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Response

Remembering Privacy and Regulation

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I. INTRODUCTION

Eric Miller, one of our nation's most creative academic lawyers—he played an instrumental role in litigation on behalf of victims of the 1921 Tulsa riot—has a big agenda in *Forget Privacy*.[1] It is to change how we think about the Warren Court. Forget that stuff we have learned about the Court's concern for privacy, especially in the 1960s, Miller says. The Court was interested in limiting government intrusion, but not necessarily in protecting privacy. The key to the Court was the promotion of "personal security."[2]

II. THE POWER OF TRADITIONAL STORIES

Like all efforts to rethink the Warren Court—or most other received wisdom—we should approach a new theory skeptically. There are reasons why the accepted wisdom has become the accepted wisdom: it is usually right. And while I certainly agree with Ralph Waldo Emerson that not everything that is popular is right, there is something to the herd mentality—especially when the herd contains scholars who have spent some time thinking about these issues. I have resisted the multiple attempts to revise the Warren Court history—the attempts that tell us that

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[1] *See* Eric J. Miller, *Forget Privacy: The Warren Court's Regulatory Revolution in Criminal Procedure*, 43 CONN. L. REV. 1 (2010).

[2] *Id.* at 4.

what the Court did was ineffective or even counter-productive.[3] Certainly there is important evidence with which one must grapple in each of these revisionist accounts. Often, people are bad advocates for their positions—in fact, sometimes such poor advocates that they end up helping the other side. Birmingham Police Commissioner Bull Connor is one such person.[4] Glenn Askew's smartly titled book, *But for Birmingham*, suggests the power that a few graphic scenes of violence had.[5] But for Birmingham—and especially but for Bull Connor and a few other violent men—the path of the Civil Rights movement might have been different.[6] And in some cases we want to begin to question the good faith of some actors. Miller's colleague at St. Louis University Anders Walker has revised our understanding of southern moderates somewhat.[7] Where once they were among the heroes of the Civil Rights movement, people who helped point the way to reasonable accommodations, Walker suggests they veiled their conservative motives in what Martin Luther King called "the tranquilizing drug of gradualism."[8]

Maybe what really happened is that time had moved on. The second world war's campaign against fascism, the growing economic and political power of African Americans,[9] the good faith born of the optimistic and prosperous 1950s—all of these things led to a new order. The new world was coming with speed; not as quickly as those in SNCC, who sang "Move on over, or we'll move on over you,"[10] would like, but it was coming.

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[3] *See, e.g.*, Robert Jerome Glennon, *The Jurisdictional Legacy of the Civil Rights Movement*, 61 TENN. L. REV. 869, 901–02 (1994) (discussing critics' beliefs that the Warran Court's criminal procedure decisions went too far in protecting defendants' rights and that state court judges were taking these rulings even further); Arthur J. Goldberg, *The Warren Court and Its Critics*, 20 SANTA CLARA L. REV. 831, 831 (1980) (noting concern about the increase in crime as a consequence of the Warren Court's criminal justice decisions).

[4] *See, e.g.*, Michael J. Klarman, Brown *at 50*, 90 VA. L. REV. 1613, 1627 (2004) ("By 1950 . . . civic leaders had come to regard Connor as a liability because of his extremism and frequently brutal treatment of blacks, and they orchestrated his public humiliation through an illicit sexual encounter. Connor retired from politics in 1953, and signs of racial détente in Birmingham—including the establishments of the first hospital for blacks, the desegregation of elevators in downtown office buildings, and serious efforts to integrate the police force—quickly followed.").

[5] *See generally* GLENN T. ESKEW, BUT FOR BIRMINGHAM (1997).

[6] *Id.*

[7] ANDERS WALKER, THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED *BROWN V. BOARD OF EDUCATION* TO STALL CIVIL RIGHTS 160 (2009) ("By looking closely at how [the three southern governors,] Collins, Coleman, and Hodges tried to control racial extremism in the South in the 1950s, we gain new insight not only into strategic constitutionalism but also into the effects that *Brown* had on the southern political landscape.").

[8] *See id.* at 9 ("Minor concessions, such as seats on buses and places at lunch counters, could all be granted without overturning the South's social order. Indeed, even schools could be integrated. As the southern population moved to the suburbs and acquired wealth, district lines could be drawn and private schools formed in a way that would keep integration at a minimum.").

[9] HARVARD SITKOFF, *The Preconditions for Racial Change*, *in* TOWARD FREEDOM LAND: THE LONG STRUGGLE FOR RACIAL EQUALITY IN AMERICA 11, 12–13 (2010).

[10] JON MICHAEL SPENCER, PROTEST & PRAISE: SACRED MUSIC OF BLACK RELIGION 97 (Augsburg Fortress ed., 1990).

Much as the time of slavery had passed by 1865, the time for Jim Crow was gone by 1964, though some people still clung to it with tenacity. A series of decisions leading into *Brown v. Board of Education*[11] and *Shelley v. Kraemer*,[12] and also the pre-Warren Court cases of *Skinner v. Oklahoma ex rel. Williamson*,[13] *Sipuel v. Board of Regents of University of Oklahoma*,[14] *Missouri ex rel. Gaines v. Canada*,[15] even all the way back to *Buchanan v. Warley*[16] and *Guinn v. United States*[17]—testified that the era of overt, government-sponsored segregation was drawing to a close.[18] Through the advocacy of African-American intellectuals, like W.E.B. DuBois and Charles Hamilton Houston, liberal judges, supported by politicians, saw a new world.[19] The literature of the Harlem Renaissance dreamed of a new world; people of action brought it into being. The corollary to the adage "there is nothing so powerful as an idea whose time has come"[20] is "there is nothing so powerless as an idea whose time has past." In the Civil War, entire armies could not sustain slavery.[21] By the 1960s, our country's interest in overt discrimination was declining rapidly. The day of reckoning for Jim Crow was at hand.

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[11] 347 U.S. 483 (1954).

[12] 334 U.S. 1 (1948).

[13] 316 U.S. 535 (1942).

[14] 332 U.S. 631 (1948).

[15] 305 U.S. 337 (1938).

[16] 245 U.S. 60 (1917).

[17] 238 U.S. 347 (1915).

[18] *See, e.g.*, Brown v. Bd. of Educ., 347 U.S 483, 493 (1954) (finding that the "segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive[s] the children of the minority group of equal educational opportunities"); Shelley v. Kraemer, 334 U.S. 1, 20 (1948) ("State action . . . refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands."); *Gaines*, 305 U.S. at 350 ("[T]he obligation of the State to give the protection of equal laws can be performed only where its laws operate. . . . It is an obligation the burden of which cannot be cast by one State upon another, and no State can be excused from performance by what another State may do or fail to do."); *Buchanan*, 245 U.S. at 82 (1917) (holding that an attempt to prevent the alienation of property to a person of color "was not a legitimate exercise of the police power of the state, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law").

[19] Ralph Ellison referred to this as the "Great Constitutional Dreambook." Ralph Ellison, Invisible Man 280 (1952); s*ee also* Alfred L. Brophy, *The Great Constitutional Dream Book*, *in* 2 ENCYCLOPEDIA OF THE SUPREME COURT 360–63 (David Tanenhaus ed. 2008); Alfred L. Brophy, *Invisible Man as Literary Analog to* Brown v. Board of Education, *in* RALPH ELLISON AND THE RAFT OF HOPE 119–41 (Lucas A. Morel ed. 2004); Roger A. Fairfax, Jr., *Wielding the Double-Edged Sword: Charles Hamilton Houston and Judicial Activism in the Age of Legal Realism*, 14 HARV. BLACKLETTER L.J. 17, 18 (1998) (arguing that Charles Hamilton Houston's "wielding of the double-edged sword of judicial activism" motivated the Warren Court activism that brought about the civil rights gains of the second half of the twentieth century).

[20] Victor Hugo, HISTORY OF A CRIME (THE TESTIMONY OF AN EYE WITNESS) 409 (T.H. Joyce & Arthur Locker trans., 2005). The original phrase is frequently paraphrased as "nothing is so powerful as an idea whose time has come." FRED R. SHAPIRO, THE YALE BOOK OF QUOTATIONS 375 (2006).

[21] *See generally* ERIC FONER, THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY (2010); JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA (1988).

For me, the traditional story retains much of its power: the Warren Court was at the vanguard of a political and social movement.[22] It represented a rare instance in American history where the courts—traditionally a bastion of vested interests—moved in another direction.[23] Partly this is because of the power for progressive causes that lies in core principles of American law like the equal protection principle.[24] For what is more natural than that similarly-situated people shall be treated similarly? Is that anything more than a secular version of that ancient principle in Matthew 7:12—the golden rule?[25] The Supreme Court lent its mantle of legitimacy to the cause of equal rights at the moment that white supremacy was losing support in our nation. The pebbles—like President Truman's integration of the armed forces—announced the avalanche. And as one southerner remarked in the wake of Civil War, "[c]hange . . . not only cometh upon us, but cometh with speed and with power."[26]

III. THE TRADITIONAL PRIVACY STORY AND THE MILLER PERSONAL SECURITY STORY

As this applies to the Warren Court's criminal procedure decisions, the traditional story is that in the early 1960s, the Warren Court issued a series of decisions that protected the privacy rights of criminal defendants. And that—as happened so frequently in the late 1960s and early 1970s—there was a shift towards a more conservative approach; the fulcrum in this was the Court's 1968 decision in *Terry v. Ohio*, which validated police stops.

This is how the story is told in popular culture as well, though the Court is not a hero but a villain. Clint Eastwood's 1971 movie, *Dirty Harry*, illustrates this. Harry captures a man who had been terrorizing San Francisco and brutally killed several children. But then the prosecutor refuses to indict because Harry tortured the suspect into confessing. And then—get this—an appellate judge who was also a Berkeley constitutional law professor(!) confirmed that Harry had violated the suspect's rights. The suspect was released and then, later, Harry had to hunt him down

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[22] *See* Miller, *supra* note 1, at 3 (describing the traditional view that the Warren Court, inspired by the 1960s emphasis on civil rights and equality for racial minorities, launched a "rights 'revolution'").

[23] *See id.* ("Between *Mapp v. Ohio* and *Miranda v. Arizona*, the story goes, the Court—motivated by an emphasis on political, social, and economic equality for racial minorities—engaged in a rights-expanding jurisprudence that made it harder for police to search, seize, and interrogate criminal defendants." (citations omitted)).

[24] *See* U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

[25] *Matthew* 7:12 (King James) ("Therefore all things whatsoever ye would that men should do to you, do ye even so to them: for this is the law and the prophets.").

[26] ZEBULON VANCE, THE DUTIES OF DEFEAT: AN ADDRESS DELIVERED BEFORE THE TWO LITERARY SOCIETIES, JUNE 7TH, 1866 (Raleigh, William B. Smith & Company 1866).

again after he kidnapped a school bus with elementary school children on it.[27] How's that for an emotional appeal against crime?

Miller's story cuts against the grain of traditional stories, though. He reads the cases along different vectors, arguing that "the Warren Court's Fourth Amendment jurisprudence cannot be separated into . . . rights-expanding and rights-contracting phases"[28] and that, rather than introducing a privacy right, "the Court mounted a consistent attack on the pre-existing versions of the right to privacy. Rather than a liberal egalitarian or privacy-protecting rights regime, the central Fourth Amendment right under the Warren Court was the republican interest in personal security."[29]

Miller makes two moves here, one that divides the cases and one that unites them into his master narrative. He divides them by separating out the cases that promote rights[30] and those that regulate police conduct.[31] These cases are more typically read as unified under a like heading "privacy promoting."[32] Then Miller reunites the cases and says that what they did was emphasize "personal security," using *Terry*'s discussion of "personal security."[33]

Miller's target is not just the criminal procedure cases; it's the much larger goal of how we think about rights in the 20th century. Because criminal procedure is not an area with which I have facility, I'm going to focus on the big picture question here: what was the agenda of the Warren Court regarding privacy and security? This bigger picture will allow me to draw on cases I know better and also to give a sense of the Warren Court in its native habitat. I think there's a lot of power in Miller's close parsing of the cases; the Court talks about judicial integrity, for instance, in *Mapp*. It does not speak so clearly in that case about privacy.[34] But I wonder how much power we can hang on individual phrases.

What I see more clearly than the division that Miller points to between regulation and privacy (and his reconstructed framework of "personal security") is that the Warren Court—like liberal jurists/thinkers in the period 1945–1970 more generally—sought several goals at the same time. It sought liberty in the form of freedom from excessive governmental interference and it achieved that end in some ways through regulation of the state.[35] Miller calls this "personal security."[36] Obviously he is correct

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[27] DIRTY HARRY (Warner Bros. Pictures 1971).

[28] Miller, *supra* note 1, at 4.

[29] *Id.* at 1.

[30] *Id.* at Parts III(C)(1)–(3).

[31] *Id.* at Part III(C)(4).

[32] *Id.* at 5 (discussing scholarship that sees the Fourth Amendment cases as a "privacy revolution").

[33] *See, e.g.*, *id.* at 38, 49.

[34] Mapp v. Ohio, 367 U.S. 643, 660 (1960).

[35] *Id.*

in that the Warren Court sought to provide personal security. Part of that security was through privacy cases; part of it came through regulation of the state. Those two pieces are part of the same cosmos of liberal jurisprudence. I do not see them in tension, nor do I see evidence that people at the time saw them as in tension. The Warren Court's contemporaries saw them, I think, as parts of a movement against the hierarchy left to us by Jim Crow. There was an attempt to promote privacy and to regulate government's interference in the personal lives of citizens at the same time.[37] Some cases leaned more on the promotion of privacy. Here one might think about the resurrection of section 1983 in *Monroe v. Pape*[38] and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[39] the personal liberty cases like *Eisenstadt v. Baird*,[40] and the freedom to travel cases that Risa Goluboff has written about.[41] These collectively are about freedom from government interference. The cases and the belief system they arose from are part of Charles Reich's *The Greening of America*;[42] they are part of the 1960s ethos that "small is beautiful," which found fulfillment in grass roots politics and in books like Jane Jacobs's *The Death and Life of Great American Cities*.[43]

I sometimes refer to this as "hippie jurisprudence." Along those lines, there is *U.S. Department of Agriculture v. Moreno*, which protected hippies from discrimination in food stamps.[44] I'm not quite sure that's exactly hippie jurisprudence, but it grows from a core of values of non-discrimination, which sound rather "hippian." This stuff was going on in the state courts as well. The California Supreme Court struck down an anti-hippie ordinance (which prohibited people from sitting in a park at Carmel-by-the-Sea), in 1971 in *Parr v. Municipal Court*.[45] The ordinance prohibited sitting on public monuments (among other things):

> On any public property it shall be unlawful for any person to:
> . . . ((2)(b)) Climb any tree; or walk, stand or sit upon

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[36] Miller, *supra* note 1, at 4.

[37] *See* Terry v. Ohio, 392 U.S. 1, 24–25 (1968); *Mapp*, 367 U.S. at 660.

[38] 365 U.S. 167 (1961).

[39] 403 U.S. 388 (1971).

[40] 405 U.S. 438, 440 (1972).

[41] Risa L. Goluboff, *Dispatch from the Supreme Court Archives: Vagrancy, Abortion, and What Links Between Them Reveal About the History of Fundamental Rights*, 62 STAN. L. REV. 1361, 1367 (2010) (discussing Justice Douglas's support of the freedom of travel under the Ninth Amendment in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Shuttlesworth v. Birmingham*, 382 U.S. 87 (1965); and *Edwards v. California*, 314 U.S. 160 (1941)).

[42] *See* CHARLES A. REICH, THE GREENING OF AMERICA 8 (1970) ("As regulation and administration have grown, liberty has been eroded and bureaucratic discretion has taken the place of the rule of law.").

[43] JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 178–86 (1961) (critiquing policies of urban renewal as destroying small communities and precluding the growth of diversity).

[44] 413 U.S. 528 (1973).

[45] 479 P.2d 353 (Cal. 1971).

> monuments, vases, fountains, railings, fences, planted areas, or upon any other property not designed or customarily used for such purposes, or to sit on any sidewalks or steps, or to lie or sit on any lawns.[46]

The city argued in *Parr* that hippies threatened to destroy the community:

> "Carmel also urges the court to examine the 'historical context and the conditions existing prior to' enactment of the ordinance. We hope the court will not shut its eyes to 'matters of public notoriety and general cognizance.' We hope the court has seen the instant slum created in the Haight-Ashbury. We hope the court has seen the deterioration if not destruction of the Telegraph-campus in Berkeley; we hope the court has seen the squalor and filth of the communes in Big Sur, and the damage caused by the sheer numbers of this transient phenomenon. The court may be aware that Carmel had become a meeting place—a mecca—for the hippies who had become disenchanted with the Haight-Ashbury and Berkeley. Regarding this ordinance we hope that the court observed the 'conditions existing prior to its enactment.' The mass of humanity that occupied the park smothered the grass by their very numbers. The grass competed with and struggled against the overwhelming effect of heavy usage—cigarettes, bottles, knives, and just plain people."[47]

Perhaps the case has more to do with the post-World War II opposition to racial discrimination than with hippies, for the court invoked Justice Murphy's concurrence in *Oyama*, which invalidated California's Alien Land Law[48] (and it also cited some of Jacobus tenBroek's work on the Fourteenth Amendment, which similarly drew on the post-war optimism about the broad meaning of the Fourteenth Amendment's equality principle)[49]:

> The more basic purpose of the statute was to irritate the Japanese, to make economic life in California as uncomfortable and unprofitable for them as legally possible. It was thus but a step in the long campaign to discourage the Japanese from entering California and to drive out those who

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[46] *Id.* at 354 (quoting Caramel-by-the-Sea, Cal., Ordinance 697.02 § 2(b) (July 31, 1968)).

[47] *Id.* at 357–58 (quoting the People's brief in this case).

[48] 332 U.S. 633, 647 (1948).

[49] *Parr*, 479 P.2d at 355; Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 341 (1949).

were already there.[50]

As the *Parr* Court noted, "[i]n the instant case, it appears that the purpose of section 697.02 is to irritate youthful hippies and to make their existence in Carmel as uncomfortable as possible by closing to them effective use of those public places where they choose to congregate."[51]

The California Supreme Court also referred to a three-judge panel's opinion in *Wheeler v. Goodman*,[52] which has a memorable phrase from Judge Craven that acknowledges the personal autonomy rights of individuals and the limitations on the rights of the state to infringe on those rights: "A man is free to be a hippie, a Methodist, a Jew, a Black Panther, a Kiwanian, or even a Communist, so long as his conduct does not imperil others, or infringe upon their rights."[53]

There's something to the 1950s and 1960s ethos of personal fulfillment and courts' limitations on governments that try to restrict those rights. Some of this comes about from the regulation over government action, including everything from regulatory takings to restrictions on searches. Other pieces appear as more overt restrictions on state actors. It is a story of recognition of privacy rights, some of which happens through regulation on government action.

IV. MILLER'S RECONSTRUCTION OF THE WARREN COURT'S CRIMINAL PROCEDURE JURISPRUDENCE

Miller and I might be calling the same thing by different names. But he goes beyond the labeling of what the court is doing. Miller has a larger story: that the Warren Court continued its expansion of regulation post-*Terry*. So Miller's story is that we have misperceived the character of the Warren Court.

I am less sure of the theory of legal history in operation here, though. Not only do I see the Court as connected to the era more closely than Miller in understanding the privacy/regulatory divide, I also see the Court as closely connected to our country's changing culture.

The culture wars were in high gear during the height of the Warren Court. You may recall that Ronald Reagan, while running for governor of California, said of hippies that they "look like Tarzan, have hair like Jane, and smell like Cheetah" (or something like that). Now that's great politics and it's a reminder that the issues at stake were strong. I think that the Warren Court represented the conflicts of the era—the civil rights revolution, the feminist movement, the movement to pull down irrational

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[50] *Oyama*, 332 U.S. at 657 (Murphy, J., concurring).
[51] *Parr*, 479 P.2d at 358.
[52] 306 F. Supp. 58 (W.D.N.C. 1969).
[53] *Id.* at 62.

authority (or what was perceived as irrational authority). The Court was testing the boundaries and—in part through changes in personnel and in part through changes in what was acceptable—the Court found its limits.