition, rule of law

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108. *The Road to Serfdom in Cartoons*, LOOK, <https://mises.org/sites/default/files/Road%20to%20Serfdom%20in%20Cartoons.pdf> [<https://perma.cc/TND2-BR9L>]. On Hayek's influence in American law, see HORWITZ, *supra* note 105, at 228-30. See generally GOVERNMENT UNDER LAW: A CONFERENCE HELD AT HARVARD LAW SCHOOL ON THE OCCASION OF THE BICENTENNIAL OF JOHN MARSHALL, CHIEF JUSTICE OF THE UNITED STATES, 1801-1835 (Arthur E. Sutherland ed., 1956) [hereinafter GOVERNMENT UNDER LAW].
109. Harry W. Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143, 144 (1958). On anticommunist rhetoric against the administrative state, see JOANNA L. GRISINGER, THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL 144-45 (2012).
110. Cf. NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940, at 15 (2013) (identifying the shift during the 1810s to 1840s in the "elite definition of the 'rule of law'" from "the participatory self-governance of local communities toward a more positivist view centered on the state legislature and on relatively objective, rule-bound claims to rights on the part of white male citizens").
111. See BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 7-31 (2004).
112. Jones, *supra* note 109, at 144 ("It is difficult to define the term, even as understood in the United States.").
113. Hall, *supra* note 49, at 169 n.23.
114. See, e.g., ERNST, *supra* note 40, at 2-3, 30-33; HORWITZ, *supra* note 105, at 219-22, 225-26; Jeremy Waldron, *Thoughtfulness and the Rule of Law*, 18 BRIT. ACAD. REV. 1, 3 (2011).
115. 2 F.A. HAYEK, THE ROAD TO SERFDOM: TEXT AND DOCUMENTS, THE DEFINITIVE EDITION 112 (Bruce Caldwell ed., 2007) (1944) ("Stripped of all technicalities, [Rule of Law] means that government in all its actions is bound by rules fixed and announced beforehand . . . [T]he essential point, that the discretion left to the executive organs wielding coercive power should be reduced as much as possible, is clear enough."); see also HORWITZ, *supra* note 105, at 225-30.

was fundamentally incompatible with administrative discretion, the very fuel that ran the regulatory state.

This formulation took root in American political and legal thought. Even scholars remaining within the New Deal fold fixated on the seemingly inherent tension between discretion and rule of law, which had not worried them previously. In their optimistic fervor, neither progressives nor legal realists had set forth principled limits to discretionary authority, and this had real consequences.¹¹⁶ For example, progressive reforms justified sterilization of women charged, even if not yet convicted, with prostitution or public immorality.¹¹⁷ In the postwar aftermath of fascism and Nazism, pro-welfare statists found themselves on the defensive, in search of a theory that might legitimize administrative governance under the rule of law, a middle road between the free fall of discretion and the bulwark of legalism. “Legal-process” scholars – many of them at Harvard Law School, a training ground for New Deal bureaucrats – fashioned a workable solution: provide guidelines for administrative decision makers that would make their exercise of discretion “lawlike and legitimate.”¹¹⁸

Notwithstanding the efforts of process theory, the Oxford legal philosopher H.L.A. Hart observed that “[t]hrough English Eyes,” American jurisprudence

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116. Letter from Jerome Hall to Hans Zeisel, *supra* note 4 (“I think if you talk to Ed Levi or any other person who lived through the jurisprudence of the 30’s he would agree with me that they were skeptical of rules of law. Of course there was no school . . .”); see BERNSTEIN, *supra* note 105, at 40 (“Leading legal Progressives were hostile or indifferent to many of the priorities of modern liberals, especially regarding what came to be known as civil liberties and civil rights.”); *id.* at 42 (“This opposition to constitutional protection of natural rights and support for judicial deference to legislation never became a full-fledged intellectual movement . . .”); Shaw, *supra* note 35, at 709; see also ERNST, *supra* note 40, at 9-10, 19-20 (discussing Felix Frankfurter’s understanding of the external and internal checks on administrative action); *id.* at 32-33, 36, 71 (discussing Charles Evans Hughes and his transformation of Dicey’s “rule of law” into “rule of lawyers” to legitimate the administrative state); Jeremy K. Kessler, *The Administrative Origins of Modern Civil Liberties Law*, 114 COLUM. L. REV. 1083, 1083-84 (2014) (arguing that federal War Department lawyers embraced civil libertarianism as a tool of state-building).
117. WILLRICH, *supra* note 48, at 242, 263; see also THOMAS C. LEONARD, *ILLIBERAL REFORMERS: RACE, EUGENICS & AMERICAN ECONOMICS IN THE PROGRESSIVE ERA 109-28* (2016) (discussing the eugenics movement and its intersections with racism).
118. Shaw, *supra* note 35, at 677 (quoting William N. Eskridge, Jr. & Philip P. Frickey, Commentary, *The Making of The Legal Process*, 107 HARV. L. REV. 2031, 2048 (1994)); see also Michael Willrich, *Criminal Justice in the United States*, in 3 CAMBRIDGE HISTORY OF LAW IN AMERICA 195, 213 (Michael Grossberg & Christopher Tomlins eds., 2008) (contextualizing the Model Penal Code project, undertaken by the legal-process scholar Herbert Wechsler, within the “Cold War context” when “it seemed more important than ever to ensure that American criminal justice rested on time-honored legal principles, rather than political fiat or administrative discretion”).

still “oscillated between two extremes,” the “nightmare” of unconstrained discretion and the “noble dream” of complete legal determinacy.¹¹⁹ Hart had personally witnessed the difficulty Americans had with thinking outside of this dualism. In 1956, he visited Harvard Law School at the invitation of the legal-process theorists.¹²⁰ Hart had their concerns in mind when he presented a paper titled *Discretion*, which argued that it was a misconception to view discretion and rule of law in opposition – that, in fact, indeterminacy was a natural part of life and, accordingly, discretion was an essential part of law itself.¹²¹ Later, he expressed frustration that his ideas seemed “repellent” to his Harvard audience.¹²²

Within this larger discourse about the legitimacy of the administrative state, Hall maintained that the “rule of law on the most important level of all” was the “police aspect of rule of law.”¹²³ The emphasis on this *most important* level belied a self-justification for the topic of his lectures, but it also hinted at a gap in legal-process theory. Public-law scholars focused on judges and bureaucrats; the police never entered their discussions. A seven-page letter from Hall to Lon Fuller in 1948, outlining the reasons why Harvard Law School ought not to reduce the hours devoted to criminal law in the first-year curriculum, suggests some anxiety on Hall’s part about the status of his field in legal academia. Hall ended by remarking:

I hope nothing said above will be provocative in the wrong direction. If criminal law is on the defensive, it is only natural that those who regard it as the most valuable of all the courses, should be tempted to use occasional adjectives or to make some comparisons and raise challenges in order to place the question in a proper light.¹²⁴

119. H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 971-74, 978-80 (1977); see also NICOLA LACEY, *A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM* 328-64 (2006) (detailing Hart’s publication of *The Nightmare and the Noble Dream* as a response to one of his critics); Shaw, *supra* note 35, at 725 (discussing Hart’s “charting [of] a middle road between the Nightmare and the Noble Dream”).

120. Shaw, *supra* note 35, at 666-69.

121. H.L.A. Hart, *Discretion*, 127 HARV. L. REV. 652, 660-61 (2013); see also Shaw, *supra* note 35, at 726 (“As Hart saw it, discretion is deeply implicit in the concept of the rule of law.”).

122. Shaw, *supra* note 35, at 711 (quoting Hart).

123. Hall, *supra* note 2, at 144.

124. Letter from Jerome Hall, Professor, Univ. of Ind. Sch. of Law, to Lon L. Fuller, Professor, Harv. Law Sch. (Jan. 6, 1948) (on file with Jerome Hall Papers, Box 1, Folder “Correspondence—Lon Fuller”).

Hall repeated this sentiment in his first lecture, when he pointed out that “the functions of police are permanent universal aspects of social organization” and, if not checked, could also serve as “the *chief* physical instrument of political domination.”¹²⁵ Although Hall now seems prescient in calling attention to the rule-of-law parameters of policing, his warning reflected distinctly postwar concerns that the police could serve as handmaidens of dictatorial power.

Evoking Hayek, Hall stated that the “antithesis of the rule of law” was “domination by sheer physical force unlimited by law.”¹²⁶ More simply, rule of law required legal limitations on police action, and like Hayek, Hall did not leave any room for discretion. In fact, he used the word “discretion” only once during his lectures—when speaking of “the unlimited discretion of even benevolent rulers.”¹²⁷ Hall knew what discretion was and abhorred it in the context of the administrative state. But he did not think to use the word in the context of policing, for he did not believe that democratic police exercised discretion. Rather, they were mere law enforcers.

Indicative of Hall’s thinking is his 1948 letter to Fuller.¹²⁸ Fourth on the list of reasons in favor of keeping the four-hour criminal law course was “the prominence given the ‘rule of law’” in criminal law, in contrast to “private law courses [that] tend to magnify discretion as does administrative law and other public law.”¹²⁹ Hall went on to explain that he did “not know where else in the curriculum it is possible to learn as readily and as fully the enduring significance of the ‘rule of law,’” which in criminal law was “manifested every day in countless cases.”¹³⁰ Hall’s understanding of the rule of law as the absence of discretion corroborated Hart’s observation that American legal minds seemed to reside in extreme positions. But at least their conceptual delineations were clear.

Paradoxically, Hall’s exposition became less clear with “specific concrete applications.”¹³¹ In his first lecture, he demonstrated the rule of law “in action” by

125. Hall, *supra* note 2, at 139, 140 (emphasis added); *see also id.* at 176-77 (“That is why the theme of this paper, though focused on the relatively narrow question of police functions, may have general significance for the paramount problem of our times.”); *cf.* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 222 (1969) (“In our entire system of law and government, the greatest concentrations of unnecessary discretionary power over individual parties are not in the regulatory agencies but are in police and prosecutors.”).

126. Hall, *supra* note 2, at 143.

127. *Id.*

128. Letter from Jerome Hall to Lon L. Fuller, *supra* note 124.

129. *Id.*

130. *Id.*

131. Hall, *supra* note 2, at 144.

describing how an officer would execute the felony exception to the warrant requirement under the common law of arrests: “The rule concretely exhibited in the arrest of John Doe by a police officer is: If I reasonably think X’s home was entered by someone intending to commit a crime there, and I reasonably think John Doe did that, it is my legal duty to arrest him.”¹³² Implicit in this example was reliance on the officer’s reasoned judgment—the officer must *reasonably think* John Doe entered the home with the intention to commit a crime. The rule depended on the arresting officer determining for himself, on the spot, whether circumstances justified a warrantless arrest.

Absent from Hall’s explanation was judgment or discretion, the existence of which would have contravened the rule of law as he conceived it. Notwithstanding his expertise on the subject, Hall seemed unaware that the standard of reasonableness for warrantless arrests actually required a great deal of police discretion.¹³³ He understood warrantless arrests to conform with the rule of law because reasonableness provided a limiting principle; a police officer must “reasonably think” before acting. But in fact, the felony rule expanded the scope of police action by creating an exception to the default rule requiring officers to get a warrant from a judicial officer before making an arrest—a requirement that served to check police discretion. In the larger scheme, the exception was a discretion-enhancing measure, not a discretion-limiting one. Put simply, warrantless arrests transferred part of the judicial function of determining reasonable or probable cause, at least in the first instance, to individual officers.¹³⁴ Of course, courts maintained that the probable-cause inquiry was ultimately a judicial question,¹³⁵ but just as reasonableness functioned as a deferential safeguard against states’ legislative authority, it has also similarly accommodated police authority.¹³⁶ In many routine cases throughout the country, courts ceded much of

^{132.} *Id.*

^{133.} See THOMAS F. ADAMS, POLICE PATROL: TACTICS AND TECHNIQUES 26-27 (1971) (explaining that the word “reasonable” in criminal codes “provides for broad use of discretion by its law enforcement officers”); cf. Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 MISS. L.J. 1133, 1134 (2012) (“[R]easonableness standards permeate the law regarding the Fourth Amendment.”).

^{134.} See, e.g., *People v. Case*, 190 N.W. 289, 293 (Mich. 1922) (Wiest, J., dissenting) (criticizing the automobile exception by asking, “Where does the Constitution depute to police officers the office of the magistrate in determining probable cause?”).

^{135.} See, e.g., *Brinegar v. State*, 262 P.2d 464, 479 (Okla. Crim. App. 1953).

^{136.} See, e.g., Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1505-08 (2016); Lee, *supra* note 133, at 1147 (“[R]easonableness review as currently applied in the Fourth Amendment context is highly deferential, resulting in decisions that usually uphold the challenged governmental action.”); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 199-200, 210-11 (1993)

their judicial responsibility by deferring to the police's justifications. In countless scenarios that unfolded daily between individuals and police officers, with only the nebulous reasonableness standard to govern these encounters, rule of law appeared to have deviated far from its first principles. Hall's illustration of the rule of law in action contradicted the basic premise of the rule of law in theory.

Further reflecting the contradictions in the "police aspect of rule of law," Hall referred to the warrant exception as both a rule and a standard, eliding any differences between the two.¹³⁷ This conflation is worth noting. In *The Road to Serfdom*, Hayek maintained that standards, which "qualify legal provisions increasingly by reference to what is 'fair' or 'reasonable,'" undermined rule of law and ultimately led to totalitarianism.¹³⁸ This was a direct challenge to latter-day progressives such as Harlan Fiske Stone who articulated rights in the language of standards. In 1936, Stone wrote that the "great constitutional guarantees . . . of personal liberty and of property . . . are but statements of standards," and that the "chief and ultimate standard which they exact is reasonableness of official action."¹³⁹ Hall's proposition that "[r]ules of law are certain *standards* and commands" evoked this progressive vision of rights.¹⁴⁰ Indeed, *Standards* was the title of his first lecture, which laid out his theory of democratic policing. This is puzzling given that by the 1950s, he had left behind his early progressive optimism and embraced a more legalistic outlook.¹⁴¹ Hall was undoubtedly aware of rule-of-law criticisms of standards,¹⁴² but he failed to appreciate any differences between rules and standards when it came to policing, instead emphasizing how the standard of reasonableness was crucial to the rule of law. This blind spot allowed him to invoke a less-than-traditional view of rules and standards to justify the discretionary powers of the most authoritarian figure in American society.

(likening the Fourth Amendment's reasonableness standard to the rational basis standard, both of which are deferential to state action); *see also infra* note 208.

137. Hall, *supra* note 2, at 144.

138. HAYEK, *supra* note 115, at 116. Similarly, the early twentieth-century administrative law expert Ernst Freund proposed the model of the German *Rechtsstaat*, "a state bound by fixed and certain rules that demarcate spheres of legitimate state action and of individual liberty." ERNST, *supra* note 40, at 9.

139. Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 23 (1936).

140. Hall, *supra* note 2, at 144 (emphasis added).

141. GREEN, *supra* note 45, at 151-57, 189-95.

142. Early twentieth-century debates about freedom of contract were often abstracted into disputes about rules versus standards. *See* Moshe Cohen-Eliya & Iddo Porat, *American Balancing and German Proportionality: The Historical Origins*, 8 I•CON 263, 280-82 (2010). On freedom of contract, *see*, for example, HORWITZ, *supra* note 105, at 131; WILLIAM M. WIECEK, *THE LOST WORLD OF CLASSICAL LEGAL THOUGHT* 181 (1998); and Stone, *supra* note 139, at 23.

Certainly, Hall did not believe that law enforcers were automatons, and he was aware that some degree of rational thinking on the part of the police was necessary. But for him, the reasoning involved in police work did not involve figuring out what to do in the gaps of existing laws; rather, it was limited to determining which laws governed a particular situation. Hall's discussion in his second lecture of how the police should handle riots reflected this understanding. "The first insight into *which legal controls to apply* in such serious situations," he explained, "is the perception that there are different kinds of mob disorder."¹⁴³ A good policeman, "familiar with *his legal powers and duties*, might often nip rioting in the bud" by discerning which laws were most appropriate for the circumstances at hand.¹⁴⁴ The correct response could simply be demanding that the mob disperse, pursuant to the Riot Act. It might be summoning citizens to assist with quelling a riot, as the common law in many states provided. In the "Detroit type," a "more serious kind of mob disorder," an officer who did nothing or who arrested one group of rioters while closing his eyes to the aggressions of another group violated the criminal law "and should be prosecuted as a criminal."¹⁴⁵

Hall did recognize that "the police must be selective in making arrests since it is physically impossible to arrest all offenders."¹⁴⁶ Yet even at this point—the closest he came to recognizing the discretion inherent in police work—he stopped short of identifying it as discretion and instead concluded that the "situation therefore demands realistic decisions guided by democratic goals and knowledge of the facts."¹⁴⁷ This democratic guidance also appeared in a recurring tautology: the "policy to guide the police of a democratic society," Hall asserted, was "to maintain order in ways that preserve and advance democratic values."¹⁴⁸ Logical circles provided a way to bypass discretion, enabling Hall to

143. Hall, *supra* note 2, at 147 (emphasis added).

144. *Id.* (emphasis added).

145. *Id.* at 148. Hall was likely referring to the Detroit race riot of 1943. See, e.g., DOMINIC J. CAPECI, JR. & MARTHA WILKERSON, *LAYERED VIOLENCE: THE DETROIT RIOTERS OF 1943* (1991); HERBERT SHAPIRO, *WHITE VIOLENCE AND BLACK RESPONSE: FROM RECONSTRUCTION TO MONTGOMERY* 310-30 (1988).

146. Hall, *supra* note 2, at 149.

147. *Id.* at 149-50; see also HALL, *supra* note 59, at 101-08 (arguing that rules of law incorporate facts and, thus, law and facts are inseparable); cf. ALBERT R. BEISEL, JR., *CONTROL OVER ILLEGAL ENFORCEMENT OF THE CRIMINAL LAW: ROLE OF THE SUPREME COURT* 3 (1955) ("Under American law, both federal and state, our police do not have full and complete discretion as to the manner, methods, procedures and practices which they can employ in investigating or in apprehending and detaining persons suspected of having committed a crime.").

148. Hall, *supra* note 2, at 146; see also *id.* at 162 ("[T]he paramount police function is to maintain order in ways that preserve and enlarge democratic values.").

describe the policeman not so much as a discretion-exercising official, but as a law enforcer who now and then required democratic inspiration to determine how best to implement the laws' commands.¹⁴⁹

Not only did Hall fail to perceive that dispersing riots or even preventing one from forming required more than guidance from democratic ideals, but he also failed to grasp the discretion inherent in crime prevention. There were "available controls and legal measures which can be taken before crimes are committed or before serious aggressions occur," Hall noted.¹⁵⁰ He pointed out that police were legally authorized to arrest for solicitation, incitement, and conspiracy to commit a breach of the peace—inchoate behaviors that were criminalized in order "to check criminal conduct in its incipient stages."¹⁵¹ Another "control of incipient symptoms of serious disorder" was the peace bond.¹⁵² In several states that allowed the procedure, a court could require an individual who posed a threat to a person or property to post a bond. Failure to do so resulted in imprisonment. Hall endorsed peace bonds as a tool of "preventive justice" since the "statutes [were] broad enough to include the issuance of orders for recognizance against almost any threatened breach of the peace."¹⁵³ In other words, Hall appreciated peace bonds for offering legal provisions for proactive policing. He did not mention, however, that this sounded functionally like the "[p]reventive, anticipatory detention" characteristic of dictatorial police, as he had described elsewhere in his lecture.¹⁵⁴

Hall knew that police officers too often carried out their duties according to their whim rather than pursuant to legal norms. He was troubled by the "startling fact that there is hardly a single physical brutality inflicted by the Gestapo and the NKVD which American policemen have not at some time perpetrated."¹⁵⁵ But for Hall, acting lawlessly was not the same as using discretion—or rather, indiscretion—in the way that legal-process theorists understood what judges and administrative officials were doing when managing the regulatory state. Lawless behavior occurred when officers defied existing laws; in contrast,

149. See Frank J. Remington, Book Review, 36 U. CHI. L. REV. 884, 891 (1969) (reviewing DAVIS, *supra* note 125) ("For some agencies, police, for example, it has traditionally been assumed that they merely 'enforce the law' and thus did not exercise discretionary power.").

150. Hall, *supra* note 2, at 150.

151. *Id.* at 151.

152. *Id.* at 150.

153. *Id.* at 151.

154. *Id.* at 141.

155. *Id.* at 140.

discretion came into play when there were no laws to dictate outcomes in particular circumstances. This was the rule-of-law problem of administration: an increasingly complex social world resulted in even more legal indeterminacy. Hall did not view the police as officials who exercised discretion to fill gaps in legal rules. In his mind, the police simply enforced laws.

Hall's inclination to view what was essentially police discretion as either lawlessness or democratically inspired lawfulness was typical of the period. There was a creeping sense, not yet fully formed, among judges and lawyers that legal indeterminacy existed in the world of policing as well. In 1953, the American Bar Foundation, with funds from the Ford Foundation, undertook a study of the entire criminal justice system, "from the time a crime is committed until the convict is released from prison."¹⁵⁶ Justice Jackson, the first committee chairman of the project, commented at its inception that even after decades as a rural lawyer, federal prosecutor, and Supreme Court Justice, he still had "the impression that no one really knows just how our criminal system is working and what its defects really are."¹⁵⁷ No one had conclusive answers for why crime was increasing and why law enforcement proved ineffective.¹⁵⁸ In fact, what legal reformers found particularly problematic was the police's decision "not to report crimes," which meant that they were not fulfilling their role as law enforcers.¹⁵⁹

An important component of the study thus included an investigation of everyday police work that "encompass[ed] not only the acts of the officer but also the situation in which he acts."¹⁶⁰ To that end, "professional field representatives" observed and tabulated every moment of an officer's working day. These meticulously gathered reports, legal reformers hoped, would provide a larger picture of the "deficiencies in a system of criminal justice."¹⁶¹ Each field report compiled over months and years added up to something of greater importance.

156. AM. BAR FOUND., SURVEY OF THE ADMINISTRATION OF CRIMINAL JUSTICE IN THE UNITED STATES: HISTORY AND STATUS REPORT 6 (July 1959) (on file with the University of Wisconsin Law Library).

157. *Id.* at 9.

158. *Id.* at 6.

159. Albert J. Harno, *The American Law Institute Proceedings, May 20, 1954, I. Crime and Punishment*, 45 NW. J. CRIM. L. CRIMINOLOGY & POLICE SCI. 520, 523 (1954).

160. O.W. Wilson, *Selected Police Practices in the Administration of Criminal Justice*, in 7 SURVEY OF THE ADMINISTRATION OF CRIMINAL JUSTICE IN THE UNITED STATES: HISTORY AND STATUS REPORT 2 (July 1959) (on file with the University of Wisconsin Law Library).

161. ARTHUR H. SHERRY, AM. BAR FOUND., THE ADMINISTRATION OF CRIMINAL JUSTICE IN THE UNITED STATES: PLAN FOR SURVEY 9 (1955).

Justice Jackson envisioned them as “building a cathedral to testify to our faith in the rule of law.”¹⁶²

By the late 1950s, as researchers began to pore over the field reports, they were stunned to realize that the police exercised a great deal of unregulated discretion. Articles and books came out of this watershed moment with titles such as *Police Discretion Not to Invoke the Criminal Process* and *Arrest: The Decision to Take a Suspect into Custody*.¹⁶³ In 1969, administrative law scholar Kenneth Culp Davis would declare, “The police are among the most important policy-makers of our entire society. And they make far more discretionary determinations in individual cases than any other class of administrators; I know of no close second.”¹⁶⁴ Herman Goldstein, who began his career as a field reporter in the police study,¹⁶⁵ would come to claim, in his seminal 1977 book *Policing a Free Society*, that “it was only approximately fifteen years ago that the existence of discretion in police work was first openly recognized.”¹⁶⁶ By “discovering” discretion sometime around 1960, scholars came to acknowledge that preestablished rules and laws could not possibly dictate the entire domain of policing as the rule of law required.¹⁶⁷ Police officers, like judges and administrators, had the power of choice. Tellingly, once reformers discovered police discretion, they sought to apply the same methods that structured the discretion of every other regulatory agency: those of administrative rulemaking.¹⁶⁸

162. Harno, *supra* note 159, at 523.

163. WAYNE R. LAFAYE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* (1965); Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 *YALE L.J.* 543 (1960); *see also* Remington, *supra* note 149, at 889 (“[I]t has only been recently that there has been any study of the exercise of discretion by police.”). Frank J. Remington believed that the inevitability of discretionary authority appeared difficult to accept even for the “discretionary justice” advocate Kenneth Culp Davis. *See* Remington, *supra* note 149, at 898-99.

164. DAVIS, *supra* note 125, at 222.

165. *See How I Got Here: Herman Goldstein*, 33 *GARGOYLE-ALUMNI MAG. WIS. L. SCH.* 16, 17-18 (2008).

166. HERMAN GOLDSTEIN, *POLICING A FREE SOCIETY* 93 (1977); *id.* at 12 (“Until recently the broad discretion police actually exercise in carrying out their responsibilities was unrecognized.”); *see also* CHRISTOPHER LOWEN AGEE, *THE STREETS OF SAN FRANCISCO: POLICING AND THE CREATION OF A COSMOPOLITAN LIBERAL POLITICS, 1950-1972*, at 37-38 (2014).

167. *See* JONATHON A. COOPER, *TWENTIETH-CENTURY INFLUENCES ON TWENTY-FIRST-CENTURY POLICING: CONTINUED LESSONS OF POLICE REFORM* 77 (2015); *see also* ADAMS, *supra* note 133, at 25-26; RISA GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S*, at 192 (2016) (discussing the “‘discovery’ of police discretion”); PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, *TASK FORCE REPORT: THE POLICE* (1967) (reporting variance in police practices throughout the United States).

168. *See, e.g.*, DAVIS, *supra* note 125, at 222-23; GOLDSTEIN, *supra* note 166, at 115.

Back in 1952, Hall did not perceive, or at least did not explicitly acknowledge, that officers exercised discretion and that the law of arrests actually required it. In his illustration of the rule of law in action, Hall understood the police making warrantless arrests as following a legal command rather than using discretion in determining whether a warrantless arrest in a given situation would be reasonable.¹⁶⁹ To account for the discretion that he could not name, Hall relied on metaphor. It was here that he wrote of the law-abiding officer as becoming “the living embodiment of democratic law” and “the concrete distillation of the entire mighty, historic corpus juris, representing all of it, including the constitution itself.”¹⁷⁰ To show how the felony rule of warrantless arrests constrained police action, Hall ended up with the discretion-wielding police officer as the personification of the rule of law. Figures of speech enabled a skeptic of the modern administrative state to wield the rule-of-law critique against bureaucratic management and, at the same time, understand police discretion to be consistent with the rule of law.

III. DUE PROCESS

Another way to align police discretion with the rule of law was to modify the concept of rule of law. Without explanation (again), Hall’s definition of democratic policing changed (again). The rule of law as the absence of discretion became the rule of law as due process—a shift from substance to procedure that occurred within a few paragraphs in the second lecture. One could interpret this conflation of concepts as intentional—that Hall meant, similar to Jeremy Waldron’s more recent exposition, that due process serves to manage state power,

169. This is a curious oversight on Hall’s part. After the Supreme Court established the automobile exception in *Carroll v. United States*, 267 U.S. 132 (1925), legal commentators at the time criticized the opinion for giving “discretionary *carte blanche*” to patrolling officers. Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 136 (2006) (quoting Comment, *Search and Seizure: Constitutional Prohibition Applied to Transportation of Contraband Liquor in Automobiles*, 13 CALIF. L. REV. 351, 352 (1925)). The automobile exception, just like the felony-arrest exception, authorized warrantless car stops and searches if officers have “reasonable or probable cause for believing” that the car has contraband. *Carroll*, 267 U.S. at 155-56. It is difficult to understand why, after about three decades, Hall failed to recognize warrantless searches and seizures as inherently discretionary acts. Perhaps, as this Essay argues, the cultural and political imperative to distinguish American police from discretion-wielding dictatorial police was so powerful as to erase the discretion of arresting officers.

170. Hall, *supra* note 2, at 144-45.

which, in turn, ensures that that power conforms to the rule of law.¹⁷¹ Hall certainly detected a connection between the “procedural” aspect of due process and the “substantive” manifestation of the rule of law. But his articulation of the primary purpose of due process in the police context is different from our current understanding of due process, which emphasizes judicial management of the police’s power. In fact, Hall’s idea of due process had little to do with placing limits on routine, discretionary policing.

According to Hall, due process included “the presumption of innocence, notice and opportunity to prepare, specificity of the indictment, right to counsel, unbiased judge, and change of venue.”¹⁷² It may be puzzling, in the post-Warren Court era, that Hall listed *trial* procedures in a discussion about policing. But he saw the “fair trial” as integral to democratic police under the rule of law. “[S]o long as the police in a democratic society obey the law,” he maintained, “they do not decide that an arrestee is guilty of any crime.”¹⁷³ In other words, due process ensured that the police did not determine individual guilt, a duty that fell strictly within the judicial domain. He granted that the police were the officials who initiated the criminal process with an arrest, but he was firm that any police action had to be followed by “a prompt, fair trial,” which prevented “our police” from turning into “a Praetorian Guard available to some would-be Caesar.”¹⁷⁴ A hearing in court represented the “sharp demarcation of the police job from judicial functions, and the restriction of police to the so-called ministerial work.”¹⁷⁵ This separation of powers was necessary because it was “the dictatorial police who sit as judges, decide cases, and enforce their decisions.” The most important point for Hall was that a free society with the rule of law maintained the separation of judicial and law enforcement functions.¹⁷⁶

171. See Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, 50 *NOMOS* 3, 5 (2011).

172. Hall, *supra* note 2, at 145. This was Hall’s list of essential due process guarantees. At the time of his lectures, jurists, most prominently Justice Frankfurter and Justice Black, were debating the contents of due process. Due process turned out to be a conceptual vessel as malleable as democratic policing itself. Legal minds could and did disagree over which procedures counted as fundamental to due process. See *infra* notes 259-260 and accompanying text; see also *Adamson v. California*, 332 U.S. 46 (1947) (determining whether the Fourteenth Amendment’s Due Process Clause incorporates the Fifth Amendment); MELVIN I. UROFSKY, *FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES* 96-99 (1991) (describing the disagreement between Justices Frankfurter and Black about the requirements of due process in *Adamson*).

173. Hall, *supra* note 2, at 155.

174. *Id.*

175. *Id.*

176. The cultural values of due process, judicial review, and trial-like procedures were imported into the Administrative Procedure Act of 1946 in order to impart democratic legitimacy to

It was precisely this perspective that motivated the American Bar Foundation's police study in the 1950s. Reports of widespread nonenforcement of crimes suggested that individual officers had taken upon themselves the roles of judge and jury when deciding to forgo arrest even though a crime had been committed.¹⁷⁷ This understanding of the limits of policing also informed the ACLU's argument in 1938 that the "most fundamental right" in the United States was "the right to be arrested."¹⁷⁸ In challenging Jersey City police's refusal to arrest strikers, lawyer Arthur Garfield Hays explained that "courts mean nothing, jury trials mean nothing, indictments mean nothing, a writ of habeas corpus means nothing, if the police don't arrest you."¹⁷⁹ When the police decided that laborers were not striking but merely creating a disturbance and, accordingly, put them on buses to New York instead of making arrests, then the police were "acting as judges."¹⁸⁰ To convince the judge of the foundational principle that "[p]olice-men are never judges," Hays submitted rhetorically, "Certainly that is a good Americanism, isn't it?"¹⁸¹ The trial judge hearing the ACLU's application for an injunction showed his hand when he informed the city's counsel that the police were "avoiding a judicial determination" of "the question whether there is a strike."¹⁸² A fundamental right to be arrested certainly sounds foreign today, when the decision *not* to make an arrest—the first entry in a criminal record that has lifelong ramifications—can be seen as the more rights-preserving course of action.¹⁸³ But at midcentury, an arrest was just as important as the trial following it to maintain the "distinctions between the functions of the judge and that of the policeman" that Hall spoke of.¹⁸⁴

administrative discretion. Both process theorists and Hall came from the same legal culture and relied on the same solution to address discretionary authority, albeit in different contexts. See ERNST, *supra* note 40, at 5, 137, 145 ("Americans decided they could avoid Tocqueville's nightmare if administration approximated the structure, procedures, and logic of the judiciary"); Kessler, *supra* note 105.

177. See Harno, *supra* note 159, at 521-23. A similar concern arose when arrests resulted in dismissals, which meant that the defendant was left with an arrest record without having an opportunity to defend against the charge. See GOLUBOFF, *supra* note 167, at 193.

178. ACLU, Civil Rights Under Mayor Hague 18 (on file with author). For an account, see, for example, LAURA WEINRIB, THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE 226-27 (2016).

179. ACLU, *supra* note 178, at 18.

180. *Id.*

181. *Id.*

182. *Id.* at 16.

183. See JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD (2015) (exploring the direct and collateral consequences of a criminal record over one's lifetime).

184. Hall, *supra* note 2, at 155.

Significantly, for Hall, the separation of functions seemed paramount over any substantive limits on police action.¹⁸⁵ To be sure, Hall believed that the police themselves had to obey all laws. He recognized that police lawlessness was “a very serious matter in a democratic society,” and he was concerned that only a handful of lawsuits were filed against the police each year, compared to the several million cases that could be brought.¹⁸⁶ This suggested that damage claims—at the time, the only viable remedy for violations of individual rights¹⁸⁷—hardly deterred the police from violating the law. Hall also acknowledged that minorities and the poor were typically the ones who suffered from lawless policing. As disconcerting as these trends were, Hall nonetheless asserted that “[m]ore serious than the millions of illegal arrests that occur annually” were “illegal imprisonments and releases *without judicial determination*.”¹⁸⁸ In other words, the main problem with unlawful arrests was not recurring police lawlessness, not the lack of adequate remedies that could encourage lawfulness, and not even that most of the people who were unlawfully arrested were minorities or poor or both. The greatest problem, according to Hall, was the fact that the police were the ones determining the final outcomes of their actions.

Hall’s proposals to address police lawlessness further indicated that he had little issue with police authority as then exercised. Illegal arrests and detentions were not “vicious or brutal,” he claimed, but were “well motivated and [served] a social need,” namely, dealing with “vagrants, drunkards, and derelicts.”¹⁸⁹ Hall also expressed worry that efforts to make an officer “pay from his personal estate for acts done in the conscientious discharge of his duties” would only make him “feel aggrieved” and injure police morale.¹⁹⁰ Because “the present police practice, crude as it is, can hardly be abandoned” given the social value of preventing crime and imposing order, Hall suggested that potential lawsuits “can be avoided

185. The importance of separating the prosecutorial and adjudicative functions had purchase beyond the police context. For instance, in 1941, the Attorney General’s Committee on Administrative Procedure recommended that “[a]s a general policy, . . . a separation of functions within each agency should be provided.” FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE 208 (1941). The Administrative Procedure Act ultimately included a separation-of-functions provision. See 5 U.S.C. § 554(d) (2018).

186. Hall, *supra* note 2, at 154.

187. See, e.g., Caleb Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493, 493-508, 513 (1955); Markowitz & Summerfield, *supra* note 36, at 1206-12.

188. Hall, *supra* note 2, at 154 (emphasis added).

189. *Id.* at 156-57.

190. *Id.* at 156.

by requiring waivers to be signed on release from prison.”¹⁹¹ Hall did believe that a better option existed than having individuals sign away their legal rights. Having a different agency, separate from the police department, deal with drunks and derelicts would “drastically” reduce the number of illegal arrests and detentions.¹⁹² That way, the task of providing prompt judicial hearings “would begin to assume manageable proportions.”¹⁹³

Because Hall appreciated what he called “preventive justice,” or what we would recognize today as discretionary policing, his preferred solution to the problem of police unlawfulness was legal reform to “enlarg[e] the right of arrest,” which would “eliminate vast numbers of presently illegal arrests and detentions.”¹⁹⁴ As Hall explained, in their efforts to investigate suspicious characters or circumstances, the police often questioned individuals and frisked them. But these actions involved a short detention, technically an arrest under the common law, which required the police to have probable cause rather than mere suspicion. By definition, then, proactive policing violated the common law of arrests. Even more problematically, according to Hall, the “archaic law of arrest encourages policemen to use wide powers, not provided for by law – so that instead of being police officers they must make decisions and discharge functions that are legislative, judicial, and administrative.”¹⁹⁵ This occurred when, to get around the “archaic law,” police officers had to arrest suspicious persons to ask a few questions and then release them upon confirming their innocence. To correct this situation, Hall endorsed the adoption of the 1942 Uniform Arrest Act, which authorized police practices that violated the common law.¹⁹⁶ It did so by defining stops, frisks, and police questioning *not* as arrests, and then lowering the standard that the police had to meet to justify those actions, from probable cause to reasonable suspicion.¹⁹⁷ Legalizing presently illegal police practices not only solved the rule-of-law problem of police lawlessness, but it also eliminated the due process problem of limited judicial resources in disposing of false positive cases inherent in proactive policing. In sum, Hall’s understanding of policing

191. *Id.* at 156–57. On the common practice of requiring release forms, see Gartner, *supra* note 80, at 12, which notes: “The so-called ‘release form,’ under which the police release from detention certain detained persons on condition they sign a waiver of their rights to civilly sue the police, is most frequently used for persons taken in as drunk. It is applied, too, in other cases.”

192. Hall, *supra* note 2, at 157.

193. *Id.*

194. *Id.* at 151, 158.

195. *Id.* at 159.

196. *Id.* at 157–60; *cf.* Packer, *supra* note 5, at 8 (noting the general perception that the Uniform Arrest Act amounted to a “substantial expansion of police power”).

197. Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 317–27, 331–34 (1942).

constrained by the rule of law entailed a commitment to judicial procedures that depended on an expansion of the scope of lawful police action.

IV. THE AMERICAN WAY

While Hall struggled to apply his theory in the real world of discretionary policing, judges confronted the tension between the rule of law and the mandate of security in actual cases. Like Hall, they resolved that tension by justifying the police's discretionary actions within their understanding of due process and the rule of law. A typical example is *Brinegar v. State*, a case that began in 1952 when two Oklahoma State highway patrolmen pulled over Virgil Brinegar for passing in a no-passing zone. The facts strongly suggested, however, that they had stopped him because he was a known "habitual whiskey runner" in a state that had remained steadfastly dry.¹⁹⁸ During the stop for the alleged traffic violation, the officers searched the glove compartment and found an opened half-pint bottle of liquor. They also wanted to search the trunk, but Brinegar claimed not to have the key with him. So the officers arrested him and put him in jail. The following morning, without getting a warrant, they impounded the car and pried the trunk open, which, as they expected, contained liquor. By the time Brinegar's case reached Oklahoma's highest criminal appeals court, the issue centered on whether the police could search the trunk of a car as part of an arrest for a minor traffic violation that had nothing to do with liquor and even may have been, the court acknowledged, "a subterfuge for a search."¹⁹⁹ The judges found themselves in a predicament. Clearly, the officers did not act within legal constraints, but their suspicions were right that Brinegar was rum running. How could they affirm the guilty man's conviction and uphold the rule of law?

The court's legal analysis began by affirming "the principle of the strict upholding" of the Fourth Amendment, which was "necessary to the preservation of the American Way of Life."²⁰⁰ At midcentury, "the American Way of Life" referred to a distinct national culture encompassing political, social, and economic values held to be the opposite of unfree, nondemocratic states. Historians have examined some of its key tenets, such as mass consumption and free enterprise, which many believed provided the basis for individual freedom.²⁰¹ In referring to the American Way in a Fourth Amendment case, the Oklahoma court included

198. *Brinegar v. State*, 262 P.2d 464, 472 (Okla. Crim. App. 1953).

199. *Id.*

200. *Id.* at 478.

201. See, e.g., WALL, *supra* note 37; Jackson Lears, *A Matter of Taste: Corporate Cultural Hegemony in a Mass-Consumption Society*, in *RECASTING AMERICA: CULTURE AND POLITICS IN THE AGE OF COLD WAR* 38, 38-57 (Lary May ed., 1989).

police adherence to the law as an essential component of personal liberty. The “strict upholding” of the constitutional provision that most directly regulated policing would ensure that law enforcement officers used their authority within the bounds of law.

Moving on from the general rule-of-law principle, the court then attempted to discern the most applicable precedent from scores of cases, both state and federal. None had an identical set of facts, but all involved a police stop and search of a car. “The lesson to be learned from the cases,” the court discovered, boiled down to one question: “*Was it reasonable?*”²⁰² The reasonableness standard intrinsic to Hall’s illustration of the warrant exception was, in fact, ingrained in Fourth Amendment jurisprudence. Like Hall’s rule-of-law flowchart, the Oklahoma court began with a constitutional principle, then proceeded to judicial decisions, and ended with the standard of reasonableness. Unlike Hall, the court actually had to apply the standard to a specific case. “The great problem,” the court noted, “has always been in the application of the rule,” which revealed even more tensions in the concept of rule of law.²⁰³

Despite their lack of sympathy for Brinegar’s “habit of violating with impunity that very constitution for which he now expresses so great concern,” the judges believed that a stop for a minor traffic violation could not justify an unrelated search of the trunk.²⁰⁴ Nonetheless, the court found a way to conclude that in this particular instance, such a search had been reasonable: the “accused’s downfall here was having the liquor in a place convenient for rapid procurement and use of firearms or other weapons.”²⁰⁵ Because officers were entitled to search a person and his immediate surroundings for weapons as a safety precaution, the glove compartment, which was within Brinegar’s reaching distance, was searchable. The whiskey found there “opened the gate for a quest otherwise barred.”²⁰⁶

The rationalization of the officers’ actions demonstrated the usefulness of the reasonableness standard. The *Brinegar* opinion recited Fourth Amendment boilerplate that “each case is to be decided on its own facts and circumstances” and, therefore, “[t]here is no formula for the determination of reasonableness.”²⁰⁷ These incantations presented an astounding articulation of the legal standard for policing under the rule of law. Having “no formula” meant that the Fourth

202. *Brinegar*, 262 P.2d at 478 (emphasis added).

203. *Id.* at 479.

204. *Id.* at 481.

205. *Id.*

206. *Id.* at 480.

207. *Id.* at 479 (quoting *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931)).

Amendment did not advance preestablished, general rules to guide police officers in performing their duties. Instead, whether a police officer acted reasonably, and thus lawfully, was a question that judges would determine after the fact on a case-by-case basis. The reasonableness standard essentially allowed courts to decide in each case whether to let the police do their job, even when they appeared to violate constitutional norms.²⁰⁸ Though mindful of the rule-of-law issues at stake, the court in *Brinegar*'s case concluded that the police, solely because of the suspect's reputation for hauling liquor, could stop a driver for a fabricated traffic violation in order to search the trunk for contraband. The *Brinegar* court believed it had given the defendant due process of law. But its "strict upholding" of the Fourth Amendment did not manifest an antidiscretion norm; it served as a discretion-justifying principle.

Abel v. United States raised far higher stakes for both American security and American criminal procedure. The case began in 1953 when a newsboy found a hollowed-out nickel containing a microphotograph of a coded message.²⁰⁹ After the defection of a dissolute Russian intelligence officer who sensed his usefulness to Moscow coming to an end, FBI agents learned the identity of the head of the Soviet spy network in North America, Rudolf Ivanovich Abel.²¹⁰ The FBI then recruited the Immigration and Naturalization Service to obtain an administrative arrest warrant for the purpose of commencing deportation proceedings against Abel. With that warrant, officers from both agencies stormed Abel's hotel room and carted off all of its contents—"a classic example of the kind of thing the Fourth Amendment to the Constitution was designed to end in America," his lawyer James Donovan argued.²¹¹ Donovan charged that the administrative warrant served as a "subterfuge" to allow the FBI to gather evidence for the espionage charge without getting a regular warrant subject to Fourth Amendment requirements.²¹² Prosecuting Abel for crimes, including a crime punishable by

208. On how the reasonableness standard in the stop-and-frisk context has enhanced police discretion, see, for example, David A. Harris, *Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality Under Terry v. Ohio*, 72 ST. JOHN'S L. REV. 975, 976 (1998); and Daniel Richman, *The Process of Terry-Lawmaking*, 72 ST. JOHN'S L. REV. 1043, 1044-46 (1998).

209. JAMES B. DONOVAN, *STRANGERS ON A BRIDGE* (Scribner 2015) (1964); see also Jeffrey Kahn, *The Case of Colonel Abel*, 5 J. NAT'L SECURITY L. & POL'Y 263, 282 (2011); Garrett Epps, *The Real Court Case Behind Bridge of Spies*, ATLANTIC (Nov. 17, 2015), <https://www.theatlantic.com/politics/archive/2015/11/abel-bridge-of-spies/416325> [<https://perma.cc/E995-VAYV>].

210. DONOVAN, *supra* note 209, at 2.

211. *Id.* at 56.

212. *Id.* at 330; see also Brief for Petitioner at 11, *Abel v. United States*, 362 U.S. 217 (1960) (No. 2).

death, based on spy paraphernalia found in the room would “pay lip service to due process of law,” Donovan maintained.²¹³

Notwithstanding Donovan’s conclusion that the FBI had “unquestionably violated the United States Constitution” and despite his formidable legal skills—he was a Harvard-educated trial lawyer, a Nuremberg prosecutor, and once the General Counsel of the Office of Strategic Services—Donovan lost at every step.²¹⁴ He raised the Fourth Amendment issue in two federal district courts and the Court of Appeals for the Second Circuit. The Supreme Court was his last resort. In 1959, Donovan declared before the Justices that “the only place that criminal procedures have been based on such a process have been in the police states of Nazi Germany [and] Soviet Russia.”²¹⁵ For the final time, a court of law rejected Donovan’s plea on behalf of Colonel Abel. The majority found no problems with the cooperation of two separate agencies so long as there was no evidence of bad faith, and they did not find any. After all, they pointed out, Donovan conceded that Abel had been in the country illegally.

After the Supreme Court handed down its decision, Donovan immediately issued a statement declaring that the “very fact that Abel has been receiving due process of law in the United States is far more significant . . . than the particular outcome of the case.”²¹⁶ He believed simultaneously that Abel’s Fourth Amendment rights had been violated *and* that Abel had received the full benefits of due process. For Donovan, due process did not necessarily mandate the right legal outcome. In fact, the understanding that due process was not intended primarily to achieve just results did not appear to be an exceptional position. When, in 1955, McGeorge Bundy, Dean of the Faculty of Arts and Sciences at Harvard, offered *A Lay View of Due Process*, he conceived of it “not as a handsome device for ensuring justice, but as a blunt instrument for the prevention or avoidance of the most serious forms of unfairness.”²¹⁷ Dean Bundy asserted that “[v]erdicts, in such a view, need not be right; they need only be, on the average,

213. Brief for Petitioner, *supra* note 212, at 13.

214. *Dr. James B. Donovan, 53, Dies; Lawyer Arranged Spy Exchange*, N.Y. TIMES (Jan. 20, 1970), <https://www.nytimes.com/1970/01/20/archives/dr-james-b-donovan-53-dies-lawyer-arranged-spy-exchange-president.html> [<https://perma.cc/HP79-5BHJ>]; *see also* DONOVAN, *supra* note 209, at 55.

215. Oral Argument at 1:04:53, *Abel v. United States*, 362 U.S. 217 (1960) (No. 2), <https://www.oyez.org/cases/1959/2>.

216. DONOVAN, *supra* note 209, at 339.

217. McGeorge Bundy, *A Lay View of Due Process*, in *GOVERNMENT UNDER LAW*, *supra* note 108, at 374.

substantially less wrong than what would have happened without legal process.”²¹⁸

If due process did not require correct verdicts or correct rulings, then what was it for? The context of Hall’s lectures and the *Brinegar* and *Abel* cases offers an explanation. All took place during the most paranoid spell of the Cold War. During Abel’s trial, a friend encouraged Donovan by reminding him of his “chance to demonstrate American justice at its finest to all the world and to Abel’s Russian masters.”²¹⁹ These claims of supremacy became increasingly common during the Cold War, which involved multiple arenas of competition, from territorial dominance to scientific progress. At the core of them all, at least from the Americans’ perspective, was an ideological contest between government by the people and the total rule of a dictator, whether fascist, socialist, or communist. This rivalry measured not only economic flourishing and equality before the law²²⁰ but also the rights of individuals in the criminal justice system. These, Donovan maintained, were “our strongest defensive weapon” against the forces of totalitarianism.²²¹ A “firm belief in the truths of freedom that led our ancestors to migrate to this land,” he declared, would prove much stronger than “our stockpile of atomic bombs” or the “development of poison gas or lethal rays.”²²² Associating due process with American values became a recurring theme in Donovan’s legal strategy. To his client, he repeatedly intoned that he would “benefit from the American trait of fair play.”²²³ To the jurors, the lawyer emphatically called on them to uphold “the tradition of a fair American trial.”²²⁴ To the public, Donovan carefully reminded them of “our principles . . . engraved in the history and the law of the land.”²²⁵ Claiming due process as distinctly American was essentially a comparative claim.

Fortuitously, the opportunity to compare the rival systems side by side came shortly after Abel’s trial, when the Soviet Union tried and convicted CIA pilot

218. *Id.* at 366.

219. DONOVAN, *supra* note 209, at 26 (quoting a letter from Ray Murphy).

220. On economic flourishing, see generally HAYEK, *supra* note 115. On equality and nondiscrimination, see generally MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS* (2000).

221. DONOVAN, *supra* note 209, at 310.

222. *Id.*

223. *Id.* at 28; *see also id.* at 16 (“I told him that he should have confidence in the basic American devotion to fair play.”).

224. *Id.* at 124; *see also id.* at 231 (“It is terribly important in this particular trial that you have a clear concept of the function of the jury in America. We believe that our trial-by-jury system is the best system ever devised for arriving at the truth.”).

225. *Id.* at 64.

Francis Gary Powers for the exact same charge: spying. On May Day 1960, Powers was captured when his U-2 spy plane, which the Russians referred to as the “Black Lady of Espionage,” crashed during a covert mission to take aerial photographs of Russian missile sites.²²⁶ Donovan used the occasion to offer his thoughts on the differences between the American and Soviet criminal justice systems. In the United States, procedural rights were “well designed to achieve abstract justice,” a concept that Donovan did not define.²²⁷ Soviet laws, in cases that did not affect the security of the state, also provided “a reasonable attempt . . . to achieve abstract justice.” But the difference arose in cases that involved state security. In Russia, such cases were “given a value transcending the natural and constitutional rights which a defendant always has in a free society.”²²⁸ Absolute dictatorships “suppressed or obliterated” “human rights” in these cases “to the degree believed to be required by national interests,” Donovan explained.²²⁹

Even if Donovan was right that manifest differences existed between Soviet trials and American ones, he missed or ignored obvious similarities between the two cases. Abel certainly received a trial, perhaps even a fair one in his lawyer’s estimation. Still, how different were the proceedings in Abel’s case in the United States from Powers’s trial in the Soviet Union, when Donovan maintained that the “seizure of Abel and all his effects at the Hotel Latham *unquestionably violated* the United States Constitution”?²³⁰ Donovan argued before the Supreme Court that by “the use of the evidence obtained in this manner, through this illegal search and seizure[,] . . . this man has been convicted of a capital crime.”²³¹ And Abel lost! To be sure, Justice Frankfurter’s opinion for the Court insisted that “the nature of the case, the fact that it was a prosecution for espionage, ha[d] no bearing whatever upon the legal considerations.”²³² But Justice Douglas saw through the disclaimer, pointing out that “[c]ases of notorious criminals . . . are apt to make bad law.”²³³

226. *Id.* at 348-49.

227. *Id.* at 356.

228. *Id.*; see also PURCELL, *supra* note 105, at 135-37 (describing the midcentury American understanding of totalitarianism).

229. DONOVAN, *supra* note 209, at 356.

230. *Id.* at 55 (emphasis added); see also *id.* at 343 (“The Fourth Amendment was the very heart of the search-and-seizure question and there never was any doubt that the constitutional protection applied to aliens, as well as every citizen.”).

231. *Id.* at 308.

232. *Abel v. United States*, 362 U.S. 217, 219-20 (1960).

233. *Id.* at 241 (Douglas, J., dissenting).

Certainly, there was a contingent of the American public that, like Douglas, was not so credulous. An editorial in the *Washington Post* observed that “[i]t would be ironic indeed if the Court had jeopardized” the “decent privacy of American homes” against unreasonable searches “in upholding the methods used to convict a Soviet spy.”²³⁴ The author had apparently read the dissenting opinion, which charged that “the administrative officer who invades the privacy of the home may be only a front for the police who are thus saved the nuisance of getting a warrant.”²³⁵ Justice Douglas could have been describing the decision in *Brinegar* as much as the decision in *Abel* in writing that “[w]hen guilt permeates a record, even judges sometimes relax and let the police take shortcuts not sanctioned by constitutional procedures.”²³⁶ Nevertheless, these views were in the minority.

The justifications of all the jurists who ruled against *Abel* demonstrated that, even in the United States, national security interests could override a defendant’s constitutional rights. The trial court stated at *Abel*’s sentencing hearing that the laws that the convicted spy had violated were “enacted by Congress for the protection of the American people and our way of life.”²³⁷ The judge certainly did not have judicial oversight of policing in mind—as we understand the purpose of criminal procedures today—when he informed Donovan that “it is the job of the F.B.I. to bring to light information concerning violations of the law and [that he did not] think [that] it is part of the Court’s duty to tell them how they should function.”²³⁸ Donovan’s argument for excluding evidence, the judge asserted, was an “extreme attitude.”²³⁹ Others shared the judge’s view. One lawyer who previewed the defense’s affidavit on the Fourth Amendment issue “denounced the entire document and said that to present such ‘lurid’ material in open court would smear the FBI.”²⁴⁰ This lawyer prioritized security not only over the Fourth Amendment guarantee but also over an open hearing. Editorials, if they can serve as a barometer of public opinion, suggested that many Americans agreed with the Supreme Court’s decision. “In protecting the life of a great nation against Communism,” one commentator insisted, “officers cannot be expected to be too technical.”²⁴¹ “If they had waited to get a search warrant they

234. Editorial, *Writ of Assistance*, WASH. POST, Apr. 2, 1960, at A16.

235. *Abel*, 362 U.S. at 242 (Douglas, J., dissenting).

236. *Id.* at 241-42.

237. Transcript of Record at 828-29, *Abel*, 362 U.S. 217 (No. 2).

238. Brief for Petitioner, *supra* note 212, at 13.

239. DONOVAN, *supra* note 209, at 110.

240. *Id.* at 58.

241. *Id.* at 343.

might not have secured the evidence to convict the spy.”²⁴² Another cautioned that it was “a dangerous situation indeed when a Soviet spy apprehended with the materials of his trade in his possession[] can almost be freed on a technicality.”²⁴³ American procedures, it turned out, were not too stringent to hinder the FBI’s efforts to protect the nation from communism.

Even though the weight of opinion fell against him on the Fourth Amendment issue, Donovan still believed that his Russian client had received due process of law. Abel and Powers received the same substantive outcome, but for Donovan, the mere existence of due process made all the difference between liberty and oppression. A fair trial was sufficient for American freedom. The result did not matter because the point of due process – the cultural work that it did – was to differentiate the United States from the Soviet Union. In this light, Donovan was not so different from his editorializing peers. Even as newspaper columnists breathed a collective sigh of relief that procedural technicalities had not been so rigid as to set the Russian spy free, they still deemed the entire proceeding an exemplar of the strength of American due process. The Abel case, one paper exulted, “jibes precisely with the hallowed American principle that every malefactor – not excepting Communists spies – is entitled to a day in court.”²⁴⁴ Even Chief Justice Warren, who dissented in the case, later spoke in praise of the fact that Abel had been “accorded a full civilian trial.”²⁴⁵ But when a conviction at the conclusion of trial seemed foreordained, as Abel believed all along, the pageantry of due process became a symbolic gesture, masking any similarities between the United States and foreign regimes abroad, even for sophisticated legal minds.

When confronted with aggressive policing to the point of lawlessness, jurists and mainstream Americans alike found reassurance in the idea of due process instead of questioning the extent of their reliance on the police or the FBI. Hall’s explication of democratic policing and Donovan’s evaluation of the Supreme Court’s decision had little to do with the need to place substantive limits on law enforcement. To be sure, Hall and Donovan believed that the United States had the rule of law. But when the legalist understanding of the rule of law had to give way to the realities of twentieth-century policing, the meaning of the rule of law changed from an antidiscretion principle to a due process ideal. Due process conveyed the meaning that even if individuals in the United States were not free from the tremendous power of the police, Americans were free.

242. *Id.*

243. *Id.*

244. *Id.* at 33 (quoting an editorial in the *San Francisco Chronicle*).

245. *Freedom and the Military*, WASH. POST, Feb. 4, 1962, at E4.

V. PRELUDE TO THE DUE PROCESS REVOLUTION

The Warren Court upheld Colonel Abel's conviction in 1960, one year before it launched the Due Process Revolution. The use of due process to rationalize police discretion preceded the Supreme Court cases we have long celebrated for limiting police discretion. In 1961, the Court in *Mapp v. Ohio*²⁴⁶ incorporated the Fourth Amendment's exclusionary rule against the states, which, according to conventional accounts,²⁴⁷ spawned countless constitutional challenges and placed judges in the role of reviewing even the most routine police actions. One possible way to distinguish *Abel* from *Mapp* and its progeny may be on the basis of the national security concerns underlying the spy case. But explaining away *Abel* as an outlier does not help to account for other cases at the peak of the Due Process Revolution that also came down against criminal defendants.²⁴⁸

A different understanding of due process, that of midcentury Americans, may refine our perspective of the Court's revolutionary years. It may be that the Court intended not simply to limit police action, but to allow it so long as officers did not encroach on judicial functions. The three cases that occupy the pantheon of the Revolution – *Mapp v. Ohio* in 1961,²⁴⁹ *Gideon v. Wainwright* in 1963,²⁵⁰ and *Miranda v. Arizona* in 1966²⁵¹ – all forged new rights in ways that preserved the separation of magisterial and law enforcement roles. Moreover, *Terry v. Ohio*, decided in 1968,²⁵² and *Papachristou v. City of Jacksonville*, decided in 1972,²⁵³ show that when the Supreme Court wanted to enable discretionary policing within rule-of-law constraints, it did so by applying the standard of reasonableness – just as Hall did in his illustration of the rule of law in action. In this light, all of these cases indicate more continuity from the 1950s through the early 1970s than we have previously recognized.

Just as significantly, the specter of totalitarianism lurked in the cases as well, demonstrating that the Cold War imperative of distinguishing American justice

246. 367 U.S. 643 (1961).

247. See *supra* notes 5-6.

248. See *Hoffa v. United States*, 385 U.S. 293 (1966); *Lopez v. United States*, 373 U.S. 427 (1963); see also *Kamisar*, *supra* note 7, at 4 n.15 (providing additional details on the Warren Court's view of the government's power to employ undercover agents).

249. 367 U.S. 643 (1961).

250. 372 U.S. 335 (1963).

251. 384 U.S. 436 (1966).

252. 392 U.S. 1 (1968).

253. 405 U.S. 156 (1972).

from dictatorial regimes also shaped Supreme Court doctrine.²⁵⁴ In *Gideon*, for instance, the Court declared that “[t]he 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.”²⁵⁵ Even more pointedly, the *Papachristou* opinion asserted that vague vagrancy laws, “though long common in Russia, are not compatible with our constitutional system.”²⁵⁶ These references to totalitarian states abroad strongly suggest that the Due Process Revolution was not just a legal movement to reform policing. Reexamining these well-known cases as a cultural project of a piece with Hall’s 1952 lectures may help us see more clearly how a democratic theory that accommodated discretionary policing informed the Warren Court’s constitutional interpretations.

Hall believed that a “prompt, fair trial” administered by judge or jury, not the police, was crucial to democracy.²⁵⁷ So did the Warren Court, which connected this democratic necessity to the Sixth Amendment right to counsel. Accordingly, in *Gideon* the Court required states to appoint lawyers for indigent defendants, explaining that “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.”²⁵⁸ One could analyze this radical move in purely doctrinal terms, as part of the longstanding debate on incorporation. On one side, Justice Frankfurter argued that the government provision of counsel to poor defendants was not “so fundamental and essential to a fair trial, and so, to due process of law.”²⁵⁹ On the other, Justice Black, who wrote the *Gideon* majority opinion, maintained that due process required it because of “the fundamental nature of original Bill of Rights guarantees.”²⁶⁰ From a doctrinal point of view, a disagreement about the legal interpretation of due process lay at the heart of this debate – a dispute that Black ultimately won with respect to the right to counsel.

But it is also possible to place Frankfurter and Black within the same legal culture. Whether Frankfurter looked to “those canons of decency and fairness which express the notions of justice of *English-speaking peoples*,”²⁶¹ or Black to

254. See Primus, *supra* note 39, at 423 (“In the years after World War II, the Supreme Court continually reformulated constitutional doctrine in ways designed to prevent a totalitarian regime . . . from arising in the United States.”).

255. *Gideon*, 372 U.S. at 344.

256. *Papachristou*, 405 U.S. at 168-69 (footnote omitted).

257. Hall, *supra* note 2, at 155-56.

258. *Gideon*, 372 U.S. at 344 (emphasis added).

259. *Betts v. Brady*, 316 U.S. 455, 465 (1942).

260. *Gideon*, 372 U.S. at 341.

261. *Adamson v. California*, 332 U.S. 46, 67 (1947) (Frankfurter, J., concurring) (emphasis added).

the first eight amendments to argue that “the people of no nation can lose their liberty so long as a Bill of Rights *like ours* survives,” their interpretations of due process were grounded in Anglo-American history, tradition, and ideas.²⁶² Their culture was the same, though it encompassed divergent legal arguments. Although at odds on a technical matter of law, the Justices were united in their partiality to the American adversarial trial, especially during the Cold War.²⁶³ This context has informed several legal scholars’ explanations for why jurists, even elite members of the bar, supported the provision of counsel to indigent defendants.²⁶⁴ The mandate to demonstrate the superiority of the American system over Soviet show trials also explains why *Gideon* proved uncontroversial among the American public as well.

The significance of a fair trial also informed the Justices’ views on the limits of policing. The Warren Court’s most doctrinally innovative decision, *Miranda v. Arizona*, sought to manage how police conducted interrogations by requiring the exclusion of statements if the police failed to inform the suspect of the rights to remain silent and to have a lawyer present during questioning.²⁶⁵ The judicial creativity employed to tether the *Miranda* right to the Fifth and Sixth Amendments provoked immediate backlash. Two years later, Congress passed the Omnibus Crime Control and Safe Streets Act, which explicitly sought to overrule *Miranda*.²⁶⁶ That the Court took such bold interpretative steps to protect individuals from coercive interrogation tactics is understandable, and has been understood, as a measure against police abuse and torture. Language in the opinion provides ample support for this explanation. For instance, the Court declared that “[e]ven without employing brutality, the ‘third degree’ or [psychological] stratagems . . . , the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.”²⁶⁷

But the need to curb coercion was not the only reason for the Warren Court’s *Miranda* decision. After all, although the Court concluded that in-custodial interrogations contain “inherently compelling pressures” even without physical in-

262. *Id.* at 89 (Black, J., dissenting) (emphasis added).

263. See Primus, *supra* note 39, at 444-45.

264. See, e.g., *id.* at 445. See generally Sara Mayeux, *The Cold War Right to Counsel* (2017) (unpublished manuscript) (on file with author) (explaining that in the 1950s, a legal consensus emerged that the government ought to provide counsel for the poor because the right to counsel was associated with both a fair trial and an American national identity).

265. *Miranda v. Arizona*, 384 U.S. 436 (1966).

266. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 187.

267. *Miranda*, 384 U.S. at 455.

timidation, *Miranda* did not abolish the practice or enumerate the coercive practices short of brutality or psychological manipulation that would also violate due process.²⁶⁸ In fact, the opinion affirmed that “[c]onfessions remain a proper element in law enforcement” and insisted that its decision was “not intended to hamper the traditional function of police officers in investigating crime.”²⁶⁹

The Court’s procedural remedy—establishing a right to counsel during questioning—suggests that the *Miranda* rule served an additional purpose. The opinion noted the possibility that the “most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police.”²⁷⁰ In other words, *Miranda* extended the right to counsel outside the courtroom and into the station house because, without such assistance, an officer’s heavy-handed tactics to extract a confession might effectively seal a defendant’s fate and render a trial moot.²⁷¹ This would dissolve the “distinctions between the functions of the judge and that of the policeman” that Hall had insisted were basic to a democracy.²⁷² Most Americans did not appreciate the *Miranda* right’s connection to a fair trial. For them, the decision seemed to serve as a constraint on effective law enforcement, which explains why *Miranda* did not enjoy *Gideon*’s popularity. But the Court made the connection explicit in its opinion. For the Justices, having counsel present during interrogations not only offered a way to allow police interrogations to continue; it also ensured that a fair trial, not the police’s wiles, would determine the question of guilt.

A similar logic also appeared in *Mapp v. Ohio*, the case that started the Due Process Revolution. To justify incorporating the Fourth Amendment’s exclusionary rule, the opinion asked rhetorically that if coerced confessions were excluded “without regard to [their] reliability,” then “[w]hy should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effect, documents, etc.?”²⁷³ The reliability of physical evidence was arguably harder to controvert than verbal statements made under coercive circumstances. Even so, the *Mapp* opinion suggested that

268. *Id.* at 467.

269. *Id.* at 477-78.

270. *Id.* at 466 (quoting *Mapp v. Ohio*, 367 U.S. 643, 685 (1961) (Harlan, J., dissenting)).

271. *See id.* at 445 (noting that confessions made during “incommunicado interrogation of individuals in a police-dominated atmosphere” were “admitted at [defendants’] trials”).

272. Hall, *supra* note 2, at 155.

273. *Mapp*, 367 U.S. at 656.

unlawful police searches and seizures came too close to undermining “a fair, public trial.”²⁷⁴ Just as *Miranda* saw the progression from police questioning to trial, *Mapp* likewise linked police investigations to trial and accordingly viewed illegally seized evidence as a form of compelled testimony that tainted the integrity of a judicially determined conviction.

The Court did not rely solely on the “close connection” between the Fourth and Fifth Amendment rights to take the momentous step of incorporating the rule of exclusion.²⁷⁵ In *Mapp*, the police had searched a home without a warrant.²⁷⁶ The probable-cause determination for warrants and their issuance were, of course, long-established magisterial duties. According to Justice Jackson’s oft-quoted explanation, the Fourth Amendment “protection consists in requiring that those inferences [to support a search warrant] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.”²⁷⁷ As much as the exclusionary rule was intended to check police discretion, it sought to do so by ensuring that the police would not usurp a judicial function.

Reexamining the *Mapp* decision in the light of Hall’s exposition on due process offers a different way to understand the Justices’ views on the limits of the police’s power. “One of the standards of the police in a democratic society,” Hall explained, “is the sharp demarcation of the police job from judicial functions.”²⁷⁸ It may have been that the Justices drew the line between legitimate and illegitimate police discretion along the contours of the Fourth Amendment’s warrant requirement. *Mapp* fell on the illegitimate side and demonstrated how far the Court was willing to go to address warrantless police action when the Constitution and the common law required that the police go see a judge first. In fact, the cases that Yale Kamisar identified as prodefense opinions issued after the Due Process Revolution—incongruously so, Kamisar believed—all sought to

274. *Id.*; see also *People v. Cahan*, 282 P.2d 905, 910 (Cal. 1955) (Traynor, J.) (“The rules of evidence are designed to enable courts to reach the truth and, in criminal cases, to secure a fair trial to those accused of crime.”).

275. *Mapp*, 367 U.S. at 646 n.5.

276. Cf. SKLANSKY, *supra* note 13, at 45 (“Warrants, in fact, were the principal motif of the Warren Court’s approach to the Fourth Amendment.”); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 358 (1974) (observing that the Warren Court “has increasingly emphasized that the ‘definition of “reasonableness” turns, at least in part, on the more specific commands of the [fourth amendment’s] warrant clause” (alteration in original) (quoting *United States v. U.S. Dist. Court for the E. Dist. of Mich.*, 407 U.S. 297, 315 (1972))).

277. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

278. Hall, *supra* note 2, at 155.

strengthen the warrant requirement.²⁷⁹ The Warren Court was not simply protecting individual rights; more basically, it was protecting the judge's role.

In situations where the judiciary's adjudicative primacy was not at risk, particularly in the context of order maintenance, the Supreme Court proved willing to authorize a great deal of proactive, discretionary policing. The most prominent example is *Terry v. Ohio*, which legitimized stop-and-frisks by adopting the 1942 Uniform Arrest Act's reasonableness standards, just as Hall had advocated in the 1950s.²⁸⁰ The "discovery" of police discretion in 1960 did not appear to have made a difference to the outcome of the case. Rather than requiring probable cause, *Terry* accepted an officer's reasonable suspicion. Given the Court's adoption of the lower standard, many scholars view *Terry* as an about-face, a capitulation to the proponents of law and order.²⁸¹ The opinion, littered with references to the "general interest . . . of effective crime prevention and detection," certainly gives this impression.²⁸²

But interpreting *Terry* as a retreat presupposes that midcentury jurists of a liberal stripe repudiated all forms of discretionary policing. Placing *Terry* within a longer period stretching back to Hall suggests more continuity on the part of the Warren Court. In justifying its decision, the Court pointed out that "we deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which *historically has not been, and as a practical matter could not be, subjected to the warrant procedure.*"²⁸³ Throughout the opinion, the Court offered variations of the same theme, either by noting "the limitations of the judicial function in controlling the myriad daily situations in which policemen and citizens confront each other on the street," or in rejecting the argument that its holding "constitute[d] an abdication of judicial control over" the police.²⁸⁴ That stop-and-frisks would not undermine the separation of judicial and law enforcement functions reassured the Warren Court, notwithstanding its acknowledgement that the practice would harm minorities more.

279. During its final year, the Warren Court limited the scope of warrantless searches incident to arrest in *Chimel v. California*, 395 U.S. 752 (1969), and imposed restrictions on the issuance of search warrants in *Spinelli v. United States*, 393 U.S. 410 (1969).

280. See *Terry v. Ohio*, 392 U.S. 1, 2 n.3, 10 (1968); *supra* notes 194-197 and accompanying text.

281. See, e.g., Kamisar, *supra* note 7, at 5; Jeffrey Fagan, *Terry's Original Sin*, U. CHI. LEGAL F. 43, 45 (2016).

282. *Terry*, 392 U.S. at 22.

283. *Id.* at 20 (emphasis added).

284. *Id.* at 12.

This position, rather than a step back from the Due Process Revolution's heady years, was actually in line with the midcentury view that, on balance, was supportive of proactive policing. Even though the NAACP pleaded in its amicus brief in a companion case to *Terry* that "what the ghetto does *not* need is more stop and frisk,"²⁸⁵ the Court's opinion nonetheless relegated the reality of race to a sentence and a footnote and ignored the fact that the officer in the case was white and two of the three suspects were black.²⁸⁶ Scholars have explained this slight as a consequence of political backlash to the Due Process Revolution.²⁸⁷ But from a historical perspective, *Terry* was not so much a break from the Court's earlier decisions. It simply fell on the legitimate side of police discretion because street encounters that demanded spur-of-the-moment action did not involve a traditionally magisterial role.

It was no coincidence that the concept of reasonableness permeated the *Terry* opinion, which held that stop-and-frisks were *reasonable*, and thus justified, if the officer had *reasonable* suspicion to support it.²⁸⁸ Hall's illustration of the rule of law in action had also invoked the reasonableness standard, and the common law had long allowed officers to forgo a warrant if they reasonably believed that a felony had been committed.²⁸⁹ In the police context, jurists understood reasonableness as a legal principle limiting police discretion when requiring a warrant seemed impracticable. By adopting the reasonableness standard in *Terry*, the Court believed it was placing a rule-of-law constraint on warrantless, discretionary policing.

285. Brief for the N.A.A.C.P. Legal Defense & Educ. Fund, Inc., as Amicus Curiae at 62, *Sibron v. New York*, 392 U.S. 40 (1968) (Nos. 63, 74 & 67).

286. *Terry*, 392 U.S. at 14 & n.11.

287. See, e.g., STUNTZ, *supra* note 5, at 217; Willrich, *supra* note 5, at 217-23 (describing the transition in criminal justice from the "liberal moment" of the 1960s to the "severity revolution" that began in the 1970s).

288. See, for example, the prolix holding stated in conclusion: "We merely hold today that where a police officer observes unusual conduct which leads him *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, where in the course of investigating this behavior he identifies himself as a policeman and makes *reasonable* inquiries, and where nothing in the initial stages of the encounter serves to dispel his *reasonable* fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him." *Terry*, 392 U.S. at 30 (emphasis added).

289. See *supra* note 132 and accompanying text; see also CHRISTOPHER G. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES CONSIDERED FROM BOTH A CIVIL AND CRIMINAL STANDPOINT 83-84 (St. Louis, F.H. Thomas Law Book Co. 1886) (setting forth the warrant exception for felony arrests).

Midcentury distinctions between legitimate and illegitimate police discretion also informed the Burger Court's celebrated decision in *Papachristou v. City of Jacksonville*. Cultural change, after all, does not neatly align with the tenures of Chief Justices. Although the Court invalidated vague vagrancy laws for giving "unfettered discretion" to officers on the beat, it is important to note that it did not prohibit the criminalization of loitering and other vagrancy-like conduct.²⁹⁰ *Papachristou's* procedural remedy—requiring legislatures to be more specific when criminalizing conduct—raises the question of what else troubled the Justices about unlimited discretion apart from the policing of nonconformists.²⁹¹

Again, Hall's explication of democratic policing provides some clues. One of the implications of "the sharp demarcation of the police job from judicial functions," according to Hall, was that "the police do not define or declare any general rules of law, as do judges."²⁹² This was precisely what vague vagrancy laws enabled the police to do. As Justice Douglas wrote in the Court's opinion, "Here the net cast [by the ordinances] is large, not to give the courts the power to pick and choose but to increase the arsenal of the police."²⁹³ The police, in other words, were defining the law by enforcing ambiguous laws pursuant to their own interpretations. Even more fundamentally problematic, these laws subverted the rule of law by allowing the police to skirt the probable-cause requirement for arrests—"a Fourth and Fourteenth Amendment standard applicable to the States as well as to the Federal Government," Douglas noted.²⁹⁴ If an officer did not have probable cause to make an arrest for, say, larceny, then the officer could instead make an arrest for vagrancy. Sometimes, vagrancy laws offered a way to prosecute an individual for conduct that was not criminal at all, an even clearer-cut violation of the rule of law. An example of this is told in Laura Hillenbrand's well-known story of the famous racehorse Seabiscuit. In 1938, the police arrested a man who was planning to put a sponge up Seabiscuit's nostril. Because there was no crime of attempted assault on a horse, the man was charged with vagrancy.²⁹⁵ For midcentury jurists, laws that were so vague as to permit the police to define what they criminalized and even to use them in contravention of well-established laws were anathema to a democratic society. The vagrancy laws at issue in *Papachristou* had crossed a clear line.

290. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168 (1972).

291. See GOLUBOFF, *supra* note 167, at 221-57, 298-332 (comprising chapters seven, "Hippies, Hippy Lawyers, and the Challenge of Nonconformity," and nine, "Vagrancy Is No Crime").

292. Hall, *supra* note 2, at 155.

293. *Papachristou*, 405 U.S. at 165.

294. *Id.* at 169 (footnote omitted).

295. LAURA HILLENBRAND, SEABISCUIT: AN AMERICAN LEGEND 161 (2001).

But *Papachristou* left room for discretionary policing, which became evident in its aftermath. The Florida legislature revised its vagrancy law, which still criminalized loitering and prowling “under circumstances that warrant a justifiable and *reasonable* alarm or immediate concern for the safety of persons or property in the vicinity.”²⁹⁶ It was, of course, up to the beat officer to determine, in the first instance, what constituted such reasonable alarm. The standard of reasonableness in the new ordinance gave police the discretion to continue their crime-prevention and order-maintenance duties, but now within the well-established parameters of the Anglo-American legal tradition, just as it had in the common law of arrest, Hall’s felony-arrest example, and *Terry v. Ohio*. Even Justice Douglas’s understanding of the rule of law, which he identified as “the great mucilage that holds society together,” could encompass discretionary policing so long as it was reasonable.²⁹⁷

This Essay’s reinterpretation of the Due Process Revolution as a project to preserve the judicially supervised “fair trial” does not necessarily challenge standard narratives that point to race as an impetus for modern criminal procedure.²⁹⁸ But the account offered here does help clarify the precise role that race played. While achieving racial justice may not have been the explicit or primary goal of the Supreme Court, racial injustice provided the most egregious examples of unfair trials.²⁹⁹ In American history, a fair trial came under greatest threat when it involved black defendants, and these cases, particularly from the Jim Crow South, sometimes proved difficult for even the most unsympathetic Justices to ignore. As Michael Klarman has observed, the Supreme Court in the 1920s and 1930s permitted public school segregation, the white primary, and the

296. FLA. STAT. ANN. § 856.021(1) (West 1972) (emphasis added). Florida courts upheld the constitutionality of the new vagrancy statute. See *State v. Ecker*, 311 So. 2d 104 (Fla. 1975); *D.A. v. State*, 471 So. 2d 147 (Fla. Dist. Ct. App. 1985).

297. *Papachristou*, 405 U.S. at 171.

298. For examples of this standard narrative, see Kahan & Meares, *supra* note 6, at 1153, 1156–57; and Michael Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48 (2000).

299. The evidence supporting a causal connection between race and modern criminal procedure is circumstantial rather than direct. Although Michael Klarman argued that the constitutional cases in the 1920s and 1930s had “racial origins,” he never imputed to the Justices an intention to achieve racial justice. Indeed, he noted that the composition of the Court did not favor intervention in state criminal proceedings on behalf of minorities. Klarman carefully couched his argument that “egregious exemplars of Jim Crow justice . . . provided the occasion for the birth of modern criminal procedure.” Klarman, *supra* note 298, at 49 (emphasis added); see also *id.* at 53, 59. Similarly, in arguing that “[t]he need that gave birth to the existing criminal procedure regime was institutionalized racism,” Dan Kahan and Tracey Meares refer to an “unmistakable premise,” “assumption,” and “context.” Kahan & Meares, *supra* note 6, at 1153, 1156–58.

poll tax, yet stretched the principle of federalism to overturn state criminal convictions of black defendants in four landmark cases.³⁰⁰ Klarman commented that “the Justices thought it was one thing to segregate and disfranchise blacks, and quite another to execute possibly innocent black defendants after farcical trials.”³⁰¹ Actually, the Justices were not so inconsistent in their views on race; rather, they were consistent in their commitment to ensuring that southern justice did not stray too far from their standards of a fair trial. These earlier criminal procedure cases that paved the way doctrinally for the Warren Court all involved fundamental defects in trial procedures: convictions obtained through mob-dominated trials,³⁰² a violation of the right to counsel,³⁰³ an all-white jury,³⁰⁴ and an involuntary confession.³⁰⁵

These criminal procedure decisions indicate that the importance of trials predated the official start of the Cold War.³⁰⁶ While the origins of this adversarial culture are beyond the scope of this Essay,³⁰⁷ it is worth pointing out that even in the first several decades of the twentieth century, the political imperative to uphold capitalist democracy against communism motivated many in the United States to extol the exceptionalism of the American trial. The *New York Times*, for instance, noted in 1932 that *Powell v. Alabama*—in which eight of nine black boys accused of rape were sentenced to death after a four-day trial, without having had an opportunity to secure and consult with legal counsel—“turned wholly upon ‘due process of law’” and came down to the question: “Did the convicted youths have a fair trial?”³⁰⁸ In addition to apprising readers of the holding, the

300. Klarman, *supra* note 298, at 50–78, 94. The four landmark cases were *Moore v. Dempsey*, 261 U.S. 86 (1923); *Powell v. Alabama*, 287 U.S. 45 (1932); *Norris v. Alabama*, 294 U.S. 587 (1935); and *Brown v. Mississippi*, 297 U.S. 278 (1936).

301. Klarman, *supra* note 298, at 94.

302. *Moore*, 261 U.S. 86.

303. *Powell*, 287 U.S. 45.

304. *Norris*, 294 U.S. 587.

305. *Brown*, 297 U.S. 278.

306. For an early twentieth-century articulation of trials as a fundamental principle of the rule of law, see JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW 33, 35 (1927), which notes, “nothing has been held more fundamental to the supremacy of law than the right of every citizen to bring the action of government officials to trial in the ordinary courts of the common law.”

307. For an excellent account, see AMALIA D. KESSLER, INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800–1877 (2017).

308. *The Scottsboro Case*, N.Y. TIMES, Nov. 8, 1932, at 20; see also JAMES GOODMAN, STORIES OF SCOTTSBORO 24–38, 85–89 (1994) (discussing the political aspects of *Powell v. Alabama*).

article also spelled out the significance of the decision: *Powell* disproved the communist charge that “a spirit of wicked class prejudice pervades the United States, and that here no justice can be had for the poor and ignorant.”³⁰⁹ The reporter supposed that the ruling “ought to abate the rancor of extreme radicals, while confirming the faith of the American people in the soundness of their institutions.”³¹⁰ Lost in the news about the Supreme Court’s overturning the sham trials was the manner in which the sheriff’s deputies had rounded up the nine boys, questioned and arrested them, and lined them up for identification. Although the Warren Court was undoubtedly more sensitive to discriminatory policing than the Hughes Court, both displayed a similar commitment to the adversarial trial in analogous times, when racism was rampant in local justice systems and when global affairs required a demonstration of American superiority.

From the longer perspective of legal culture, the Due Process Revolution may not seem so revolutionary. But perhaps what was so transformative about the Warren Court’s criminal procedure cases is not what the Justices intended to do, but rather the unintended consequences of what they did. Given what we know about judicial rubberstamping of warrant applications,³¹¹ “modern” criminal procedure, at least in the Fourth Amendment context,³¹² has not taken place primarily in cases where the police have to get warrants. It has developed mainly in disputes over the reasonableness standard, in cases where individual litigants sought to challenge the exercise of discretion that constitutional laws actually countenanced. In this light, the Due Process Revolution was truly a movement from the ground up rather than from the top down.

309. *The Scottsboro Case*, *supra* note 308.

310. *Id.*

311. See, e.g., Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 529 n.317 (1991) (raising the problem of magistrate shopping); David B. Kopell & Paul H. Blackman, *The Unwarranted Warrant: The Waco Search Warrant and the Decline of the Fourth Amendment*, 18 HAMLINE J. PUB. L. & POL’Y 1, 42 (1996) (“As practicing lawyers, we know that usually judges rubber stamp the applications for search warrants” (quoting *Activities of Federal Law Enforcement Agencies Toward the Branch Davidians: Joint Hearing Before the Subcomm. on Crime & Nat’l Sec. of the H. Comm. on Gov’t Reform & Oversight*, 104th Cong. 40 (1995) (statement of Dick De Guerin))); Richard Van Duizend et al., *The Search Warrant Process: Preconceptions, Perceptions, and Practices*, NAT’L INST. JUST. 3 (1984), <https://www.ncjrs.gov/pdffiles1/Digitization/93585NCJRS.pdf> [<https://perma.cc/SF3K-WGE3>] (“[S]earch warrant applications appear to be rejected very infrequently by reviewing magistrates”).

312. Although the warrant requirement applies only in the Fourth Amendment context, the reasonableness standard permeates other areas of criminal procedure as well. For example, whether a *Miranda* interrogation has occurred is determined by whether a police practice is “reasonably likely to elicit an incriminating response from [a] suspect.” *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (emphasis added).

The Warren Court Justices may not have sought revolution, but they ended up fomenting one in how the American people thought about criminal procedural rights as individual rights. Nearly everyone, from the police and their law-and-order advocates to reformers and activists to law professors, perceived the Court to be reining in the police.³¹³ And it is true that the Court's decisions did so in important ways. Making the police get a warrant or requiring them to give the *Miranda* warning before conducting an interrogation did place restraints on how the police carried out investigations. But this narrative has become so powerful that it has shaped a dominant interpretation of due process as a limit on police discretion while obscuring the ways that due process also enabled discretionary policing. Indeed, what may be most revolutionary about the Warren Court's Due Process Revolution is the way that it transformed a cultural value into a political one.

313. For a police perspective, see, for example, ADAMS, *supra* note 133, at 8, which notes that “[t]he *due process* provisions of the Constitution and the Bill of Rights have been interpreted by the various courts as controlling influences on such police procedures .”